

<p><b>COURT OF APPEALS, STATE OF COLORADO</b>                  2 E. 14<sup>th</sup> Ave., Denver CO 80203</p> <hr/> <p>on appeal from the Jefferson County District Court                  Case No. 99 DR 3717                  Div. 3 of the First Judicial District</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p style="text-align: center;"><b>Case No. 07 CA 0379</b></p>
<p><b>In re the Marriage of:</b></p> <p>CHRISTY RYAN, <b>Petitioner-Appellee</b>                  and                  SEAN HARRINGTON, <b>Respondent-Appellant.</b></p>	
<p>Sean L. Harrington                  P.O. Box 351855                  Westminster, CO 80035                  (508) 361-2018                  e-mail: esoxlucios@hotmail.com</p>	
<p><b>APPELLANT’S REPLY BRIEF</b></p>	

**ERRATA 1:** A typographical error appears in the Opening Brief and should be corrected: On page 26, the “timely Rule 59 Motion for Reconsideration” was denoted by the trial court appeals clerk in her Index as appearing at Vol. VI at 1325-1335. (not at Vol. VII at 1558-59, as father incorrectly stated in his Opening Brief).

**ERRATA 2:** Another typographical error appears on page 26 of the Opening Brief, where it refers to Chief Judge Jackson’s April 10, 2007 Order (denying the Rule 59 Motion, mentioned supra) as appearing at Supplemental Vol. I at 10-11. In fact, it is now unclear exactly where in the Record the order appears.<sup>1</sup> This was handwritten and dated 4/11/2007 by the chief judge on front page of the Rule 59 Motion and, which order is recorded in the Register of Actions (Vol. VII, pp. 1565-1599) as ICON event ID # 453. The full text of his order is reproduced at ¶ 4 in Supplemental Record, Vol. I, page 8).

<sup>1</sup> Oddly, Vol. VI covers a period up to February 2005, then jumps to February through March 2007 at pages 1283 through 1339, then reverts back to April, 2005 at p. 1340. Because father lives out of state, he is not able to check out the record for review and, as a matter of practicality, has relied solely on the prepared Index.

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Appellant (“father”) replies, as follows, to the Answer Brief submitted by appellee (“mother”) on December 3, 2005.

### **PROCEDURAL BACKGROUND**

Mother filed a cross-designation with this Court on or about July 18, 2007 (attempting to include the entire last eight years of trial court proceedings). Father accurately predicted that she was attempting to obfuscate the few, fairly straightforward legal issues within the scope of this appeal with ad hominem attacks and irrelevant issues dating back to the winter of 1999-2000 (as she has done in appeals 03CA1825, 04CA1161 and 04CA1986).<sup>2</sup> A motions panel of this Court appeared to agree and denied mother’s Cross-Designation of Record by Order dated August 15, 2007.

Yet, this Court’s ruling has not deterred mother, who has included those issues, anyway. *See Pastrana v. Hudock*, 140 P.3d 188, 189 (Colo. App. 2006) (“[W]e will disregard statements of fact in either party’s brief that are unsupported by the record or irrelevant to the issues on appeal”).

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<sup>2</sup> These arguments are contained in Father’s Objection to the cross-designation of record, filed on or about July 30, 2007.

The following items (and related arguments) cited by mother in her Answer Brief are outside the Record on appeal:

- Alleged numerous awards for attorneys fees against father under Section 13-17-102. **Answer Brief at 3; 5; 8; 14**
- February 15, 2000 Temporary Orders **Answer Brief at 5**.<sup>3</sup>
- Attorney fees allegedly awarded against Father on or about March 9, 2000 *Id.*
- Father’s complaint[s] filed with “the Attorney Regulatory Committee” **Answer Brief at 6**
- Father’s November 13, 2003 recusal Motion *Id.*
- July 2003 order regarding parenting time *Id.*
- [An] alleged complaint[s] filed with the “Judicial Qualifications Commissions” **Answer Brief at 10**.
- Alleged “three simple recommendations . . . as agreed to and Ordered in the November 2001 Stipulation . . .” **Answer Brief at 15**.

Father respectfully requests that mother’s entire Answer Brief or, alternatively, references to these items and the related arguments, be stricken.

The balance of Mother’s [re]Statement of the Case concerns father’s alleged mental illness; father’s motives in seeing his daughter (who has been concealed

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<sup>3</sup> Mother’s attorney mistakenly referred to this as February 15, 2007.

from him for the past three years in another state, with the aid and encouragement of Madeline Wilson (opposing counsel)); and father's allegedly vexatious motives in asserting claims or defenses in the court below and Court of Appeals. Mother neither denies, confirms, elaborates upon nor adds any clarity to father's chronological presentation of the facts. The Court, therefore, should presume that mother has voluntarily waived her opportunity regarding the same.

Because Mother's [re]Statement of the Issues is replete with desultory and scandalous ad hominem statements, most of which are disrespectful of the truth, and, because these allegations distract from, rather than add clarity to, the issues presented to the merits panel, Father has addressed those allegations in a contemporaneously filed Motion to Strike and Motion to Seal and he devotes his Reply Brief solely on the issues presented for review.

### **MOTHER'S "SUMMARY OF ARGUMENT"**

Nowhere in mother's Answer Brief does she address the applicable standard of review for any of the three issues on appeal. Instead, mother asserts that "This entire matter is moot" and suggests that, because the custody portion of the district court case has been transferred to Texas under the Uniform Child Custody

Jurisdiction and Enforcement Act (“UCCJEA”), C.R.S. § 14-13-101, *et seq.*, father should have voluntarily dismissed his appeal, thereby forfeiting his claims against Bill Fyfe and his arguments concerning trial court orders, which, if not challenged, have preclusive effect in any other proceeding. Mother’s belief that the mootness doctrine attaches when another state assumes jurisdiction under the UCCJEA is mistaken and fatal to her argument.

## **MOTHER’S ARGUMENTS**

### **Applicability of the Mootness Doctrine**

Mother correctly cites Marriage of Hartley for the proposition that the mootness doctrine attaches whenever a judgment, when rendered, would have no practical legal effect upon the existing controversy.” 886 P.2d at 689. However, it is for this very reason that the mootness doctrine is inapplicable here:

In the case at bar, the trial court’s orders have collateral estoppel consequences on any portion of the case that has been assumed by the court in Texas (or anywhere else). These rulings don’t simply evaporate because another state has become the child’s home state under the UCCJEA.

Moreover, because father is seeking compliance with the mandate regarding the special advocate’s fees, the transfer of the case did not deprive the Colorado

court of jurisdiction over those fees. A UCCJEA transfer does not automatically impact financial issues, such as child support. *See* UCCJEA, section 102(3)(d).<sup>4</sup> *And see In re Doria*, 855 P.2d 28, 30 (Colo. App. 1993) (While the custody issue may be decided in another state, there is no legal basis for a trial court to defer to another state on issues of maintenance and child support). Child and Family Investigator fees are in the nature of child support.<sup>5</sup>

In addition, Father is also seeking reimbursement of fees, expert costs and attorney fees from the special advocate, Bill J. Fyfe. Because Fyfe is not an appointee of the Texas court and has no relationship with that court, the Texas court has no authority over him. Rather, only courts in Colorado may exercise authority over child and family investigator appointees pursuant to Colorado statutes authorizing the same.

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<sup>4</sup> “By excluding proceedings involving monetary obligations, this Act continues the notion of divided jurisdiction. A court may well have jurisdiction to dissolve the marriage or to make an order for child support without having jurisdiction to make a custody determination.” *Ibid*.

<sup>5</sup> *See The Role of the Child and Family Investigator and the Child's Representative in Colorado*, First Ed. (Robert M. Smith ed., CLE in Colo., Inc., Supp. 2005) at § D1.6 (“The fees of a guardian *ad litem* are in the nature of child support . . . Because the CFI and CLR are the post-1997 guardians *ad litem* of C.R.S. § 14-10-116, their fees are not dischargeable in bankruptcy”). (citing *In re Miller*, 55 F.3d 1487 (10<sup>th</sup> Cir. 1995)).

Mother not only failed to preserve her argument in the trial court proceedings, she argued that Colorado should retain jurisdiction over all matters.

**Supplemental Vol. I at pp. 13-22.**

### **Effect of Rule 97 on the Proceedings**

Mother does not deny that, once a recusal motion has been filed, a trial judge loses all authority over the case except to decide the pending Motion. Mother does not deny that the trial judge in this case issued no less than eight (8) orders during the time that a recusal Motion was pending. Mother does not deny that neither of the two appeals (04CA1161 nor 04CA1986) had anything to do with a recusal issue. Mother does not deny that a trial court is divested of jurisdiction only of those substantive issues that are on appeal. Instead, mother argues—without any reliance on legal authority—that it was appropriate for the trial judge to rule on some motions but, to avoid ruling on the pending recusal motion for two-and-one-half years, because appeals of unrelated matters were pending. This contention is untenable.

Mother also seems to argue that the trial judge disqualified herself on her own Motion, completely unrelated to father's arguments and, instead, in connection with the assumption of jurisdiction by the Texas court under the

UCCJEA. Yet, because the trial judge’s recusal order made no mention of the transfer to Texas and father had not waived his objection to the judge’s authority, mother’s arguments are purely speculative. Transfers of custody jurisdiction under the UCCJEA do not require recusal of the trial judge in the former home state. Moreover, the Chief Judge reassigned the case —notwithstanding the UCCJEA jurisdictional event— to Judge Berryhill. **Supplemental Record, Vol. I at 116-118.**

Finally, mother argues that the trial judge should not have been disqualified because of a ruling resulting in a “temporary cessation in the parenting time.”

**Answer Brief at 10.** However, father did not argue this on appeal. Rather, father argued specific other reasons why the trial judge should have recused (enumerated on page 25 of his Opening Brief). Mother failed to file any responsive pleading to father’s August 2004 recusal Motion or to other motions, where Father raised these same issues and, therefore, mother has waived any objection thereto.

### **Mandate from 04CA1161**

Mother admits that the trial court has failed to implement the May 8<sup>th</sup> 2006 mandate from 04CA1161 (**Answer Brief at 3 & 11**) yet, argues that, because a Texas district court assumed jurisdiction of custody under the UCCJEA in August of 2007, the Colorado district court did not need to comply with the mandate during

the prior fifteen months. *Id.* The Mandate Rule recognizes no such exception. As argued above, the orders concerning Bill Fyfe's fees did not become moot simply because the Texas court is now the child's home state under the UCCJEA. Bill Fyfe has already attempted to collect on those fees (*see* **Vol. V at 1191-92**) and may continue to attempt to collect against fees that this Court overturned in 04CA1161. As a matter of law and the orderly administration of justice, a trial court is obliged to comply with the mandate.

#### **Mandate from 04CA1986**

Mother argues without amplification that, "the trial court properly applied the law to the facts concerning disqualification of a Special Advocate." Yet, mother does not deny: that the trial court's order in response to the mandate was merely a paraphrasing of the original order; that the trial court's recitations of factual events is not corroborated (and, instead, is contradicted) by the **uncontested** evidence in the Record; and that the trial court did not review or consider Dana Cogan's peer review of Fyfe's work product and conduct, the American Psychological Association's Code of Conduct, Chief Justice Directive 04-08 (the Special Advocate Standards), or C.R.S. Section 12-43-222(1)(g). Mother's Answer Brief included neither any discussion of the aforesaid authorities

nor any substantive analysis of Fyfe's conduct or the ethical implications thereof. Mother also did not address the nature of the *ex parte* relationship between Bill J. Fyfe and this particular trial judge.

Rather, mother focused her argument on father's motives concerning whether he actually wants to see his daughter, who mother whisked out of the state without notice to the court or to father and, who was concealed from father with the substantial aid and encouragement of mother's attorney, Madeline Wilson, until the child's whereabouts was discovered with the aid of a private investigator. **Vol. VI at 1340-1351.** Further, mother's argument is based primarily on purported documents that are outside the Record on appeal. As explained *ante*, these are not valid legal arguments that address Fyfe's conduct as a child and family investigator and whether the trial court applied the applicable law to the facts at issue.

### **Section 13-17-102(6)**

Subsection (6) of 13-17-102 (C.R.S.) provides that attorney fees may not be assessed against a party appearing without an attorney unless the court finds that the party clearly knew or "reasonably should have known" that the claims at issue lacked substantial justification. In his dissent in Yadon v. Southward, Judge Taubman explained:

Although the supreme court has held that both pro se litigants and those with lawyers are bound by the same rules of procedure and evidence, this holding only applies when the rules are the same. It does not apply when the relevant rules or statutes expressly establish different procedures for represented and unrepresented litigants.

64 P.3d 909, 915 (Colo.App. 2003) (citing Viles v. Scofield, 128 Colo. 185, 261 P.2d 148 (1953)).

Throughout mother's brief, she acknowledges that Father was "*pro se*." She also acknowledged that Father was charged with attorney fees under 13-17-102(2) for a motion (a special appearance) prepared without the assistance of counsel. Yet, mother asserts that, "The father clearly had knowledge of 13-17-102 and "he would not be the person contemplated by 13-17-102(6)." This contention is singularly untenable. Even if, *arguendo*, father was specially appearing by and through an attorney at that time, the test for whether he and/or his attorney should have been charged with attorneys fees under the statute is the "no rational argument" test (Little v. Fellman, 837 P.2d 197, 202 (Colo. App. 1992)), requiring a "rationale basis in the law or evidence to support [a] claim." *Id.* Mother has not argued that any of father's arguments in his January 2007 Special Appearance (objecting to jurisdiction by Judge Tidball) lacked a cognizable basis in law or fact or that the trial court made the required findings regarding the same.

Alternatively, mother appears to argue that a trial court has discretion to disregard the General Assembly's intent under subsection (6) and, therefore, need not provide such findings. Mother's primary support for this argument is her allegation that father has been previously charged with attorney fees under Section 13-17-102(2) in the past, despite the fact that father is not an attorney; notwithstanding Section 13-17-102(6); and arising from orders that are not in the Record on appeal. **Answer Brief at 14.** She further asserts that all of these awards were waived by virtue of a November 6<sup>th</sup> 2001 stipulated/ordered Agreement, which is also not in the record. *Id.* Even if the Agreement was in the record, her representation makes clear that the matter of any alleged past awards addressed therein is now bound by *res judicata* and cannot form the basis of any prospective claims for relief.

Finally, mother does not deny that, if the trial court did not have jurisdiction to consider father's March 27, 2007 Motion for Reconsideration (**Vol. VI at 1325-1335**), as explained by the Chief Judge in his April 10, 2007 Order,<sup>6</sup> then the trial court could not have jurisdiction to enter the March 22, 2007 Order awarding attorneys fees.

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<sup>6</sup> "Denied for lack of jurisdiction." See Register of Actions, ICON event ID # 453; and see ¶ 4 on page 8 of Supplemental Record, Vol. I, where the full text of the Chief Judge's order is reproduced.

### **Mother's Request for Attorney Fees, Costs and Damages**

Mother argues that she is entitled to attorney fees, costs and damages based upon her unfounded ad hominem statements that father has a history of stubborn litigiousness in the court below. Mother fails to cite any court findings that father has been labeled a “vexatious litigant” and relies entirely on matters that were not included in the Record on Appeal. Regardless, divisions of this Court have consistently applied a rule of awarding appellate attorney fees “only if the appeal itself is frivolous.” Front Range Home Enhancements, Inc. v. Stowell, \_\_\_ P.3d \_\_\_ (Colo. App., November 01, 2007). Although mother claims that she believes, “the sole purpose of the father’s appeal is to harass the mother,” she provides no basis in law or fact to support the misplaced belief.

### **Conclusion**

For the foregoing reasons and based on the foregoing authorities, the trial court’s orders since August 16<sup>th</sup> 2004 signed by Judge Jane Tidball should be vacated for want of jurisdiction and the case should be remanded to the substitute judge to implement the mandates from 04CA1161 and 04CA1986; to award costs, a refund of Fyfe’s fees and attorney fees to father; and to commence further proceedings to determine if additional discipline of Mr. Fyfe is warranted.

Respectfully submitted this 10<sup>th</sup> day of December, 2007.

  
Sean L. Harrington

## CERTIFICATE OF MAILING

I hereby certify that on the 11<sup>th</sup> day of December, 2007, a true and accurate copy of the foregoing REPLY BRIEF was mailed first class, postage pre-paid, as addressed hereto:

**COLORADO COURT OF APPEALS**  
N<sup>o</sup> 2 East 14<sup>th</sup> Avenue  
Denver, Colorado  
80203

Madeline Elizabeth Wilson  
501 S. Cherry Street, Suite 610  
Denver, CO 80246

