

Sean Harrington  
197m Boston Post Rd., West #151  
Marlborough, MA 01752  
(978) 852-3788

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**State of Colorado  
Dept. of Regulatory Agencies – Division of Registrations  
Mental Health Licensing Section**

Dr. Martinez:

Thank you, again, for being available (sans notice) for my impromptu phone call yesterday.

I have been researching the matter of the HB-1251 (trying to remain objective and not start from a conclusion and work my way backward). Here is the result of my analysis:

**SECTION 4:** C.R.S. §12-43-215(7) The provisions of this article shall not apply to MENTAL HEALTH PROFESSIONALS ACTING WITHIN THE SCOPE OF A COURT APPOINTMENT TO UNDERTAKE custodial evaluations ~~undertaken~~ in domestic relations cases in the courts of this state or TO MENTAL HEALTH PROFESSIONALS ACTING WITHIN THE SCOPE OF A COURT APPOINTMENT TO UNDERTAKE domestic and child abuse evaluations ~~un-~~~~dertaken~~ for purposes of legal proceedings in the courts of this state.

**SECTION 31: Effective date - applicability.** This act shall take effect July 1, 2004, and shall apply to acts occurring on or after said date.

It may be that you have met with the legislators and, perhaps, even had a hand in crafting this bill. However, I [respectfully] disagree with the interpretation regarding its lack of retrospective application, and I hope that you will adopt my logic, as more fully set forth hereinbelow:

I do not read Sect. 4 to directly address, “acts,” as contemplated by Sect. 31, nor does it expressly articulate such, “acts,” as being subject to broader jurisdiction by the regulatory agency. Rather, by its clear and unambiguous language, it principally addresses to whom the provisions of §12-43-215 apply. From this, we can infer that, “whom,” is dynamically defined by behavior (acts) that fall within the scope of a court appointment.<sup>1</sup> Because the “whom,” element is defined by behavior, it doesn’t stand to reason that the Sect. 4 would be more concerned with the date of the acts that changed the status of “whom,” but whether the Respondent met the definition of the “whom” element, as defined by his most recent behavior, at the time he was called to the attention of the Board. In this sense, the “acts” contemplated by Sect. 31 is the complaint brought by the com-

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<sup>1</sup> By this inference, the “whom,” element affects the *in personam* jurisdictional authority of the Board and the, “within the scope,” language deals with the subject matter jurisdictional authority of the Board –with emphasis in that order. In both prongs, Sect. 4 is a modification of the Board’s jurisdiction, not an attachment of new legal consequences to particular acts, events or behaviors, *per se*.

plainant. The real question to be asked (at that time) is, does the Board have the power to act based on the definition of “whom,” at the time the complaint is raised?

*Arguendo*, even if “acts,” as contemplated by Sect. 31, should be read into Sect. 4 to be those behaviors or acts complained of that fell outside the scope of the court appointment, if those acts have a lasting effect (such as continuing collection activities; retaliatory statements based on vernal motivations that have become part of the public record;<sup>2</sup> or acts that have prospective affect in prejudicing a parties rights to redress or a clearly established constitutional right) and the Respondent refuses to desist, such acts should be considered to now be within the Board’s jurisdiction. Or, the “acts” could also be the Respondent’s refusal to retract earlier “acts” that have the lasting effect (as noted, hereinabove, and, in the instant case, his retaliation for the complainant’s exercise of First Amendment Petitioning activities). (see *e.g.*, Twyman v. Twyman, 790 SW.2d 819 (Tex.Ct.App. 1990) (applied a tolling of statute to a continuing tort based upon a husband’s conduct over a number of years); U.S. v. Guest, 86 S.Ct. 1170 (statutes of limitations tolled for previous acts when each new act is done)). Therefore, if I request of him to retract his Report; or reconcile his statements and records to properly reflect the valid order of the court and his fee agreement; or to recuse on the basis of the appearance of bias, and he refuses any or all of the above (including through a failure to answer), he has, in effect, renewed the acts complained of.

In an effort to answer questions such as, “Is Sect. 4 more germane to modifying the jurisdiction of the board or to modifying the consequences of certain acts or which acts are now subject to new consequences?”, I recommend that we look to case law governing both this specific issue and statutory interpretation to anticipate how the Appeals Court might interpret the amended Article: Although “retroactive effect” is not defined in Title 19 (the Children’s Code), the Marital Dissolution Act or Title 12, the doctrine is commonly used in determining the application of rules, statutes and Acts. See, *e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 267-69, 114 S.Ct. 1483, 1498-99, 128 L.Ed.2d 229, 254 (1994). An Act has an unconstitutional retroactive effect if it takes away or impairs vested rights acquired under existing laws. The Supreme Court held in Landgraf that an Act is not retroactive merely because it applies to a case arising from conduct antedating its enactment. *Id.*, 114 S.Ct. at 1498-99 **Rather, a court must ask whether it attaches new legal consequences to events completed before its enactment.** *Id.* at 1499 See also Bodine v. Department of Labor & Indus., 29 Wn.2d 879, 888, 190 P.2d 89 (1948), (if a statute affects the remedy only, it may be given retrospective effect); Amin v. State, 939 P.2d 413, 416 (Alaska App. 1997) (the constitutional prohibitions on *ex post facto* laws prohibit “*the retrospective application of laws that ‘alter the definition of crimes or increase the punishment for criminal acts.’*”) (quoting Collins v. Youngblood, 497 U.S. 37, 43 (1990)). In a decision released May 20<sup>th</sup>, 2004, by the Colorado Court of Appeals (Case N<sup>o</sup> 02CA2416, American Insurance Compensation Co. v. McBride), the

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<sup>2</sup> “[W]e agree that there is a risk of injury to a parent when a therapist expresses concern about poor parenting of one kind or another. The risks could include diminished parenting time, or in the extreme case, perhaps a change in custody. Those risks are real and potentially very damaging to the parent.” Ryder v. Mitchell \_\_\_ P.3d \_\_\_ (Case N<sup>o</sup> 00SC889 Colo. 2002)

court opined, “Where a statute effects a change that is procedural or remedial, it may be applied retroactively,” noting that, “a law violates this constitutional prohibition against retrospective legislation if it (1) takes away or impairs vested rights acquired under existing laws, (2) creates a new obligation, (3) imposes a new duty, or (4) attaches a new disability with respect to transactions or considerations already past.” (citing Trailer Haven MHP, LLC v. City of Aurora, 81 P.3d 1132 (Colo. App. 2003), Lobato v. Indus. Claim Appeals Office, \_\_\_ P.3d \_\_\_ (Colo. App. No. 02CA1145, June 5, 2003) and Colo. Const. art. II, §11.<sup>3</sup>) The court further noted that, when determining whether the legislature intended for an Act to have retrospective effect, “*express language of retroactive application is not required to find such retroactive intent.*” (citing In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002)).

Although, here, Sect. 32 appears to clearly state that the legislature did *not* intend for the Act to have *any* retrospective effect, whatsoever, Landgraf, *supra*, holds that the Act is **not** retroactive merely because it applies to a case arising from conduct antedating its enactment. Applying the instruction of Landgraf and the other cases cited, *supra*, no event or behavior committed by a court-appointed mental health professional has any new or different legal consequence as contemplated by Section 4 –said differently, it is not more (or less) “illegal” or unethical to engage in or refrain from any particular behavior and there is no greater or lesser penalty imposed. Instead, the more restrictive applicability of exemption from the Article’s provisions (to individuals acting within the scope of their judicially delegated duties) is more germane to a broadened jurisdiction of the Board, rather than a “consequence” of a behavior, and is to be applied to any individual brought to the attention of the board *after* the Article was enacted. My complaint and newly discovered evidence was mailed to your office on the 15<sup>th</sup> of July, two weeks after the Article was amended and enacted in law and, thus, for the foregoing reasons, I believe that the Board had jurisdiction to act.

Although I have not yet received any correspondence from the Board regarding my last submission, I do understand that, upon receipt of a final agency decision on this matter, which has not yet issued, I may have the option of appeal through judicial review or, perhaps, directly with the Court of Appeals (I have not yet researched what remedies are available in Colorado). I assure you that such an appeal would not arise out of discord, but in seeking an [alternate] interpretation from the Court of Appeals that might give you the “permission,” to act in a manner that you stated the Board desires to, but which you believe you do not currently have. With this letter, I am requesting that you share this with your Board attorney[s] for concurrence or dissent and write back or call to me (using the contact information above). However, I am not asking for a final agency decision pursuant to §24-4-205 or other applicable authorities, at this time. Rather, I want to extend Dr. Fyfe the opportunity to take corrective action and report his subsequent refusal to do so, if any, to the Board, first, as the Board may then be more comfortable with exercising jurisdiction.

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<sup>3</sup> “No *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation . . . shall be passed by the general assembly.”

Finally, in our discussion, yesterday, you stated that prior reports of unethical conduct, if not acted upon for any reason (including want of jurisdiction) are strictly confidential and beyond subpoena power. Although you and Ms. Springer, both, related to me that Dr. Fyfe is no stranger to the Board and, you, yourself, stated that the Board would like to have taken action against him in my case and others (which is why you lobbied for HB-1251), you stated that you believed that such opinions and observations by yourself or your staff were also beyond subpoena power by express statutory enactment. I would like to know, at your convenience, which statutory authorities apply so that I may research them. I do note that the website maintained by the Colorado Psychological Association states, “The board is not under any statutory obligation to withhold the identity, but in practice they will endeavor not to reveal the identity of individuals until a finding that there is enough merit to the grievance to warrant further investigation.” Unless there is such an express statute, I am aware of no authority or privilege that would proscribe you or your staff from testifying about such opinions or observations, so long as they meet the requirements of C.R.E. §404(b). (You mentioned that there were four other courts in which this was upheld, and I would like to research those cases if you could let me know which ones they were in your reply letter so that I may determine their applicability to my situation.) I also recall that you mentioned that the policy consideration behind the confidentiality was to prevent improper use of the knowledge of uncharged conduct. On the other hand, you acknowledged that, until HB-1251, the only oversight there has been for court-appointed experts and Special Advocates has been the trial court and the caprice of each respective judge. There has been no way for a trial court to become aware of a pattern of unethical conduct by such an individual (an observation shared by Sam Benson, the Family Court Liaison in Jefferson County and others). Because of the impact that such individuals have on the welfare of children and the community, the only way to effectively enable the court to regulate these individuals, both within and without their judicially delegated duties, is to supply them with information regarding their conduct (not withhold it). The trial court is in the best position to assess the credibility of the witnesses, the sufficiency of the evidence, its probative effect and weight, and the inferences to be drawn, therefrom. People in the Interest of A.D., 56 P.3d 1246, 1248 (Colo. App. 2002).

In conclusion, I thank you for your time in considering these matters and allowing me to engage them with you. I want to remind you that my objectives here are larger than myself –I want, to the fullest extent possible, to advocate for all persons who have been subjected to the defects and loopholes that exist in our current system.

...with kind regards,

  
Sean Harrington