Family Law Update

2019

Prepared by

Ronald D. Litvak, Esq.
Timothy R.J. Mehrtens, Esq.
Luke S. Abraham, Esq.

LITVAK LITVAK MEHRTENS and CARLTON, P.C.

ATTORNEYS AT LAW

Stanford Place III
4582 South Ulster Street Parkway, Suite 1400
Denver, Colorado 80237
(303) 837-0757
www.FamilyAtty.com

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1. Property

There are no 2018-2019 cases under this heading to date.

2. Maintenance

There are no 2018-2019 cases under this heading to date.

3. Child Support

In re the Marriage of Boettcher,
2018 COA 34 (Colo. App. March 8, 2018)

Trial Court: Judge W. Troy Hause, Weld County
Opinion by Judge Terry, Loeb, C.J., and Wedd, J., concur

***NOTE: The Colorado Supreme Court granted the Petition for Writ of Certiorari on whether section 14-10-115, C.R.S. (2018), provides for the Colorado Child Support Guidelines to be the rebuttable presumption in all cases, including those where incomes exceed the uppermost threshold, which must be overcome by evidence that a deviation from the guideline amount is necessary to meet the needs of the children.

In a post decree modification of child support matter. Father appealed a district court order increasing his child support and required him to pay a portion of wife's attorney fees.

In their 2011 separation agreement, no child support was owed by either party. In 2015, Mother moved to modify child support. Father's income had increased to $92,356 per month; Mother's income was $13,343 per month. The district court increased Father's child support to $3,000 per month and ordered him to pay 70% of Mother's attorney fees.

On appeal, in its substantive parts, Father contended that the district court erred by (1) determining there was no rebuttable presumptive child support obligation when the combined incomes exceed the top level of the guidelines and (2) not making sufficient findings and including inappropriate expenses in awarding $3,000 in child support. The Court of Appeals disagreed as to both contentions.

There is a rebuttable presumption that the child support amounts generated by the child support statute are the appropriate amounts of child support to be paid for incomes of $1,100 to $30,000 per month, as set forth in the child support guidelines, C.R.S. §14-10-115(7)(b).

For child support awards where the combined income of the parties is above the highest level of the schedule, $30,000, the judge may use discretion to determine child support, but the presumptive basic child support obligation shall ***not be less*** than it would be based on the highest level. C.R.S. §14-10-115(7)(a)(II)(E). The Court of Appeals disagreed with Father's argument that child support was capped at the highest level in the guideline and that any greater award constituted a deviation under C.R.S. §14-10-115(8)(e). To the contrary, the Court of Appeals held that awarding any less than that amount provided at the top of the guideline constituted a deviation; it was not deviation, but rather discretion, for the court to award more than that amount provided at the top of the guideline. In exercising its discretion, the district court should consider all relevant factors, including: (1) the child's and the custodial parent's financial resources; (2) the standard of living the child would have enjoyed had the marriage not been dissolved; (3) the child's physical and emotional condition and educational needs; and (4) the financial resources and needs of the noncustodial parent. Here the trial court considered these factors and set a monthly child support amount that fell between that of a calculation capped at $30,000 and one that was extrapolated.

The Court of Appeals further found that Father's argument that his child support obligation should be capped at $30,000 combined gross income (where, here, his income alone equaled $92,356 per month) conflicted with the "Income Shares Model" on which Colorado's child support guidelines are based. That model assumes a certain percentage of each parent's income will be spent on the children and calculates child support accordingly. Treating the parents here the same as parents earning less than one-third of their income would be counter to the Income Shares Model rationale and intent.

Because the amount of child support awarded did not constitute a "deviation" from a presumptive child support guideline amount, the trial court was not required to make findings that any other amount would be inequitable, unjust or inappropriate. C.R.S. §14-10-115(8)(e).

As to Father's argument the trial court included inappropriate expenses in reaching its child support award, the Court of Appeals found no error in the trial court's inclusion of Mother's travel and activity expenses when participating with the child because he was too young to undertake these activities without her. The Court of Appeals also disagreed with Father that the trial court's consideration of Mother's desire to save for the child's college expenses violated C.R.S. §14-10-115(13)(a) – payment of postsecondary education – holding that "educational needs" are a factor the court considers under C.R.S. §14-10-115(2)(b).

In re the Marriage of Heine,
2018 COA 154 (Colo. App. November 1, 2018)

Trial Court: Judge Andrew R. MacDonald, Boulder County
Opinion by Judge Taubman, Bernard and Welling, J.J., concur

This case determines that the conflict between the holdings of *In re Marriage of Emerson*, 77 P.3d 923 (Colo. App. 2003) and *In re Marriage of White*, 240 P.3d 534 (Colo App. 2010) is resolved by the 2013 amendment to C.R.S. § 14-10-122(5). Deciding that the 2013 amendment was intended to overrule the holding in *White*, and that a court may retroactively enter a child support order against either parent, regardless of the parent's status as obligor or obligee.

Mother and Father are the parents of two children and were divorced in 2008. In February 2015, the district court modified parenting time to a week-on/week-off schedule and modified child support based on the new schedule. Then in June of 2015, the parties agreed to modify the parenting time schedule such that Father would be the primary residential parent and Mother would have parenting time every other weekend. With the new schedule, Father began paying Mother a reduced child support amount and subsequently filed a motion to modify child support in July of 2016.

Prior to any hearing on Father's motion, the parties again modified parenting time in February 2017 such that Mother became the primary residential parent of one child, while Father remained the primary residential parent of the other child.

Father's motion to modify child support came before the district court in March 2017. The district court determined that due to the agreed upon change in parenting time beginning in June of 2015, Mother should have paid child support to Father. The District Court found that Mother owed Father $21,389 in child support arrearage and used that arrearage to offset child support Father owed to Mother. Mother appealed the district court's ruling on the basis the court erred when it imputed income to her and erred in applying C.R.S. § 14-10-122(5) in making the child support order.

In addressing the application of amended C.R.S. § 14-10-122(5), the Court of Appeals examined the conflicting holdings of *White* and *Emerson*. Prior to the 2013 amendment to C.R.S. § 14-10-122(5), the section permitted retroactive modification of "those provisions of child support *of the obligor* under the existing child support order." (Emphasis added). Both *White* and *Emerson* were decided prior to the 2013 amendment. In *White*, the Court of Appeals concluded that the plain language of the statute only permitted the obligor's child support obligation to be retroactively modified. In *Emerson*, the Court of Appeals interpreted the statute to provide that the support duty and identity of the obligor shifts with the agreed upon change in custody, and therefore child support could be retroactively modified to either party.

The 2013 amendment to C.R.S. § 14-10-122(5) clarified that the modification can be as of the date physical care changed and it added language. However, the amendment to the statute does not resolve the ambiguity highlighted by the *Emerson* and *White* cases. To resolve the ambiguity, the Court of Appeals looked to the legislative intent of the 2013 amendment, and the Court concluded the General Assembly intended to change the statute in favor of the holding in *Emerson*. The amendment legislatively overrules the *White* case.

4. Assisted Reproduction

In re the Marriage of Rooks, 2018 CO 85 (Colo. October 29, 2018)

Opinion by Justice Marquez
Justice Hood dissents, Chief Justice Coats and Justice Samour join in the dissent

The Colorado Supreme Court holds that at court should first look to any existing agreement regarding disposition of pre-embryos in event of divorce. In the absence of such an agreement, a court should balance the parties' interests when awarding the pre-embryos in a dissolution. The Court determined the trial court and Court of Appeals considered certain inappropriate factors in attempting to balance the parties' interests, including whether or not the spouse seeking to use the pre-embryos can afford to have another child, the number of existing children, and whether a parent seeking to use the pre-embryos could adopt a child.

The parties have three children together, and wife used her last eggs to create pre-embryos. The Parties' storage agreement with Fertility Clinic left it up to the court to award embryos in a Dissolution of Marriage action if the parties could not agree. Wife argued at trial she should get the embryos, otherwise she could never have more children. Husband wanted the embryos discarded. The trial court awarded the embryos to husband, relying on two approaches: the "Contract Approach" (Tennessee) and The "Balancing of Interests Approach" (New Jersey, Pennsylvania). A third approach, the "Contemporaneous Mutual Consent Approach" (Iowa), was rejected by the trial court.

No Colorado Statue or appellate decision addresses disposition of cryopreserved embryos on Dissolution of Marriage.

Both the trial court and Court of Appeals analyzed the approaches in other jurisdictions. Under the Contract Approach, an agreement between spouses as to disposition made when the embryos were created and cryo-stored will be enforced in event of divorce. Davis v. Davis, 842 S.W. 2nd 588, 597 (Tenn. 1992).

Under the Balancing of Interests Approach, when the parties have no agreement who should receive the embryos on dissolution of marriage, the Trial Court is to balance the interests to determine the issue. Davis, 842, S.W.2d 598, 603-04; J.B. v. M.B., 783 A.2d 707, 713-14, 719-20 (N.J. 2001); Reber v. Reiss, 42A.3d 1131, 1136 (PA. Super. Ct. 2012). In applying this approach, the Davis court said, "[o]rdinally, the party wishing to avoid procreation should prevail assuming the other party has a reasonable possibility of achieving parenthood by means other than use of the embryos in question." Factors courts have considered in favor of procreation involve cancer patients and other circumstances where there is no option for having a biological child.

Under the Contemporaneous Mutual Consent Approach (Iowa approach), if the parties have not previously agreed, the court will not allocate them. Instead, the embryos are left in storage indefinitely until the parties can agree. This approach has been criticized as being "totally unrealistic", suggesting that the parties will one day be able to reach agreements as to matters upon which they clearly do not agree. As the Trial Court noted, this approach "essentially gives one party a *de facto* veto over the other party" because the issue will inevitably be determined by the passage of time.

The Court of Appeals affirmed the trial court's decision to award the embryos to husband under the balancing of interests approach. The Colorado Supreme Court reversed the judgment of the Court of Appeals because of the consideration of inappropriate factors, including the person's ability to afford another child and the number of the existing children, and remanded with directions to return the matter to the trial court to apply the announced balancing framework.

In his dissent, Justice Hood takes the position that because a court should never infringe on a person's constitutional right to avoid procreation, and the court should adopt the contemporaneous mutual consent approach. Justice Hood argues it is not the role of the court to compel a party to consent, and the approach minimizes the government's role in resolving a dispute involving competing constitutional interests.

5. Parental Responsibilities

In re Parental Responsibilities Concerning W.C.,
2018 COA 428 (Colo. App. May 3, 2018)

Trial Court: Judge Karen L. Brody, Denver County
Opinion by Judge Taubman, Hawthorne, and Ashby, JJ. PER CURIAM

***NOTE: Petition for Writ of Certiorari Granted by Colorado Supreme Court on November 13, 2018. The Petition for Writ of Certiorari granted as to "Whether the court of appeals erred in determining that a district court retains continuing jurisdiction to review and decide motions to modify parental responsibilities brought under Colorado's Uniform Dissolution of Marriage Act ("UDMA") while the trial court's prior orders regarding the same matter are on appeal."

Mother filed an allocation of parental responsibilities action concerning W.C. Following a permanent orders hearing, the district court granted mother majority parenting time and sole decision-making authority. Father appealed those orders arguing the district court misapplied the best interests of the child standard. While Father's appeal was pending, he filed motions to modify parenting time and decision-making responsibility in the district court on the basis mother demonstrated a "pattern of poor judgment," "questionable judgment," and "vindictive behavior" constituting a change in circumstances that justified a change in parenting time and decision making. Mother filed a motion to dismiss Father's motions.

The district court ruled that it lack jurisdiction under the holding of *Molitor v. Anderson*, 795 P.2d 266 (Colo. 1990) because the motions affected the substance of the judgment on appeal and that Father's position promotes a waste of judicial resources. However, the district court did not dismiss the motions, but decided to take no further action "unless and until the Court of Appeals finds that the Court has jurisdiction or remand and gives this Court authority to consider the motions.

The Court of Appeals granted Father's motion to clarify and concluded that "under the UDMA a district court retains continuing jurisdiction to modify parental responsibilities while the current allocation order is on appeal, but only when the modification sought is based on a change in circumstances arising after the original order was issued."

The Court of Appeals distinguished this present case from the holding in *Molitor where* the Supreme Court concluded a district court does not retain jurisdiction to consider and deny a C.R.C.P. 60(b) motion to vacate a judgment while that judgment is on appeal. The Court of Appeals held that because the court is entering a new order based on circumstances that have changed since the appealed order, the new order is not directly affecting the judgment appealed from as in *Molitor*. The Court of Appeals acknowledged the possibility of wasted judicial resources, but determined the legislative mandate to consider the best interests of the child takes precedence.

In re the Marriage of Morgan,
2018 COA 116 (Colo. App. August 9, 2018)

Trial Court: Judge Ryan L. Kamada, Weld County
Opinion by Judge Fox, Webb and Richman, JJ., concur

The Court of Appeals followed the Supreme Court's decision in *Spahmer v. Gullette*, 113 P.3d 158 (Colo. 2005): when a parent indicates that he or she wishes to relocate, the court must allocate parenting time assuming the parent will move.

Mother appealed the portion of permanent orders allocating parental responsibilities for the parties' two minor children. Prior to the permanent orders hearing, Mother notified the magistrate that she wished to move with the parties' children to California. The appointed parental responsibilities evaluator ("PRE") recommended that the children be allowed to relocate to California. Father requested a supplemental PRE. The supplemental PRE recommended that the children remain in Colorado with shared decision-making responsibilities. After hearing, the magistrate ordered the children to remain in Colorado.

Mother contended the trial court failed to follow the principle enunciated in *Spahmer*. Despite recognizing that Mother clearly expressed her intention to move to California, the magistrate

issued a year-round 5-2-2-5 parenting time schedule, a schedule impractical to implement if Mother lives in California. The Court of Appeals noted that Mother's stated intent was unambiguous, as was the case in *Spahmer*. The Court further held that although Mother admitted that she would not move without her children if they were ordered to remain in Colorado, such a statement did not make Mother's intention ambiguous and should not be considered by the Court. Pursuant to *Spahmer*, the trial court must accept the location a party intends to live and allocate parenting time accordingly.

Mother also appealed the magistrate's order awarding mutual decision-making responsibility. The Court reiterated that allocation of decision-making is in the sound discretion of the district court. The Court found the magistrate did not abuse discretion in its order for mutual decision-making responsibility.

In re the Marriage of Tibbetts,
2018 COA 143 (Colo. App. August 9, 2018)

Trial Court: Judge Brian J. Flynn, Mesa County
Opinion by Judge Taubman, Webb and Nieto, JJ., concur

Do parenting time issues under the UDMA become moot when a child turns eighteen? The Court distinguished *In re Marriage of Hartley*, 886 P.2d 665 (Colo. 1994), finding that the appeal became moot when the child turned eighteen.

The parties have one child. In 2016, Father moved for the parenting plan to be terminated and for the parties' child to determine her own parenting time schedule. The parties' child was 16 at the time of Father's motion. The magistrate denied Father's request to terminate the parenting plan and found the existing parenting plan was working despite child's dislike of it. Father appealed, filing his opening brief the day before the child turned eighteen. Mother subsequently moved to dismiss the appeal, contending the child had become an adult, rendering the appeal moot.

The Court of Appeals found that "child" is not defined in the UDMA, but noted the term is defined in UCCJEA as "an individual who has not attained 18 years of age." A person under eighteen years is also defined as a child in the statute creating the Office of the Child's Representative, the children's code, and the age of competence statute. The Court found that once a child turns 18, he or she can make decisions, and neither parent can force an 18-year old to comply with the parenting time provisions. As a result, the appeal is moot.

The Court distinguished the age of emancipation with respect to child support, and noted child support acts on the parents, not the child.

In distinguishing the *Hartley* case, the Court noted that the child in *Hartley* remained under eighteen throughout the entirety of the case and determined the *Hartley* court's statement that the court retains jurisdiction over child custody issues under the UDMA until the age of emancipation at 21 years of age is dicta.

In re Parental Responsibilities Concerning W.F.L., 2018 COA 164 (Colo. App. November 15, 2018)

Trial Court: Judge Robert Raymond Lung, Elbert County
Opinion by Judge Taubman, Terry and Fox, JJ. concur

In this case involving application of the Uniform Child-custody Jurisdiction and Enforcement Act ("UCCJEA"), the Court of Appeals held that under C.R.S. § 14-13-306(1) a district court is authorized to register foreign orders and simultaneously begin proceedings for enforcement. The Court further held a party is entitled to seek all the remedies as if the orders had been entered in Colorado and the district court could consider events that occurred before the foreign order was registered in Colorado.

The parties have one child together, but were never married. A Georgia court entered a final order in 2011 and a modified parenting plan in 2012. Mother and child moved to Colorado in 2014. In 2016, Father petitioned to register the 2012 Georgia parenting plan under § 14-13-305. Mother responded to Father's petition by stating the 2011 order needed to be registered as well and co-petitioned to register both orders. Father subsequently filed a motion under C.R.S. § 14-10-129.5 to enforce the Georgia orders and requested a hearing and additional terms. At the final orders hearing, the trial court registered the Georgia orders and adopted the parties' stipulations for future parenting time. However, the trial court determined it lacked jurisdiction to grant Father enforcement remedies under § 14-10-129.5. Father appealed.

Mother argued Father's appeal is moot because trial court adopted the parties' stipulation modifying the Georgia parenting time orders. The Court held that Father's appeal was not moot because Father asked for specific relief under § 14-10-129.5, such as make-up parenting time, and those requests are not mooted by adopting modification order.

The Court held that nothing in § 14-13-305(3)(a) prevents the court from registering the Georgia orders and simultaneously beginning proceedings to enforce them. Furthermore, the court held on registration "Colorado courts still have a duty to enforce another state's orders, and the UCCJEA permits courts, on registering such orders, to enforce them through any remedy available under Colorado law." In addressing Father's motion for enforcement, the district court can consider events that occurred before Father sought registration of the Georgia orders.

6. Attorney's Fees

Lees v. James,
2087 COA 173 (Colo. App. December 13, 2018)

Trial Court: Judge F. Michael Goodbee, Adams County
Opinion by Judge Tow, Hawthorne and Bernard, J.J., concur

This is not a family law case, but it addresses a number of issues that may arise in the context of family law.

Article 17 of Title 13 provides courts with the authority to award attorney fees in certain circumstances. Pursuant to § 13-17-102(3) "When a court determines that reasonable attorney fees should be assessed, it 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." Section 13-17-102(2) is a more specific rule that permits the court to award attorney's fees against any attorney or party who has brought or defended a civil action that lacked substantial justification.

The Court of Appeals held that nothing in § 13-17-102(2) and § 13-17-201 exempts the concurrent application of the general rule in § 13-17-102(3), that provides that attorney fees may be joint and several.

The second issue that may be pertinent to family law in this case is the use of persuasive authority. The proscription against citation of unpublished opinions (except under specific exceptions) in the Court of Appeals does not prohibit trial courts from considering unpublished opinions for whatever persuasive value they may have.

Roberts v. Bruce
2017 CO 585 (Colo. June 18, 2018)

Opinion by Justice Boatright

When a trial court awards attorney fees under C.R.S. § 13-17-102, it may only award the fees incurred related to the conduct in Colorado's courts. Here, where an action was also filed in West Virginia, the attorney fees incurred there (and, on removal to a Federal Court) could not be awarded as part of an award based on bringing an action that is held to have lacked substantial justification.

7. Same Sex Marriage

In re the Marriage of Hogsett,
2018 COA 176 (Colo. App. December 13, 2018)

Trial Court: Judge Bonnie McLean, Arapahoe County
Opinion by Judge Freyre, Dunn, J., concurs, Furman, J., specially concurs

The Court of Appeals holds, as a matter of first impression, that the Supreme Court holding of *Obergefell* applies retroactively to Colorado same-sex couples in deciding whether a common law marriage exists between them. The Court also holds that the test for determining whether a common law marriage exists as articulated in *People v. Lucero*, 747 P.2d 660 (Colo. 1987) applies to same sex relationships, but the test should be applied consistently with the realities and norms of a same-sex relationship.

In this matter, the parties began dating in 2001 and entered into 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 reached 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 *Lucero* test 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 pre-*Obergefell* conduct, but that the *Lucero* test was not met.

Both parties agreed that *Obergefell* applies retroactively in deciding whether a same-sex common law marriage exists. The Court of Appeals looked at decisions in other jurisdictions as well in holding "We agree with these authorities and the parties that *Obergefell* applies retroactively to a Colorado same-sex relationship and, thus, that a party like Hogsett may allege that a common law marriage existed pre-*Obergefell*."

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 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 indicated that common law marriage places an unnecessary burden on parties and the courts.

8. Procedure

In re Fox v. Alfini,
2018 CO 94 (Colo. December 3, 2018)

Original Proceeding Pursuant to C.A.R. 21
Mesa County District Court Case
Opinion delivered by Justice Gabriel, Justice Hood specially concurs,
Justice Samour dissents, Chief Justice Coats and Justice Boatright joint in the dissent

This is an original proceeding pursuant to C.A.R. 21. The Supreme Court of Colorado reviewed a district court's order that compelled the production of a recording of the Plaintiff's initial consultation with her attorney. The district court ruled the recording was not protected by attorney-client privilege because her parents were present during the consultation.

The Supreme Court of Colorado concludes "the presence of a third party during an attorney-client communication will ordinarily destroy the attorney-client privilege unless the third party's presence was reasonably necessary to the consultation or another exception applies."

In this case, the Plaintiff suffered a stroke while she was at her chiropractor's office. She subsequently contacted her attorney for a potential case against the chiropractor and had an initial consultation with the attorney in the presence of her parents. Her attorney recorded portions of the initial consultation. During the deposition of Plaintiff's mother, the Defendant's discovered there was a recording of the initial consultation. The Defendant's moved to compel the production of the recording arguing that the attorney-client privilege no longer applied due to the presence of third parties. Plaintiff argued that due to diminished mental capacity as a result of her stroke, the presence of her parents was necessary to facilitate her communications with counsel.

In upholding the district court's finding the attorney-client privilege did not apply, the Court was persuaded by the authorities that required an objective standard of necessity in determining whether a third party was needed to facilitate an attorney-client communication. The Court determined the order to compel was supported by the evidence, which included social media

posts made by the Plaintiff prior to her initial consult, which indicated she had made a full recovery.

In his special concurrence, Justice Hood agrees with the majority's opinion, but he worries about the chilling effect the opinion might have on some attorneys and parties that legitimately need a third party present at an initial consultation. Due to that concern, Justice Hood believes the work product doctrine would be the best refuge for parties under similar facts.

In his dissent, Justice Samour took issue with the district court's failure to conduct an evidentiary hearing to resolve the conflicts in the exhibits submitted by both parties. By relying on a cold paper record, and not live testimony, the district court was not in a position to judge the credibility of witnesses and resolve conflicts in evidence. Due to the foregoing, the three-justice minority argued the district court's factual findings should be accorded no deference and that the case should have been remanded to the district for an evidentiary hearing.

In re the Marriage of Runge,
2018 COA 23M (Colo. App. February 22, 2018)

Trial Court: Judge Bruce Langer, Boulder County
Opinion by Judge Furman, Richman, J., specially concurs, Taubman, J., dissent

Four years and 364 days after the entry of the Decree of Dissolution, Wife filed a motion under C.R.C.P. 16.2(e)(10) to "discover and allocate assets" that Wife alleged Husband failed to disclose or misrepresented at the time of their dissolution proceeding in 2011. Wife alleged Husband omitted business entities from his Sworn Financial Statement and misrepresented the value of his primary business and the amount of the mortgage debt on the marital residence.

Notably, Wife did not allege that Husband failed to disclose a specific item mandated under C.R.C.P. 16.2. Rather, she relied on suspicions that Husband "likely" failed to disclose and misrepresented assets.

Husband moved to dismiss Wife's motion, arguing that she did not allege sufficient facts showing a material omission or misrepresentation and that the court lacked subject matter jurisdiction because the five year period during which the court may reallocate assets under C.R.C.P. 16.2(e)(10) expired the day after Wife filed her motion. The district court granted Husband's motion to dismiss, ruling that Wife's motion did not state sufficient grounds for relief under the rule.

Mother appealed the ruling of the district court on two grounds: (1) the district court should have applied the C.R.C.P. 12(b)(5) "plausibility" standard as announced in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) in deciding Husband's motion to dismiss, and (2) sufficient grounds were asserted

in her motion and, if not, the court should have allowed her to conduct discovery to prove her allegations.

The Court of Appeals concluded the *Warne* "plausibility" standard did not apply to the dismissal of a motion made under C.R.C.P. 16.2(e)(10). The *Warne* "plausibility" standard provides that a complaint must "state a claim for relief that is plausible on its face" to avoid dismissal under C.R.C.P. 12(b)(5). The Court of Appeals noted that C.R.C.P. 12(b)(5) applies to any "pleadings", and because Wife's motion is not a pleading the district court did not err when it did not apply the *Warne* standard in dismissing Wife's motion.

The majority of the Court next addressed the sufficiency of Wife's allegations to trigger an allocation of assets under C.R.C.P. 16.2(e)(10). The Court of Appeals concluded Wife failed to allege sufficient grounds to trigger C.R.C.P. 16.2(e)(10) and the district court did not err in dismissing Wife's motion. During the dissolution, Husband advanced funds to Wife to hire an accounting expert and gave the Wife voluminous documents. The Court of Appeals distinguished this case from the *In re the Marriage of Hunt*, 353 P.3d 911 (Colo. App. 2015) opinion. In *Hunt*, the husband failed to disclose required items.

In the case at bar, Wife did not allege that Husband failed to disclose a required document. At temporary orders, Wife's counsel admitted that they had received a lot of documentation and the case was complicated. With that context in mind, the Court of Appeals took note that Wife signed the separation agreement shortly thereafter, and did not wait to value Husband's business interests or further investigate Husband's business interests. Wife's vague assertions of non-disclosure based upon suspicions were insufficient and the Court of Appeals concluded, "the rule was not intended to protect a party from choosing, perhaps unwisely, to settle a dissolution case after acknowledging the complexity of and before fully evaluating the information provided by the other party. Nor does it provide for post-decree discovery into an ex-spouse's assets."

On the issue of whether the district court lacked subject matter jurisdiction to allocate material assets under C.R.C.P. 16.2(e)(10) because the five-year period expired, the majority held that the five-year look back period prescribed by rule does not limit the court's jurisdiction to rule on timely motions if the five-year period expires before the ruling. However, the Court of Appeals left the issue open for future appeals, stating "because we affirm the court's dismissal of wife's motion, this opinion des not decide whether the court would have had jurisdiction to allocate assets if it had granted wife's motion."

In Judge Richman's concurring opinion, he addressed Husband's argument that the Court lost subject matter jurisdiction. Judge Richman concluded the court's jurisdiction to allocate assets was not lost when the court did not rule on the motion until after the five-year period expired. In support of his conclusion, Judge Richman cited *In re Marriage of Schelp*, 228 P.3d 151 (Colo. 2010), in which the Supreme Court had stated C.R.C.P. 16.2(e)(10) supplanted the C.R.C.P. 60(b)'s six-month window, and that the Rule does not require a decision on the motion within the six months. Judge Richman argued that Husband's proposed interpretation would create

absurd results and the deadline to file a motion under the rule would depend on the state of the court's docket. Judge Richman also disagreed with the suggestion in Judge Taubman's dissent that a *nunc pro tunc* order could be used in the event the Court does not have enough time, arguing it would be contrary to holdings of *Mark v. Mark*, 697 P.2d 799 (Colo. App. 1985) and *Dill v. County Court*, 37 Colo. App. 75 (1975).

In Judge Taubman's dissenting opinion (which would also have had the Husband prevailing), he viewed the issue of subject matter jurisdiction under C.R.C.P. 16.2(e)(10) as the dispositive question. Judge Taubman concluded the language of the rule should be given its plain and ordinary meaning, and the use of the word "jurisdiction" meant the Supreme Court did not intend the Rule to be interpreted as imposing a filing deadline. Judge Taubman disagreed with the majority's interpretation of the rule, that the court may consider a motion whenever it is filed, but only retains jurisdiction to allocate assets if the motion is granted. Judge Taubman also disagreed with Judge Richman's interpretation because he concluded it is contrary to the plain language of the rule.

In re the Marriage of Durie,
2018 COA 143 (Colo. App. September 20, 2018)

Trial Court: Judge Michael Spear, Douglas County
Opinion by Judge Taubman, Welling and Kapelke, JJ., concur

Three years after the district court incorporated the parties' Separation Agreement, Wife filed a motion under C.R.C.P. 16.2(e)(10) for a reallocation of proceeds from Husband's post-decree sale of business assets. Under the parties' Agreement, Husband received the business assets with an equalization payment due to Wife for half of the value of the interests. The business assets were valued at $878,589. A joint expert had valued the assets at $855,000 investment value and $770,000 fair market value. Wife also had hired an independent expert who valued the assets at a little under $920,000.

Wife motion alleged "upon information and belief" Husband engaged in negotiations to sell the business interests prior to the parties entering the Separation Agreement. A little over a year after the dissolution, Husband sold a portion of the business interests allocated to him for $6,900,000. Husband filed a Motion to Dismiss Wife's motion, which the District Court granted when it applied the "plausibility" standard of *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) and found Wife's allegations were insufficient to make allegations plausible. Wife appealed.

Both parties initially focused their arguments on the applicability of the "plausibility" standard set forth in *Warne v. Hall*, 2016 CO 50, but during the pendency of this appeal, the Court of Appeals issued the *Runge* opinion, which held the "plausibility" standard did not apply to Rule 16.2(e)(10) motions. As a result, the Court of Appeals requested that the parties address the *Runge* ruling, whether Wife could allege facts on information and belief in her motion, and whether Wife was permitted to conduct discovery on her motion.

The Court of Appeals agreed with the *Runge* division that ruled Rule 12(b)(5) and the "plausibility" standard do not apply in determining a motion filed under Rule 16.2(e)(10), and the Court ruled the district erred in using that standard. The Court also rejected Husband's argument that Rule 9(b) applies. Rule 9(b) requires that pleadings asserting fraud must allege circumstances with particularity. The Court recognized that not all motions filed under Rule 16.2(e)(10) sound in fraud.

The Court of Appeals also held that although a motion under Rule 16.2(e)(10) is not a pleading, the specific provision of the rule permits a party to make allegations based on information and belief. The Court noted the moving party may have not have complete information about the circumstances of the alleged misstatement or omission. As a result, any Rule 16.2(e)(10) motion must be examined by the District Court under a preponderance of the evidence standard.

With respect to the issue of discovery, the Court of Appeals concluded that Wife is entitled to undertake discovery in support of her motion. The Court cited Rule 26 and the *Gromicko* case in noting the discovery should be proportional to the needs of the case. In *Runge*, the majority stated that Rule 16.2(e)(10) does not provide for post-decree discovery, but the Court here found that language to be *dicta*. In this case, the Court found Wife made sufficient allegations to warrant discovery as to specific omissions or misstatement alleged.

The Court of Appeals reversed the District Court's order and remanded the case with directions.

In re the Marriage of Humphrey,
2018 COA 31 (Colo. App. March 8, 2018)

Trial Court: Judge Lael Montgomery, Denver County
Opinion by Judge Berger, Bernard and Freyre, JJ., concur

Wife filed a petition to dissolve her marriage. During the dissolution proceeding, Wife requested the appointment of a receiver over marital property, which included the "Frosted Leaf" marijuana businesses. The district court granted Wife's request for the appointment of a receiver and appointed the appellee Sterling Consulting Corporation. Neither receiver, nor the receiver's principal, Richard Block, held licenses required by the Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code to own, operate, manage, control, or work in a licensed marijuana business.

State Licensing Authority (SLA) moved to intervene in the case. SLA moved to modify the receivership order by removing the Sterling Consulting Corporation as the receiver until Mr. Block and his employees obtained the requisite licenses. After a hearing, the district court granted the SLA's motion to intervene, but denied SLA's motion to modify the receivership order. SLA appealed the district court's order.

The Court of Appeals reversed the district court's order and instructed the district court to terminate the appointment of the existing receiver unless the receiver has obtained the necessary licenses as of the issuance of the mandate from the Court of Appeals.

The Court of Appeals concluded that a court of a jurisdiction cannot authorize violations of that jurisdiction's laws and there is no authority for the court to disregard marijuana licensing laws enacted by the General Assembly. Under both the Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code, no person without the required licenses may operate a marijuana business. The Court rejected the district court's argument that its power to appoint a receiver trumped the licensing requirements for marijuana businesses because the court's power to appoint receivers for marijuana business is not in conflict with the licensing laws.

The Court determined a receiver is an officer of the court but is not exempt from statutorily prescribed license requirements and that requiring courts to appoint receivers who comply with the licensing requirements does not impermissibly limit the court's equitable powers.

9. Collateral Issues

Scott v. Scott,
2018 COA 25 (Colo. App. February 22, 2018)

Trial Court: Judge Thomas M. Diester, Mesa County
Opinion by Chief Judge Loeb, Rothenberg and Carparelli, JJ., concur

This civil action involves litigation between former Wife, Roseann Scott (Roseann) and Widow, Donna Scott (Donna), over who is entitled to the death benefit from a life insurance policy on the life of Melvin Scott (Melvin).

Roseann was married to Melvin and they divorced in 1978. As a part of their separation agreement, Melvin was required to maintain life insurance for the benefit of Roseann until she remarried.

Melvin died August 2, 2015. When Roseann attempted to collect on his Prudential Policy, she discovered Melvin had changed the beneficiary to Donna a couple of years prior to his death.

Roseann sued Donna in state court over the Prudential policy proceeds. Donna filed a motion to dismiss under C.R.C.P. 12(b)(5) and C.R.C.P. 12(b)(6). The district court summarily granted Donna's motion to dismiss. Roseann alleged three claims for relief, (a) civil theft; (b) conversion; (c) unjust enrichment and constructive trust.

The Court of Appeals did not find that Donna's actions constituted civil theft, but held there was a conversion of life insurance proceeds, that Donna had been unjustly enriched and that a constructive trust is the appropriate remedy.

In support of its ruling the Court of Appeals cited *Great American Reserve Insurance Co. v Maxwell*, 555 P.2d 988, 989-90 (1976), holding that a divorce decree requiring an insurance policy holder to maintain a policy for a certain beneficiary transforms that beneficiary's expectancy interest in the policy into an irrevocable "vested right". "Accordingly, we conclude that Roseann has a protectable interest as the designated beneficiary of her former spouse's life insurance policy because of the language contained in the separation agreement between her and Melvin, which was, as conceded by the parties, made an order of the court."

11. Protection Orders

Parocha v. Parocha,
2018 CA 41 (Colo. May 21, 2018)

Certiorari to the District Court, Boulder County
Opinion by Justice Hart

Wife fled from New Jersey to Colorado to escape her abusive spouse. Her husband, aware she was in Colorado, contacted her almost daily and, when Wife expressed reservations about returning to New Jersey, the frequency and tone of the contact intensified into repeated calls, emails, and text messages. Wife felt threatened and sought a civil protection order.

The question of first impression presented by these facts is whether and when a civil protection order is available to a victim of domestic abuse who comes to Colorado seeking refuge from a non-resident.

Under Colorado's long-arm statute, C.R.S. § 13-1-124, and under concepts of constitutional due process, the Supreme Court held that an out-of-state party's harassment, threatening, or attempt to coerce an individual known by the non-resident to be located in Colorado is a tortious act sufficient to establish long-arm jurisdiction. This conduct creates a sufficient nexus between the out-of-state party and Colorado to satisfy the requisite minimum contacts such that the exercise of jurisdiction comports with notions of fair play and substantial justice, analyzing Colorado law under the test enunciated in *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).