

<b>DISTRICT COURT, JEFFERSON COUNTY, COLORADO</b> 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6130	
<b>In re the Marriage of:</b>  Petitioner: <b>CHRISTY HARRINGTON, n/k/a           CHRISTY RYAN</b>  and  Respondent: <b>SEAN L. HARRINGTON</b>	
Sean Harrington, <i>Pro Se</i> 197M Boston Post Road, West Suite #151 Marlborough, MA 01752	↑ <b>COURT USE ONLY</b> ↑  Case Number: 99DR3717 Jefferson County Case No. 30-192795-44-8A
<b>MOTION FOR RECONSIDERATION OF MAY 4<sup>TH</sup> ORDER and DISQUALIFICATION OF BILL FYFE AS SPECIAL ADVOCATE</b>	

**COMES NOW**, Sean Harrington, pursuant to C.R.C.P. §60(b)(3) & (5), to submit the within MOTION FOR RECONSIDERATION OF MAY 4<sup>TH</sup> ORDER and DISQUALIFICATION OF BILL FYFE AS SPECIAL ADVOCATE, and in support thereof, states as follows:

**Procedural Background**

1. On the 21<sup>st</sup> day of August, 2003, this court issued an Order appointing Bill Fyfe as special advocate. The Respondent requests that this court take **judicial notice** of the 21 August Order.
2. Page 2 of the aforementioned Order states in part:

“Each party shall pay half of the full \$2,000 retainer directly to SA no later than 14 days of the parties’ first meeting with the SA. Additional charges of SA shall be paid 50-50, and shall be paid within 30 days of the date billed.” *Id.* at ¶10

\* \* \*

“The parties shall confer with SA when and as SA directs, and shall cooperate fully with SA” *Id.* at ¶11

3. On the 30<sup>th</sup> of December, the Respondent entered into a fee agreement (“Contract for Service” [sic]) with Fyfe, which was signed by Fyfe on January 14<sup>th</sup>, 2004. The Respondent submitted a copy of the contract as, “Exhibit A,” in his “Respondent’s May 3<sup>rd</sup> 2004 Disclosure of Exhibits.” The Respondent request that this court take **judicial notice** of the Exhibit, thereto.
4. Paragraph 2 of the aforementioned Contract provides, in part:
 

“I also understand that I will pay 50% on any additional fees when billed, within ten (10) days of receipt of the bill.”
5. On the 22<sup>nd</sup> of April, 2004, Fyfe moved this court to *nunc pro tunc* assess Harrington with 100% of fees related to his cooperation with the SA investigation –specifically, the provision of court documents, letters and medical records relating material to the SA investigation and, in most instances, directly pertaining to specific issues that Fyfe had inquired about.
6. Fyfe’s request in Paragraph 5 hereinabove, was in direct contravention of both the prior order of the court requiring, “Additional charges of SA shall be paid 50-50,” and the Contract for Service, obligating the Respondent to, “pay 50% on any additional fees.”
7. On the 4<sup>th</sup> of May, 2004, this court issued an order in response to a letter from Fyfe, granting his request to *nunc pro tunc* assess fees at a rate of 100% to the Harrington for any documentation that the he provides or had provided while cooperating with the investigation.

### **District Court is divested of jurisdiction**

8. On the 19<sup>th</sup> of September, 2003, the Respondent filed a Notice of Appeal in the instant case. The Respondent requests that this court take **judicial notice** of the Notice of Appeal.
9. §II(j) of the Notice of Appeal submits the issue of the *nunc pro tunc* dismissal of the former SA, Natalie Van Note, subsequently replaced by Fyfe. The Designation of the Record included this court’s order appointing Fyfe, which is now in the Record on Appeal at Vol. II, pp. 332-35, and which is being appealed.
10. This court had no authority to issue the order in Paragraph 9, hereinabove. *“Generally, once an appeal is taken, a trial court is divested of jurisdiction to determine substantive matters that directly affect the judgment being appealed unless the appellate court has issued a remand order.”* Molitor v. Anderson, 795 P.2d 266 (Colo. 1990), and People v. Dillon, 655 P.2d 841, 844 (Colo. 1982) A trial court’s jurisdiction is not restored until the mandate from the appellate court issues. Hrabczuk v. John Lucas Landscaping, 888 P.2d 367, 368 (Colo. App. 1994).
11. The Order entered by this court on May 4<sup>th</sup>, 2004, is in clear excess of jurisdiction and is void and unenforceable. *An order that exceeds the judge's jurisdiction is a void order and can be either ignored or attacked in any proceeding in any court where the validity of the judgment comes into issue.* (See Rose v. Himely (1808) 4 Cranch 241, 2 L ed 608; Pennoyer v. Neff (1877) 95 US 714, 24 L ed 565; Thompson v. Whitman (1873) 18 Wall 457, 21 L ed 897; Windsor v. McVeigh (1876) 93 US 274, 23 L ed 914; McDonald v. Mabee (1917) 243 US 90, 37 S ct 343, 61 L ed 608.

### **A clarifying order cannot modify judgment *nunc pro tunc***

12. The May 4<sup>th</sup> Order of this court is in response to Fyfe's request for clarification of a previous order and, thus, is a clarifying order.
13. Under C.R.C.P. §60(a), a court may amend a judgment to correct a clerical error. *However, while it authorizes a court to amend a judgment to correct a clerical error, Rule 60(a) does not authorize the court to render a different judgment.* Hurst v. Hurst, 582 So. 2d 1144 (Ala. Civ. App. 1991). The court may not give retrospective effect to a clarifying order.
14. Although the order operates as a clarifying order, the court's intent appears to be a modification *nunc pro tunc*. Clarification, however, is not a proper purpose for a *nunc pro tunc* order. 49 C.J.S. Judgments §128a (1997):

"A *nunc pro tunc* order serves merely to correct a prior order which incorrectly reflects what the trial court actually ruled at that time...[t]he court is not called on to construe the judgment, but only to enter of record such judgment as was formerly rendered and not entered of record as rendered" *Id* at 201

15. Because the prior order contained neither a clerical error and the May 4<sup>th</sup> order is not, by definition, a *nunc pro tunc* order, the clarifying order constitutes an, "*impermissible modification of the divorce judgment.*" Ex parte Littlepage, 796 So. 2d 298 (Ala. 2001) *Id.* at 302 See also Beck, 144 Ill. 2d at 242, 579 N.E.2d at 829 ("*the trial court's nunc pro tunc modification of its earlier order was improper and therefore void*"); Desantis v. Desantis, 714 So. 2d 637, 638 (Fla. 4<sup>th</sup> DCA 1998) (A trial court may not, in the guise of an enforcement proceeding, readdress the distribution of property when the property has been previously distributed.); Ferguson v. Olmsted, 451 P.2d 746, 749 (Colo. 1969) (denial of relief under Colorado equivalent of F.R.C.P. 60(b)(5) affirmed because property decrees cannot be modified)

### **Trial court's May 4<sup>th</sup> order imposes *ex post facto* effect**

16. Though "retroactive effect" is not defined in the Children's Code or Marital Dissolution Act, the term is commonly used in determining the application of rules, statutes and orders. 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). In that context, a law has a retroactive effect if it takes away or impairs vested rights acquired under existing laws. The U.S. 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
17. Here, this court's order is retroactive and burdens Harrington with 100% of the costs of his cooperation with the Special Advocate's investigation (specifically, the provision of documentary evidence) *after* that cooperation had been rendered (in specific accordance with

the existing and valid order of August 31<sup>st</sup>, 2003). Said differently, Harrington is being burdened *ex post facto* with “*new legal consequences*,” for “*events completed before*,” the enactment of the May 4<sup>th</sup> order. Landgraf, *supra*.

### **Trial court’s May 4<sup>th</sup> order facilitates an impermissible breach of contract**

18. It is undisputed that Fyfe and Harrington have entered into a Contract for Service agreement consistent with the prior order of this court. “[T]he making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs – not on the parties’ having meant the same thing, but on their having said the same thing.” Holmes, The Path of the Law, 10 Harv. L.Rev. 457, 463 (1897) (emphasis in original).
19. This court has a duty to honor the prior order and to enforce the contract entered into between Fyfe and Harrington and which, upon information and belief, is further supported by the Contract for Service between Fyfe and the Petitioner, Ryan. “A judge cannot refuse to enforce a [contract]...contract enforcement is not normally a matter of judicial convenience.” Bandera v. City of Quincy, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. 2003).
20. There is nothing ambiguous about the contract phrasing as to Harrington, “I also understand that I will pay 50% on any additional fees when billed, within ten (10) days of receipt of the bill.” “*In determining intent contractual words and phrases are read using their plain and ordinary meaning.*” Cache National Bank v. Lusher, 882 P.2d 952 (Colo. 1994) and “A trial court may not look beyond the plain words of a contract to interpret it based on the contracting parties’ underlying intent unless the contract’s terms are ambiguous or are used in a special or technical sense not defined in the contract.” KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985)
21. Fyfe’s request, which dishonored the contract and is inconsistent with the court’s prior order constitutes a breach of contract. No party may conduct itself in a way “*that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.*” Drucker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976) *Id.* at 471-472
22. This court’s May 4<sup>th</sup> order facilitates the breach of contract described hereinabove.

### **Special Advocate is afforded no immunity for breach of contract or extortion**

23. The August 31<sup>st</sup>, 2003 order of this court states on p. 3 that, “The SA shall be immune from any civil or criminal liability to the maximum extent permitted by law.”
24. Court-appointed therapists, guardians *ad litem*, special advocates, etc. are conferred absolute quasi-judicial immunity for their evaluations and recommendations where their activities are intimately related and essential to the judicial decision-making process. Awai v. Kotin, 872 P.2d 1332 (Colo. App. 1993).

25. While absolute immunity “*protects against malicious acts, provided such acts are performed as part of a judicial or prosecutorial function,*” (Stump v. Sparkman, 435 U.S. 349, 355-56 (1978)), the “law,” referred to in paragraph 23 hereinabove, affords no person, including judges, immunity from “criminal liability.” Imbler v. Pachtman, 424 U.S. 409; 96 S.Ct. 984 (1976), Bradley v. Fisher, U.S. 13 Wall. 335 (1871), Ex parte Virginia, 100 U.S. 339, 346-347 (1879) “*There is no judicial immunity from criminal liability*” Shore v. Howard, 414 F.Supp. 379
26. Further, the SA does not enjoy absolute quasi judicial immunity for his acts that are not intimately related and essential to the judicial decision-making process. It is the nature of the acts, not simply the status of a person as a therapist, that determines the availability of immunity for the challenged acts and the extent of protection afforded by that immunity. (See e.g., Collins v. Tabet, 806 P.2d 40, 52 (N.M. 1991)). Breach of contract is not a judicially delegated duty. Assessing fees is not part of the judicial decision-making process. Assuming, *arguendo*, that either was or could be, such immunity would deprive one party of the ability to enforce and recover under a contract, rendering it equitably void.

**Special Advocate has engaged in unethical practice and should be disqualified**

27. This court stated in its May 4<sup>th</sup> Order that it “reviewed the Respondent’s Response.” The “Response” referenced could only be the advisory copy (filed with this court) of Harrington’s letter to Fyfe dated April 28<sup>th</sup>, 2004. The Respondent request that this court take **judicial notice** of that letter.
28. In the letter described in Paragraph 27, hereinabove, Harrington describes a phone call (on p. 2 of said letter) on or about the 27<sup>th</sup> of April between himself and Fyfe’s secretary “Maria.”
29. During the phone call mentioned in Paragraph 28, hereinabove, Maria explained to Harrington that they were refusing to provide a copy of the Contract (described in Paragraph 3, hereinabove) that was signed by Dr. Fyfe. Harrington was provided with a copy of the contract only after he suggested a breach of contract claim against Fyfe was likely.
30. Fyfe could have, but chose not to advise Harrington of his “new fee policy,” and, instead, accrued his fees first and then sought *nunc pro tunc* judicial approval for his policy. Fyfe did not advise Harrington at any time that any material he had received was irrelevant or overly voluminous. Fyfe made no attempt to advise Harrington to limit the volume or scope of documentary evidence, copies of legal pleadings or advisory material that he was receiving.
31. These fees included the “review” of advisory reference material, such as a North Dakota Law Review article “Parental Alienation: Not in the Best Interests of the Children,” and a treatise from the Journal of Family Violence, “Divorce Related Malicious Mother Syndrome.” Neither party should be billed for Dr. Fyfe’s exercising the option to read literature pertinent to his profession, but not directly material to the instant case. For example, if Harrington had sent Dr. Fyfe a complementary copy of the Diagnostics and Statistics Manual (DSM-IV), he cannot, in good conscious, charge either or both parties the 25 hours required to read it.

32. Based on Fyfe's *sua sponte* assessment of fees in a manner favorable to Ryan and based upon his civil breach of contract, seeking approval under the cloak of judicial immunity for the same, Dr. Fyfe has exemplified bias and unethical practices for his own unjust enrichment and should be disqualified, forthwith.
33. On or about the 3<sup>rd</sup> of May, in response to Fyfe's unethical practices, Harrington filed a complaint with the State of Colorado Department of Regulatory Agencies – Mental Health Licensing Section.
34. In addition to Fyfe's extant exemplification of bias and *sua sponte* motion favorable to Ryan in contravention of both fee contracts and the prior order, it would be unlikely that a reasonable person to expect that Fyfe could remain impartial with a pending ethics complaint against him by Harrington.
35. Because Dr. Fyfe has not yet finished his investigation, has produced no Report and has provided no *indicia* to the parties concerning his possible recommendations, the within request is based in no way on an "*adverse judgment*" or dissatisfaction with his recommendation[s].
36. Because Fyfe's investigation and his subsequent recommendations are an extension of judicial function, the rules and precedents governing disqualification of judges apply also to those conferred judicial authority and immunity and bias or prejudice or the appearance thereof is sufficient to warrant recusal. (See generally Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, Little, Brown & Company, (1996); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542).
37. For the reasons more fully set forth in Paragraphs 1 through 36 hereinabove, the May 4<sup>th</sup> order should be vacated pursuant to C.R.C.P. §60(b)(3) & (5), Fyfe should be disqualified and the all previous monies paid by Harrington (to date, \$1,422.50, plus costs) refunded by Fyfe or paid directly to Harrington by the Petitioner, who insisted on his appointment in substitution for the preexisting Special Advocate, Natalie Van Note.

**WHEREFORE**, the Respondent requests that this court vacate its May 4<sup>th</sup> Order, enter a new order disqualifying Dr. Bill Fyfe from the instant case and requiring that Dr. Fyfe refund all monies paid by the Respondent directly to the Respondent within 30 days of such order, and for other such relief as this court may deem proper.

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Respondent

## **CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_ day of May, 2004, I mailed a true and accurate copy of the foregoing document via pre-paid first class mail addressed as follows:

**Jefferson County District Court**  
100 Jefferson County Pkwy.  
Golden, CO 80401

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