

COLORADO COURT OF APPEALS

Court of Appeals No. 04CA1161
Jefferson County District Court No. 99DR3717
Honorable Jane A. Tidball, Judge

In re the Marriage of

Christy Harrington, n/k/a Christy Ryan,

Appellee,

and

Sean L. Harrington,

Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE TAUBMAN
Roy and Loeb, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: March 9, 2006

Law Office of Madeline Wilson, Madeline Wilson, Denver, Colorado, for Appellee

Karen S. Renne, Golden, Colorado, for Appellant

In this post-dissolution of marriage proceeding, Sean L. Harrington (father) appeals from the trial court's order holding him responsible for special advocate fees charged for the review of documents he submitted. We reverse and remand.

In August 2003, the trial court appointed the special advocate and ordered that father and Christy Harrington (mother) each pay half of the full \$2,000 retainer and split all additional charges "50-50."

In April 2004, the special advocate informed the trial court that father had forwarded a number of documents to him and that reviewing the documents had been difficult and labor intensive because they were replete with footnotes, addenda, and legal terminology. The special advocate stated that the sheer volume of the documents led him to conclude that father should be responsible for the fees incurred and requested that the court so allocate the fees. The special advocate attached a list of the documents and an invoice showing that he had spent an additional six and one-half hours to review them.

The trial court issued an order holding father responsible for the outstanding \$845 in fees incurred for the document review and also for "any future fees billed by the Special Advocate that are directly attributable to the Special Advocate's time spent reviewing documents submitted by Mr. Harrington."

Father filed a timely motion to reconsider, citing both the trial court's order appointing the special advocate and the parties' contract with the special advocate, which reiterated their agreement to split the special advocate's fees equally. Father also argued that he was merely cooperating with the special advocate's investigation and that the documents, in most instances, directly pertained to specific issues the special advocate had inquired about. The other grounds asserted by father are not pertinent to this appeal.

The trial court denied father's motion to reconsider without any findings.

Father contends that the trial court abused its discretion by holding him solely responsible for the special advocate's fees,

contrary to its order of appointment, which provided that the fees were to be split equally between the parties. We agree.

Former Colo. Sess. Laws 1997, ch. 14, § 14-10-116(3) at 32 (repealed and replaced by § 14-10-116.5, C.R.S. 2005, effective July 1, 2005), which applied to the appointment of a special advocate at the time of this proceeding, required that the court enter an order for costs, fees, and disbursements in favor of the child's appointed representative and against any or all of the parties. In re Marriage of Eggert, 53 P.3d 794 (Colo. App. 2002).

The statute provided no specific guidance as to the method of apportioning costs between the parties, Weber v. Wallace, 789 P.2d 427 (Colo. App. 1989). However, divisions of this court have previously determined that it was within the trial court's discretion to allocate the fees either to one party or to both. See In re Connolly, 76 P.2d 224 (Colo. App. 1988)(because appointment of guardian ad litem was appropriate under the circumstances, court did not abuse its discretion in ordering father to pay those fees), rev'd on other grounds sub nom. Abrams v. Connolly, 781 P.2d 651

(Colo. 1989); In re Marriage of Barnthouse, 765 P.2d 610 (Colo. App. 1988)(no abuse of discretion where trial court ordered father to pay a portion of the fees for the children's attorney).

Here, the trial court's order appointing the special advocate comprehensively described the special advocate's responsibilities. Among other things, the special advocate was "to become informed about aspects of the parties, their child, and the family relevant to allocation of parental rights and responsibilities, including responsibilities for decision making and parenting time."

Further, the order directed mother to provide the special advocate with copies of all court orders regarding custody or parenting matters and a copy of a transcript of any remarks made by the court concerning parenting issues.

Significantly, the August 2003 order did not state that the parties were precluded from providing information to the special advocate.

As noted, with respect to payment, the court ordered that each party pay half of the \$2,000 retainer and that all additional charges

would be split equally between the parties. That payment provision did not contain any circumstance that might result in either party being assessed more than half of the fees. Thus, by the plain terms of the court's order, father was only responsible for paying half of the additional \$845 charge.

This conclusion is supported by the contract between father and the special advocate, which also provided that fees between father and mother would be split equally. Similarly the contract did not contain any language that would warrant a different allocation of fees by the parties to the special advocate.

We are mindful that the trial court here ordered father to pay the additional fees charged by the special advocate after reviewing the special advocate's letter and father's response. Nevertheless, we conclude that the trial court abused its discretion in entering this order for three reasons.

First, it is not apparent to us why the special advocate had an interest in writing to the court to request a different allocation of his fees. Presumably, had the special advocate not written to the trial

court requesting a different allocation of his fees, those fees would have been paid equally by father and mother, and the special advocate would have been fully paid. Alternatively, if mother believed, as she now asserts on appeal, that father's submissions to the special advocate were excessive and frivolous, she could have requested of the trial court that she not be required to pay her share of the special advocate's additional fees.

Second, although the special advocate indicated in his letter to the trial court that reviewing father's documents had been a "difficult and labor intensive task," the special advocate did not assert that the documents were irrelevant or frivolous. Also, while the special advocate indicated that reading the documents was more difficult because they were replete with footnotes, addenda, and legal terminology, one article submitted by father to the special advocate concerned the topic of parental alienation, a subject which other divisions of this court have addressed in a similar context, See, e.g., Kniskern v. Kniskern, 80 P.3d 939 (Colo. App. 2003) (division considered father's request to change residence of

children based upon mother's alienating children from father in alleged violation of separation agreement provision that mother not alienate the children).

Third, while we have no quarrel with the trial court" order to the extent that it directed that father would be solely responsible for future filings he submitted to the special advocate, the trial court could not make father retroactively responsible for a different allocation of payments. Based on the initial order appointing the special advocate, as well as father's contract with the special advocate, father had no notice that he could be assessed a disproportionate share of the special advocate fees based upon his submission of additional material to the special advocate. If the special advocate believed that father's filings were excessive, inappropriate, or irrelevant, he could have so advised the court after briefly perusing them. At that point, either the court could have directed the special advocate to read all the documents, with the proviso that father would be responsible for the additional costs, or father could have advised the special advocate not to read some or

all of his material in the event that he would be solely responsible for the special advocate's additional costs.

Because the special advocate first read all the documents and then requested of the court that father be solely responsible for payment for his additional time, father was presented with a fait accompli, and faced a court order allocating the additional fees to him without any prior opportunity to guide his conduct so that it would not result in his sole responsibility for the additional fees.

Finally, In re Marriage of Emerson, 77 P.3d 923 (Colo. App. 2003), upon which mother relies, is distinguishable. There, the division rejected the mother's contention that the trial court erred in ordering her to pay \$675 for special advocate fees after the father had initially agreed to pay a \$1,500 fee to the special advocate. However, in Emerson, supra, 77 P.3d at 927, the order of appointment specifically provided that the special advocate's costs "may be later assessed between the parties." Here, in contrast, there was no language either in the trial court's order appointing the special advocate or in the special advocate's contract with father

that contemplated a different allocation of fees under any circumstances.

Accordingly, the trial court's order directing that father be solely responsible for the special advocate's additional cost of \$845 is reversed, and the case is remanded with directions that the sum shall be allocated equally between the parties pursuant to the August 2003 order appointing the special advocate.

JUDGE ROY and JUDGE LOEB concur.