Family Law Update
2016

by

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Opinions Current Through:

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1. Children

In re the Parental Responsibilities of B.C.B, 2015COA42 Court of Appeals No. 14CA405 (Colo. App. April 9, 2015)

Trial Court: Judge Judith L. LaBuda, Boulder County; Court of Appeals: Opinion by Judge Jones, Fox and Ney, JJ., concur.

In a proceeding to determine parental responsibilities for the child of A.L.C. (Mother) and C.R.B. (Father), Father appealed from the trial court's judgment declining jurisdiction under the UCCJEA which was affirmed in ***In re the Parental Responsibilities of B.C.B,*** 2015COA42, Court of Appeals No. 14CA405 (Colo. App. April 9, 2015).

The parties were unmarried but had a child, B.C.B., born in Idaho on December 5, 2012. B.C.B. moved with the parties to Colorado on July 17, 2013. On August 31, 2013, Mother and B.C.B. went to Massachusetts to stay with Mother's family. At the hearing to determine Uniform Child Custody Jurisdiction and Enforcement Action (UCCJEA) jurisdiction, Mother testified that she had planned to return to Colorado but decided not to due to relationship issues, while Father testified Mother was simply on vacation and set to return. Once Father realized that Mother and B.C.B. would not be coming back to Colorado, he petitioned the trial court for an APR for B.C.B.

Mother was later served in Colorado. Mother contested Colorado's jurisdiction and filed a custody action in Massachusetts. The Massachusetts court and Colorado district court conferred and the Colorado court asserted temporary emergency jurisdiction over B.C.B., ordered Mother to return to Colorado with the child, and set a hearing to determine UCCJEA jurisdiction.

Following the jurisdiction hearing, the trial court applied § 14-13-201(1)(b), C.R.S. and held that B.C.B. had stronger ties with Massachusetts than Colorado and more substantial evidence concerning the child's care and personal relationships was available in Massachusetts and therefore declined jurisdiction under § 14-13-201(1)(b), C.R.S.

The UCCJEA governs when a Colorado court or a court in a different state has jurisdiction to allocate parental responsibilities for a child. The Court of Appeals noted that review of a district court's legal determination as to jurisdiction under the UCCJEA is *de novo*

and review of a court's decision declining to exercise jurisdiction is based on the abuse of discretion standard.

The UCCJEA prioritizes home state jurisdiction over all other jurisdictional bases for initial APR orders under § 14-13-201, C.R.S. Only when a child has no home state or the child's home state has declined to exercise its jurisdiction does a court look to other factors enumerated in subsections § 14-13-201(1)(b), (c), and (d). Here, the trial court found, and both parties conceded, that Idaho was B.C.B.'s home state—not Colorado or Massachusetts. Because neither party sought a hearing in Idaho, and because Idaho was not asked, and therefore did not decline to exercise its home state jurisdiction, the trial court could decide if Colorado or Massachusetts was a more appropriate forum. In order to determine proper jurisdiction, the trial court correctly relied upon § 14-13-201(1)(b) to determine whether B.C.B. and his parents had a significant connection with Colorado or Massachusetts. Ultimately, the trial court did not err by finding Mother was B.C.B.'s primary caregiver, that Mother had limited or no connections with Colorado, and that B.C.B. had more significant connections with Massachusetts than Colorado.

Father's contention that the district court erred by permitting simultaneous proceedings under the UCCJEA because the first action was filed in Colorado was without merit. § 14-13-206(1)-(2), C.R.S. does not require the trial court in the state where the first action was filed to take jurisdiction; it simply mandates that the court where proceedings were later initiated stay its action and communicate with the court in the state where proceedings are first filed.

People in the Interest of C.Z., 2015COA87
Court of Appeals No. 14CA2453 (Colo. App. June 18, 2015)

Trial Court: Judge Elizabeth Strobel, Weld County; Court of Appeals: Opinion by Judge Taubman, Gabriel and Booras, JJ., concur.

While the Court of Appeals, in ***People in the Interest of C.Z., 2015COA87***, **Court of Appeals No. 14CA2453 (Colo. App. June 18, 2015),** was principally addressing a Juvenile Court matter, they argued applicability of the Americans with Disabilities Act (ADA) can be juxtaposed into the many areas of the law, including Family Law. In this Dependency and Neglect action, M.E.Z. (Mother) and J.E.Z. (Father) appeal the trial court's judgment terminating their parent-child relationship with C.Z.

In a matter of first impression, the issue before the Court of Appeals was whether the Americans with Disabilities Act (ADA) preempts § 19-3-604(1)(b)(I), C.R.S. (2014), which permits termination based on a finding that no appropriate treatment plan can be devised to address a parent's unfitness caused by a mental impairment.

In 2013, the Weld County Department of Human Services filed a petition on the basis that Mother was unwilling to treat her multiple mental health diagnoses and Father was diagnosed with severe depression. The trial court adjudicated C.Z. dependent and neglected and approved treatment plans for the parents. Once the Department of Human services received the psychological and parent-child interactional evaluations, the Department moved to terminate Father's and Mother's parental rights on the grounds that no appropriate treatment plan could be devised to address the parents' unfitness. After a contested hearing, the trial court agreed and held no appropriate treatment plan could be devised to treat the parents due to their emotional illnesses, mental illnesses, and mental deficiencies, and the court terminated the parent-child legal relationship.

A district court may terminate parental rights pursuant to § 19-3-604(1)(b), C.R.S. if it finds the child has been adjudicated dependent and neglected and no appropriate treatment plan can be devised to address the parent's unfitness. Specifically, § 19-3-604(1)(b)(I) provides one basis for unfitness is that a parent has an emotional illness, or mental deficiency, of such duration and nature as to render the parent unlikely within a reasonable time to be able to care for the child's ongoing physical, mental, and emotional needs and conditions. On appeal, the parents unsuccessfully argued that § 19-3-604(1)(b)(I) conflicts and is therefore preempted by the ADA since it allows the court to terminate parental rights of disabled parents without requiring Human Services to provide the parents with rehabilitation services. The Court of Appeals reviewed *de novo* whether a state statute is pre-empted by federal law, citing *In re Marriage of Anderson*, 252 P.2d 490, 493 (Colo. App. 2010).

Following its holding in *People in Interest of T.B.*, 12 P.3d 1223 (Colo. App. 2000), the Court of Appeals held that the ADA does not restrict the trial court's authority to terminate parental rights when the parent, even on the basis of a disability, is unable to meet a child's needs. A child is entitled to a minimum level of care regardless of the special needs or restricted capabilities of his or her parents.

Pursuant to the preemption doctrine, the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal laws. At issue in this case was "conflict

preemption." Conflict preemption automatically voids a state law that conflicts with a valid federal law. A conflict can be found only when compliance with both state and federal regulations is physically impossible, or when the state statute stands as an obstacle to the accomplishment and full execution of the objectives and purposes of the federal law. Thus, as was the case here, a finding that no treatment plan can be devised to address a parent's unfitness caused by mental impairment under Colorado law is the equivalent of a determination that no reasonable accommodations can be made to account for the parent's disability under the ADA—therefore, no conflict preemption occurred.

People in the Interest of C.G., 2015COA106
Court of Appeals No. 14CA2172 (Colo. App. July 30, 2015)

Trial Court: Judge Ann Gail Meinster, Jefferson County; Court of Appeals: Opinion by Judge Dailey, Webb and Richman, JJ., concur.

Another Juvenile Court case discussed the broader applicability of the mootness doctrine and its exceptions: ***People in the Interest of C.G., 2015COA106***, Court of Appeals No. 14CA2172 (Colo. App. July 30, 2015). As a matter of first impression, the Colorado Court of Appeals decided whether an order adjudicating a child dependent and neglected becomes moot following that child's death for purposes of a Rule 60(b) Motion. The Court of Appeals held Father's request for relief here under Rule 60(b) was not moot; or, in the alternative, Father established his request for relief meets the "capable of repetition yet evading review" and "public interest" exceptions to mootness.

In March 2006, the Jefferson County Division of Children, Youth and Families filed a D&N petition and assumed temporary custody of the five-year-old child C.G. and his younger half-sibling. The Division's petition asserted that Father had "whereabouts unknown" and had abandoned C.G.. Service of the D&N petition was made by publication.

In May 2006, the court placed C.G. in the custody of Jon Phillips, the Father of C.G.'s half-sibling. The Court adjudicated C.G. dependent and neglected in November 2006 by default as to "John Doe" and APR was granted to Phillips. C.G. was murdered by Phillips one year later.

Several years later, Father, C.G.'s Mother, and the personal representative of C.G.'s estate commenced a federal court action against the Jefferson County Division of Children, Youth and Families pursuant to 42 U.S.C. § 1983 (2012) for violation of C.G.'s substantive due process rights. In June 2014, Father moved for Rule 60(b) relief in the D&N proceeding seeking to vacate the trial court's orders finding him in default and declaring C.G. dependent and neglected. Father specifically asserted the Division had failed to exercise due diligence to ascertain his identity before it served him via publication, and that the default judgment and all later orders were void for lack of due process under Rule 60(b)(3).

While the Division asserted in their response that the matter was moot, Father asserted the relief he sought would have a practical effect on an existing controversy in action—the federal 42 U.S.C. § 1983 lawsuit. Father averred that vacating the trial court's order would remove any doubt that C.G. was in the state's care and custody until the time he was murdered.

The Court of Appeals reviews *de novo* the legal question of whether a case is moot. The Court of Appeals concluded that Father's Rule 60(b) request for relief was not moot because of the collateral consequence the dependency and neglect orders has in Father's pending federal action.

T.W. v. M.C., 2015CO72, No. 14SC1045 (Colo. December 21, 2015)

Opinion: Justice Boatright; Eid and Coats, JJ. Dissent; Márquez does not participate.

The Colorado Supreme Court was faced with an issue of first impression when it had to determine the applicability of *Troxel v. Granville*, 530 U.S. 57 (2000) to a parental termination proceeding.

J.Z. is the biological mother of two little twin boys. Prior to giving birth, J.Z. was in a long-distance-relationship with the boys' biological father, M.C. who lives in Iowa. J.Z. told M.C. about her pregnancy and moved to Iowa to live with him. However, three months later, J.Z. lied to M.C., told him she had a miscarriage, and returned to Colorado.

Upon her return to Colorado, and prior to the birth of the twins, J.Z. selected T.W. and A.W. as the twins' adoptive parents through Adoption Choices of Colorado, Inc.

("Adoption Choices"). The day after the twins' birth, J.Z. filed a Petition for Expedited Relinquishment of her parental rights pursuant to C.R.S. § 19-5-103.5. J.Z. falsified the Petition by providing only M.C.'s first name and lying about his last name and her knowledge of M.C.'s whereabouts. Adoption Choices filed a Petition to Terminate the Parent-Child Relationship between the twins and their father based on J.Z.'s falsified information and, following the trial court's hearing terminating the birth mother's and then-unknown father's parental rights, the adoptive parents were allowed to take the twins home from the hospital and they subsequently filed a petition to adopt the twins.

Only nine days prior to the Court entering the final Adoption Decree in 2012, the twins' biological father M.C. was contacted by one of J.Z.'s friends via FaceBook who informed him of J.Z.'s deceit, the birth of his twins, and the adoption proceedings. Two months later, M.C. filed for relief from the judgment terminating his parental rights pursuant to C.R.C.P. 60(b)(2), on the grounds that he was the twins' biological father and his procedural due process was violated for lack of notice of the relinquishment proceedings. The trial court held a hearing pursuant to M.C.'s Motion for Relief and held that J.Z. had committed a fraud upon the court, which violated M.C.'s due process rights by failing to disclose M.C.'s full identity and contact information to Adoption Choices and the trial court and the court voided the termination of M.C.'s parental rights.

Prior to the final termination hearing, M.C. was granted limited visitation time with the twins, which he exercised by traveling from Iowa and providing the twins with food, gifts, and clothing during the visits. At this time, the trial court informally suggested the parties should consider the issue of child support, but the adoptive parents refused to disclose their financial information to both M.C. and the court. As a result, the trial court never entered a formal child support order pursuant to C.R.S. § 14-10-115. Nonetheless, M.C. made a one-time child support payment to the adoptive parents in the amount of $250 prior to trial.

The trial court also appointed a guardian ad litem ("GAL") to investigate all matters pertaining to the best interests of the twins, and the possible termination of M.C.'s parental rights pursuant to C.R.S. § 19-5-105. The GAL's report detailed the inherent difficulties associated with this case—that is, M.C. and adoptive parents are both fit parents and it is principally unfair that the parties find themselves in a custody battle through no fault of their own, but rather the malfeasance of the twins' mother. In the end, the GAL recommended the twins remain with their adopted parents since the twins had formed a strong "attachment" since birth to their adopted parents and such a factor was of "utmost importance" to the GAL's recommendation that M.C.'s parental rights be terminated.

After a two-day trial, the trial court terminated M.C.'s parental rights and concluded that the presumption that the biological father has a prior right to the custody of his children had been rebutted by clear and convincing evidence, and that terminating M.C.'s parental rights and awarding custody to the adoptive parents was "in the best interests of the child[ren]" under the statutory factors enumerated in C.R.S. section 19-5-105(3.1) et seq. In entering its ruling, the trial court found M.C. had: (1) "not promptly taken substantial parental responsibility for the children" because he had "failed to pay regular and reasonable support for the care of the [twins];" and (2) had "not established a substantial, positive relationship with the children" under C.R.S. §§ 19-5-105(3.1)(b)-(c).

M.C. appealed, and the court of appeals reversed, holding the trial court did not properly apply section 19-5-105 and the trial court's logic failed to adequately protect M.C.'s fundamental rights and liberty interest as a birth parent to make decisions for the twins because it erred in "not fully considering M.C.'s fundamental liberty interest in the care, custody, and control of his children as articulated in *Troxel*." Adoptive parents and Adoption Choices filed separate petitions for certiorari review, which were consolidated by the Colorado Supreme Court and granted.

Since the trial court's termination of M.C.'s parental rights under C.R.S. § 19-5-105 presents mixed questions of law and fact, the Supreme Court defers to the trial court's findings of fact if they are supported by the evidence on record and review the court's conclusions of law de novo pursuant to *In re B.J.*, 242 P.3d 1128, 1132 (Colo. 2010).

The Colorado Supreme Court here held: (1) the Court of Appeals erred when it found the trial court violated M.C.'s due process rights by failing to apply the *Troxel* presumption; (2) the trial court did not abuse its discretion by considering M.C.'s single child support payment when determining M.C. failed to "take substantial responsibility" for the twins; and (3) that the trial record supports the court's decision to terminate M.C.'s parental rights under C.R.S. § 19-5-105.

The Supreme Court noted it is not necessary to determine whether *Troxel* applies to all parental termination proceedings because, in the instant case, the trial court afforded M.C. the "heightened due process requirements". The trial court adhered to the heightened procedural due process requisites by first applying a "presumption in favor of preserving parental rights" with the biological parent and making several findings under section 19-5-105 (supported by the record on appeal) to overcome this presumption by the highest civil legal burden available—clear and convincing evidence.

The Supreme Court acknowledged that the right "to parent one's children" is a "fundamental liberty interest" and the right to "raise one's own children" is "essential" under *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In fact, it is a right "far more precious than any property right." *Id*. Therefore, biological parents "unquestionably" have due process rights stemming from their fundamental liberty interest in the care, custody, and control of their own children. Regardless of the fact that such parental rights are "perhaps the oldest of the fundamental liberty interests," a state has the ability to override this presumption and the parenting decisions of unfit biological parents, where doing so serves the children's best interests under the clear and convincing evidentiary standard. Since the trial court properly applied the enumerated statutory factors of C.R.S. § 19-5-105, it did not run afoul of *Troxel* or *Santosky v. Kramer*, 455 U.S. 745 (1982).

Justice Eid dissented on the basis that he believes the majority affirmed the trial court's termination of M.C.'s parental rights based on an insufficiency of a $250 child support payment, which he characterizes as "an exceedingly slim reed upon which to base a termination of parental rights order…." Justice Eid noted, "the reed becomes even slimmer" bearing in mind the trial court only "informally" raised the issue of child support but never actually entered a child support order. Justice Eid argued the trial court had no basis on which to determine that M.C. had failed to "promptly" take "substantial parental responsibility" as required for termination under C.R.S. section 19-5-105(3.1)(c) since the issue of child support was never really resolved by the trial court.

2. Property

NONE

3. Maintenance

NONE

4. Child Support Matters

In re the Marriage of Lohman, 2015COA 134, No. 14CA0606 (Colo. App. September 24, 2015)

Trial Court: Judge Michael A. O'Hara, Grand County;
Opinion by: Judge Berger (Lichtenstein and Navarro, JJ. Concur)

In the area of child support, the Court of Appeals considered jurisdiction of a foreign court over a Colorado citizen for purposes of collecting child support. At issue was whether a Colorado court, when requested to register or enforce a foreign judgment, should determine only whether the foreign court properly exercised personal jurisdiction under its law or whether the Colorado court also must determine whether the foreign court's exercise of personal jurisdiction is consistent with the Constitution and laws of the United States. The Court of Appeals held that, before a foreign judgment may be enforced by a Colorado court, it must comport with the personal jurisdiction requirements of United States law.

Husband and Wife married in Colorado in 1997 and had a child born in 1998. Wife moved back to England with the parties' child in 2008 after the parties' separation. Husband remained in Colorado. Wife petitioned for divorce in England and served Husband in Colorado. Husband never appeared in the English court.

The English court entered judgment against Husband for £638,000 (approximately $1,010,911) consisting of: $190,140 lump sum maintenance, $126,760 post-secondary education expenses, $670,243 for a home purchase, and $23,767 in attorney fees. Wife then filed a notice of registration of foreign support order in Grand County District Court pursuant to § 14-5-605, C.R.S., a section of the Uniform Interstate Family Support Act (UIFSA).

There is a personal jurisdiction requirement for enforcement of foreign support orders. First, the Due Process Clause of the United States Constitution prohibits a United States Court from issuing, recognizing, or enforcing a judgment unless the court that issued the judgment had Personal Jurisdiction over the party against whom judgment is sought to be enforced. A finding of personal jurisdiction over a nonresident of the forum state must be predicated on the existence of certain minimum contacts with the foreign jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

These personal jurisdiction "constitutional principles do not dissipate" when the orders sought to be enforced are orders for spousal maintenance or child support. Nor do these constitutional protections dissipate when the order sought to be enforced by a United States court is an order entered by a foreign nation. Thus, "sufficient minimum contacts" (the judicial test articulated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)) remains the polestar in Colorado domestic relations cases.

Additionally, UIFSA requires the Colorado district court to determine not only whether the foreign court had personal jurisdiction over the party under their laws, but also whether enforcement of the foreign court's order by a U.S. court is permissible under the Due Process Clause of the U.S. Constitution. The current version of UIFSA expressly allows a party contesting enforcement of a foreign support order to argue that the issuing foreign tribunal lacked personal jurisdiction over him or her.

As a result, Colorado must first determine if a foreign judgment meets the jurisdictional requirements of C.R.S. § 14-5-201 (2015) and the Due Process Clause of the United States Constitution for enforcement in Colorado. If the Court determines that it does, the Court must register and enforce the foreign judgment. But, if the Court finds that those jurisdictional requirements are lacking, it must dismiss the petition to register the foreign judgment. Here, the case was remanded to the trial court to determine whether the exercise of jurisdiction over Husband by the English court was consistent with the Constitution and laws of the United States.

5. Attorney's Fees

In re the Marriage of Dixon,
2015 COA 99 (Colo. App. July 16, 2015)

Trial Court: Judge Randal C. Arp, Jefferson County;
Opinion by Judge Navarro, Gabriel and Richman, JJ. Concur.

Here, the lawyer for former Wife filed an attorney's lien and later sought to enforce the lien against former Husband's maintenance payments. When Husband did not comply, the lawyer sought judgment against him for the full amount of lien.

The trial court denied the motion for judgment under C.R.S. § 13-54-102(i)(u), which exempts from levy, sale, or execution "[a]ny court-ordered domestic support obligations

or payment, including a maintenance obligation…" The trial court also assessed attorney fees against the lawyer, finding that the lawyer's claim lacked any basis.

The appellate court affirmed the trial court's denial of the motion for judgment, but reversed the finding that the claim lacked any basis.

Analyzing charging liens under C.R.S. § 12-5-119, and exemptions under C.R.S. § 13-54-102(i)(u), the appellate court agreed with the lawyer that the motion for judgment does not fall within the literal terms of the exemption statute. *In re the Marriage of Etcheverry*, 921 P.2d 82, 83 (Colo. App. 1996).

But the appellate court noted that *Etcheverry* nonetheless held that a lien could not be enforced against funds owed to a parent for child support as a matter of the public policy embedded in C.R.S. § 13-54-102(i)(u). After *Etcheverry,* in 2007, the General Assembly amended C.R.S. § 13-54-102(i)(u) to add the exemption for "maintenance obligation of payment" to the existing child support exemption.

The appellate Court, relied on the rationale of *Etcheverry* and sought (1) to prevent anomalous results, (2) to assure that maintenance is available for the needs of the payee, and (3) to follow a majority of other jurisdictions reaching the same public policy conclusion. As a result, the appellate court concluded that a lawyer may not enforce an attorney's lien against a maintenance obligation.

Given the depth of the analysis required to reach this result, the appellate court determined that the underlying claim was not lacking in legal basis. As a result, the trial court's award of attorney fees against the lawyer was reversed.

In re Marriage of de Koning, 14SC152
2016CO2 (Colo. January 11, 2016) (en banc)

Trial Court: Judge Elliff, Denver County;
Opinion by Justice Hood

The Colorado Supreme Court overruled the Court of Appeals holding in *In re Marriage of de Koning*, 2014COA4 (Colo. App. January 2, 2014).

The Supreme Court granted certiorari to review whether the trial court must consider the parties' financial circumstances as they exist at the date of permanent orders, or the date

of the attorney's fees hearing where an award of attorney's fees pursuant to 14-10-119, C.R.S. is not heard until after permanent orders.

The Supreme Court limited its holding to deciding whether to award attorney's fees when entering permanent orders and did not consider an attorney's fees request in the context of a post-decree motion to modify. Additionally, while dissolution of marriage proceedings are civil cases and it is permissible to award attorney's fees under either C.R.S. §§ 14-10-119 or 13-17-102 (2016), only § 14-10-119 is at issue here.

The parties endured a hotly contested divorce and expended in excess of $180,000 in attorney's fees and costs, which was roughly 40% of their marital estate at the time the decree entered. Wife incurred more than $90,000 in attorney's fees and $9,500 in costs while Husband incurred the remaining balance. The parties attended a two-day permanent orders hearing in March 2012. Both parties requested the court address the issue of attorney's fees and Wife requested Husband pay the expected $28,000 she would incur by the end of the trial while Husband requested each party pay their own attorney's fees and costs. But neither party was able to devote adequate time to the fees issue at hearing.

In April 2012, a decree entered and the trial court in its permanent orders but did not resolve the issue of attorney's fees. The court set a second hearing six months later in September to allow the parties to present more complete evidence regarding the reasonableness and necessity of the fees they had incurred.

Prior to the hearing on attorney's fees, and three months after the entry of the decree, Wife served discovery requests and demanded updated financial information pertaining to his personal and business bank accounts and credit cards, his businesses' financial reports, and copies of executed leases alleging Husband's mutual fund business had attracted a much larger investment pool in the intervening months between hearings. Husband moved for a protective order claiming the parties' financial resources at the time of the permanent orders hearing in March, not at the time of the attorney's fee hearing in September, governed the fee allocation. The trial court agreed with Husband.

At the conclusion of the attorney's fees hearing, the trial court determined that Husband's share of the marital estate was much less liquid than Wife's and, although Husband had a much larger income than Wife, so were his financial obligations and debts as a result of the court's permanent orders. Each party was ordered to pay his and her own fees. Wife appealed the protective order and the order denying her attorney's fees. The Court of Appeals agreed with Wife, vacated the protective order, and held that since

the trial court did not enter an order on attorney's fees, permanent orders were incomplete and updated evidence of the parties' financial circumstances "was not only relevant but was necessary for the court to determine whether Wife was entitled to fees" pursuant to CRS § 14-10-119.

Pursuant to *In re Marriage of Gallegos & Baca-Gallegos*, 251 P.3d 1086, 1087 (Colo. App. 2010), the Supreme Court reviews a trial court's decision to award attorney fees and costs for an abuse of discretion, but reviews the legal conclusions forming the basis for that decision *de novo*.

The Supreme Court clarified "[t]he UDMA and [Colorado] law contemplate a specific sequence in which the division of property, maintenance and attorney's fees computations should occur." First, the trial court must divide the marital property, valuing ***property as of the date of the decree*** or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree. Second, the trial court must consider questions of maintenance. Third, the trial court considers child support.. Lastly, the district court may, in its broad discretion, order payment of one party's reasonable attorney's fees and costs by the opposing party after considering both parties' financial resources in accord with C.R.S. § 14-10-119.

While CRS § 14-10-119 permits an award of attorney's fees "from time to time," the Supreme Court noted the statute does not feature the word "current," which undermined Wife's position that the UDMA establishes a test based on the parties' "current" financial circumstances.

Because CRS §14-10-119 features a "from time to time" ambiguity, the Supreme Court relies on CRCP 16.2 for guidance. Rule 16.2 indicates a strong preference for limiting discovery in both time and scope to facilitate the "efficient resolution" of domestic relations matters. While the trial court retains the option to grant discovery tailored to the particular needs of a case under Rule 16.2(f)(4), the rule's intent declares it is intended to "provide a uniform procedure for resolution of all issues in domestic relations cases ***that reduces the negative impact of adversarial litigation*** wherever possible." C.R.C.P. 16.2(a). Permitting additional discovery and "renewed evaluation of the parties' financial circumstances" as Wife requested, would create additional costs by allowing settled issues to be re-litigated in direct contravention to the UDMA's underlying purposes to "mitigate the potential harm to the spouses and their children caused by the process of [divorce]." CRS §14-10-102(2)(b). Prolonging divorce litigation is "particularly undesirable" because it increases the emotional toll on parties and their children.

The Supreme Court ultimately disagreed with the Court of Appeals' conclusion, and held that when deciding whether to award attorney's fees pursuant to CRS §14-10-119, a trial court must consider the parties' financial resources ***as of the date of the issuance of the decree of dissolution, or the date of the hearing on disposition or property***, if such hearing precedes the date of the decree..

The Court's holding aligns with comment 2, to Rule 121 §1-22, which states: "Unless otherwise ordered by the court, attorney fees under C.R.S. § 14-10-119 should be heard at the time of the hearing on the motion or proceeding for which they are requested."

6. Alternative Dispute Resolution

NONE

7. Rule 16.2

Rule 16.2 - The Property Context: *In re the Marriage of Hunt*, 2015 COA58 (Colo. App. 2015)

Opinion by: Judge Furman, Fox, J., concurs, J. Jones, J., specially concurs.

Wife filed a request for relief from a provision of the parties' Memorandum of Understanding (MOU) based on her contention that Husband violated C.R.C.P. Rule 16.2 (e) by not disclosing mandatory financial information. The Trial Court denied her request, finding that "[t]he parties simply made the choice to go forward [with the MOU] without seeking additional information."

On appeal, the Court of Appeals reversed. Wife based her request to set aside the MOU on formal discovery she propounded several months after entering into the MOU. While the MOU was premised on a business value of $500,000, subsequent valuations performed by accounting firms asserted the value to be either $2,165,000 (Wife's expert) or $740,000 (Husband's expert).

The provisions uniquely applicable in domestic relations cases under C.R.C.P. Rule 16.2, make it clear that it is not Wife's burden to request the documents required to be

disclosed. Rather, it was Husband's affirmative duty to provide them to her. *See*, *In Re Marriage of Schelp*, 228 P3d 151 (Colo. 2010).

Here, Husband was in possession of the documents relevant to the value of a significant marital asset, and Wife was not. This is the very reason the new version of Rule 16.2 was crafted.

In both the Opinion and a Special Concurrence by Judge Jones, the Appellate Court notes that Rule 16.2 is a special case management and disclosure rule, and that this result should not be read as altering the ability of parties in other areas of civil litigation to enter into agreements with less than full disclosure. Courts recognize a strong public policy favoring the enforcement of settlement agreements. And the Special Concurrence suggests the policy still exists, in a tempered manner, in domestic relations cases. This Special Concurrence poses, without resolution, whether the parties may be able to enter into such an agreement in a domestic relations case if they draft specific and explicit language waiving their right to set aside the decree under C.R.C.P. Rule 16.2 (e)(10). Judge Jones suggests that a clear waiver would have to exist, but "such a waiver would have to be very explicit, and would have to acknowledge that the parties may not have complied with their disclosure obligations under C.R.C.P. 16.2(e), but that they desire to settle regardless of any such failure, whether deliberate or otherwise. The language of the settlement agreement on which Husband relies in this case does not go quite that far."

Rule 16.2 - The Fraud Context: *Fritsche v. Thoreson*, 2015COA163, No. 14CA2081 (Colo. App. November 5, 2015)

Trial Court: Judge Margie L. Enquist, Jefferson County;
Opinion by: Judge Ashby (Lichtenstein and Miller, JJ., concur)

Turning to issues of property and post-decree financial matters in divorce, the civil lawsuit, ***Fritsche v. Thoreson*, 2015COA163, No. 14CA2081 (Colo. App. November 5, 2015)** dealt with a Husband's dismissed complaint against his former Wife asserting fraud, theft, and conversion. The Court of Appeals affirmed.

Husband and Wife were issued a decree of dissolution in April 2007, which incorporated the parties' negotiated allocation of marital assets. In January 2013, Wife allegedly disclosed for the first time to husband a recovery of $69,399 that she procured from a

2011 employment-related lawsuit. Additionally, in July 2013, Wife filed a sworn financial statement that allegedly disclosed, for the first time, a pension from her former employer, IBM, in the amount of $111,575.94, which would have been earned during the parties' marriage. In the parties' original memorandum of understanding, Wife stated she did not have any retirement benefits with IBM.

Husband filed a motion to modify in November 2013, attempting to reopen the parties' settlement agreement for a determination of allocation of Wife's allegedly previously undisclosed assets. The trial court never ruled on Husband's motion and it was deemed denied after the sixty-three-day period lapsed pursuant to Rule 59(j). Husband then filed a motion for relief from judgment under Rules 60(a) and (b) in the district court. The trial court denied Husband's motion determining that under the the five year look-back period provided by Rule 16.2(e)(10), the domestic court lost jurisdiction over the case filed six and one-half years after the decree. Husband then filed an independent equitable action in district court asserting fraud, theft, and conversion. Wife moved to dismiss this motion, and the district court granted her motion.

On appeal the issues addressed are: (1) Did the district court err by concluding that it lacked jurisdiction to entertain husband's claim because his only recourse was in the domestic relations court, which lost jurisdiction five years after the entry of final orders; and (2) Did the district court err by concluding that husband had failed to state a claim upon which relief could be granted? The Court of appeals answered both of these inquiries in the negative.

The Court of Appeals held *In re Marriage of Schelp*, 228 P.3d 151 (Colo. 2010), was not relevant because Rule 16.2(e)(10) no longer renders Rule 60(b)'s six-month jurisdiction window inactive and the instant case was not filed prior to the effective date of Rule 16.2(e)(1). Additionally, even after the implementation of Rule 16.2, a party to a domestic relations proceeding may file an independent equitable action in the district court related to the domestic relations court proceedings after the expiration of that five-year period.

The trial court additionally dismissed Husband's motion for his failure to state a claim upon which relief could be granted and the Colorado Court of Appeals affirmed. A party may facially attack a prior judgment or decree on the grounds of fraud or mistake. *In re Marriage of Gance*, 36 P.3d 114 (Colo. App. 2001). To the contrary, relief pursuant to an independent action is available only in cases of unusual and exceptional circumstances. *Id*. Thus, a party who challenges a judgment previously entered in a domestic relations case by seeking relief through an independent equitable action based on fraud must

establish extrinsic fraud rather than mere intrinsic fraud. Perjury and failure to disclose assets are termed forms of intrinsic fraud and do not warrant relief through an independent action.

8. Evidence

People v. Glover, 2015COA16
13CA0098 (Colo. App. February 26, 2015)

Trial Court: Judge Barney Luppa and Judge David A. Gilbert, El Paso County;
Opinion by: Judge Dailey (Webb and Richman, JJ., concur)

Glover was the leader of a "street family" of homeless and runaway young people. One of the young adults was found murdered and missing a finger. On the same day that police found the body, they arrested a 19-year-old man on an unrelated matter, and found the missing finger in his pocket. The prosecution sought to prove that Glover had ordered a hit on the victim because he was a snitch, owed him money, and wouldn't stop commenting on Glover's Facebook posts.

Prosecution presented conversations recorded on Glover's Facebook account, where Glover said, "its over for u" and threatened to "beat the shit outta" the victim. Glover challenges the admissibility of Facebook printouts.

"The admissibility of a computer printout is governed by the rules of relevancy, authentication, and hearsay." *People v. Huehn,* 53 P.3d 733, 736 (Colo.App. 2002). CRE Rules 901-903 govern authentication. The Court properly held that, because Facebook stores user information in the regular course of business, the records may be self-authenticated. To authenticate the Facebook records, two things need to be shown: (1) the records were those of Facebook, and (2) the communications recorded therein were made by the [other party].

To prove the records are those of the social networking site, Courts may rely on testimony as to how the records were obtained, the substance of the records themselves, and affidavits or testimony from the employees of the social networking site.

Facts and circumstances presented in the case provided support for the trial court's conclusion that the records were sufficiently authenticated for admission.

Glover also challenged the admission of the records as hearsay. The statements made by others from his Facebook page were not hearsay because they were admitted to provide context for his own statements. Testimony of a police detective about the Facebook process was derived from a process of reasoning familiar in everyday life and was therefore not unendorsed expert testimony. Testimony by the same detective as to the meaning of street slang is also derived from a process of reasoning familiar in everyday life (deriving the meaning of a word from the context in which it was used).

8. Same Sex Marriage

Obergefell v. Hodges, 576 S.Ct. 26 (2015)

JUSTICE KENNEDY delivered the opinion of the Court.

In a landmark decision on same gender marriage, the U.S. Supreme Court got involved in Family Law this past year, in ***Obergefell v. Hodges*, 576 S.Ct. 26 (2015)**.

Here, the states of Michigan, Kentucky, Ohio, and Tennessee, among others, define marriage as a union between one man and one woman, and the Petitioners are 14 same-sex couples and two men whose same-sex partners are deceased who filed suits in Federal District Courts in their home States, claiming that Respondent state officials violated the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

The Supreme Court held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

In the majority opinion by Justice Kennedy, the logic proceeded as follows:

1. In human history, marriage is of transcendent importance (citing, among others, Confucius and Cicero).

2. Marriage has been redefined throughout recent history: doing away with arranged marriages and barring laws that prohibit interracial marriage, removing

impediments for prisoners and those in arrears on child support to marry, and allowing married women to retain legal standing and equal protection of the law. These changes have strengthened, not weakened, the marriage institution.

3. Until the mid-20th century, same-sex intimacy had been condemned by the state in most Western nations and it was often criminalized. Gays and lesbians have been prohibited from military service, excluded under immigration laws, targeted by police, and burdened in their right to associate. Homosexuality was treated, until 1973, as a mental health illness. As recently as 1986, the Supreme Court upheld the constitutionality of a Georgia law that criminalized homosexual acts. *Bowers v Hardwick*, 478 U.S. 186 (1986). Colorado had amended its Constitution to prohibit its government from affording any protection to homosexuals, although the U.S. Supreme Court invalidated this amendment as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). In that same year, Congress passed the Defense of Marriage Act (DOMA) purporting to define marriage as between one man and one woman.

4. Under the Due Process clause of the 14th Amendment, no State shall "deprive any person of life, liberty, or property without due process of law." The fundamental liberties protected includes those in the Bill of Rights and extends to certain personal choices central to individual dignity and autonomy. Identifying and protecting these fundamental rights is an enduring part of the judicial duty to interpret the Constitution.

5. The Court cannot be bound by the social norms in existence at the framing of the Constitution or in its own prior opinions formed by the world and the time in which they were decided. Thus, the one-line opinion in *Baker v. Nelson,* 409 U.S. 810 (1972) (holding that excluding same-sex couple from marriage did not present a federal question) is not controlling.

6. Four principles guide the conclusion that the fundamental right to marry applies to same-sex couples:

    a. The right to personal choice is inherent in the concept of individual autonomy. *Loving v. Virginia*, *Goodridge v. Department of Public Health*, 798 N.E.2d 955, (Mass. 2003); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).
    b. The right to marry supports a two-person union unlike any other in its importance to the committed individuals. Citing *Griswold v. Connecticut*, 381 U.S. 479 (U.S. 1965).

c. The right to marry safeguards children and families and thus derives from related rights of childrearing, procreation, and education. Citing *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Zablocki v. Redhail*, 434 U.S. 374 (1978).
d. The right to marry is a keystone of our country's social order. Alexis de Tocqueville, *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

In identifying the burdens placed on same-sex couples by not allowing marriage, the Court opined:

"There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives…laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."

As in most recent decisions, the dissent was vehement and frequently caustic. Chief Justice Roberts noted: "[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us." And, "Stripped of its shiny rhetorical glass, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society." Chief Justice Robert's concern is that the Constitution should be a shield, not a sword available to demand positive entitlements from the state.

Justice Scalia wrote separately to assert that the majority opinion is a threat to American democracy. He noted that the People who ratified the U.S. Constitution and the 14th Amendment did not understand that they were prohibiting the limitation of marriage to opposite-sex couples. He stated, "Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its 'reasoned judgment,' thinks the Fourteenth Amendment ought to protect."

Justice Thomas also wrote separately about "liberty," decrying the entire doctrine of substantial due process as indefensible. While losing the battle to cite the oldest text to the majority (J. Thomas only reached back as far as the Magna Carta, while the majority cited Confucius and Cicero), he defined "liberty" in the sense it had been defined in that

text, to refer to a right of loco-motion – a right to be free from physical restraint. Even if he were to concede that "liberty" means freedom from governmental action, he concluded that the petitioners in the case had not been deprived of a liberty.

And Justice Alito wrote a dissent as well, reiterating the themes of Justices Scalia and Thomas's dissents as to the limited nature of "liberty" in the Constitution and the democratic forum for debate and resolution of the issue.

9. Taxes

Iglicki v. Comm'r, T.C. Memo. 2015-80 Docket No. 23542-12 (April 27, 2015)

Tax Court: Judge Kerrigan

The Federal Tax Courts addressed an important Family Law issue in ***Iglicki v. Comm'r*, T.C. Memo. 2015-80**, **Docket No. 23542-12 (April 27, 2015)**. A former Husband and Wife were a couple who married in 1991. They divorced in Maryland, receiving a final divorce decree on June 22, 1999 incorporating the parties' Separation Agreement.

Under the Separation Agreement, Husband was to pay $735 a month in child support but no spousal maintenance unless he defaulted on his obligations under the Separation Agreement. If Husband did default, he would become immediately liable for $1,000 per month in spousal maintenance.

After moving to Colorado, Husband defaulted on his obligations pursuant to the Separation Agreement and the divorce decree and began incurring spousal maintenance obligations as of November 1, 2002. In 2003, former Wife filed suit in El Paso County, Colorado to enforce the Separation Agreement, obtaining a writ of garnishment against Husband's wages from the El Paso district court for a total of $64,156 in spousal support arrears. During 2010, Husband paid $50,606, of which $11,256 was for child support.

Former Husband claimed a deduction for $39,350 on his 2010 tax return for maintenance payments and former Wife reported $13,441 of alimony income on her 2010 tax return. The IRS determined a deficiency of $10,479 and an accuracy-related penalty of $2,096 with respect to Husband's Federal income tax for the year 2010.

At issue for the tax court's consideration was: (1) Whether former Husband is entitled to an alimony deduction under IRC section 215(a); and (2) Whether former Husband is liable for the accuracy-related penalty under IRC section 6662(a).

Typically, pursuant to IRC § 215(a), a deduction is allowed an amount equal to the alimony (maintenance) payments paid during such individual's taxable year. However, in this case, Husband's payment to Ms. Iglicki did not qualify pursuant to IRC § 71(b)(1) since it had become a final money judgment pursuant to C.R.S. § 14-10-122(1)(c) (2015). Since the verified entry of judgment was issued to assist Ms. Iglicki in collecting past due but unpaid spousal maintenance and it was not stated that the obligation would terminate on death of former Wife, the amount is a final money judgment against Husband and not a maintenance payment. As a result, Husband and his current wife are liable for both the the tax deficiency of $10,479 and the accuracy-related tax penalty.