

DISTRICT COURT, JEFFERSON COUNTY,
COLORADO
100 Jefferson County Parkway
Golden, CO 80401

In re the Marriage of:

**CHRISTY HARRINGTON, a/k/a CHRISTY RYAN,
n/k/a CHRISTY RYAN,**

Petitioner,

and

SEAN HARRINGTON,

Respondent.

Attorneys for Special Advocate William J. Fyfe, Ed.D.:

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Case Number: 99-DR-3717

Div. 9 Ctrm: 5F

**SPECIAL ADVOCATE WILLIAM J. FYFE, ED.D'S RESPONSE TO RESPONDENT
SEAN HARRINGTON'S OBJECTION TO ENTRY OF APPEARANCE BY COUNSEL
ON BEHALF OF THE COURT'S APPOINTED CHILD AND FAMILY
INVESTIGATOR**

Special Advocate William J. Fyfe Ed.D, through his attorneys, Jaudon & Avery LLP, respectfully submits his response to Respondent Sean Harrington's Objection to Entry of Appearance by Counsel on Behalf of the Court's Appointed Child and Family Investigator. In support thereof, Dr. Fyfe states as follows:

FACTUAL BACKGROUND

1. On May 29, 2008, the Court of Appeals vacated orders entered denying

Respondent's motions for relief from judgment pursuant to C.R.C.P. 60(b)(5) and remanded the case for: (1) reconsideration of Respondent's "motion to disqualify under C.R.C.P. 60(b)(5);" and (2) determination of whether the Court had divided the \$845 dollars worth of Special Advocate fees evenly between the parties. *In re Marriage of Harrington*, No. 07CA0379 (Colo. App. May 29, 2008) (*Harrington IV*) at 7-8. The Court noted that the appeal was not moot because Respondent sought "sanctions against the special advocate for his alleged unethical practice, including reimbursement of special advocates' fees, expert fees, and attorney fees..." *Id. at 4*.

2. In conformity with the Court of Appeals Opinion, this Court issued an Order dated September 17, 2008 directing Respondent to "set a hearing on his May 18, 2004, June 9, 2004 and July 30, 2004 motions for reconsideration and to disqualify the Special Advocate including allocation of the Special Advocate fees." *Order dated September 17, 2008*. In response to the Court's order, on October 1, 2008, the undersigned entered an appearance on behalf of Dr. Fyfe to the extent that Respondent sought to impose sanctions against Dr. Fyfe.

3. On October 3, 2008, Respondent Sean Harrington filed a pleading objecting to the entry of appearance of counsel on behalf of Special Advocate Dr. Fyfe. Respondent's Objection admits that he requests for "the Court to exercise its authority to discipline the child and family investigator for alleged unethical conduct and remove him from rolls of approved child and family investigators utilized by this Court." *Objection at 1*. Among other things, Respondent contends that the Special Advocate has not filed a motion to intervene and therefore may not intervene in this action and that entry of appearance of counsel somehow transforms the non-adversarial post-dissolution proceedings into adversarial proceedings. *Id. at 1-2*. Respondent also contends that if Dr. Fyfe is allowed to "intervene" he should be permitted to assert contract and tort claims against Dr. Fyfe, seek actual, nominal, and punitive damages, and have a jury determine his claims. *Id. at 4*.

4. Further, on October 2, 2008, Respondent filed a Motion for Summary Judgment or, in the Alternative, Judgment on the Pleadings. That motion states *inter alia* that Respondent seeks some \$8,795.00 from Dr. Fyfe, "including return of the fees father paid to [Dr.] Fyfe, reimbursement for father's expert costs and attorney fees necessitated by [Dr.] Fyfe's conduct..." *Motion for Summary Judgment at 7*.

ARGUMENT

5. The Court should deny the relief requested in Respondent's Objection because Dr. Fyfe has a due process right to be represented by counsel in proceedings which may potentially result in the imposition of sanctions against him. There is no question that Respondent seeks sanctions as against Dr. Fyfe. Specifically, Respondent seeks (1) disqualification of Dr. Fyfe as special advocate and removal of Dr. Fyfe from the list of special advocates; (2) refund of fees paid to Dr. Fyfe; (3) expert costs; and (4) attorney fees.

6. It is axiomatic that "[a] party facing possible imposition of sanctions has a due process right to notice that such sanctions are being considered by the court and a subsequent

opportunity to respond.” *Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1134 (10th Cir. 1991). This is particularly true when a party requests costs or attorney fees as a sanction. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987) (“The basic requirements of due process with respect to the assessment of costs, expenses, or attorney’s fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond.”); *see also Roberts v. Adams*, 47 P.3d 690, 700 (Colo. Ct. App. 2001); *In re Marriage of Mockelmann*, 944 P.2d 670 (Colo. App. 1997) (“When a hearing is requested to determine the reasonableness and necessity of attorney fees, due process requires that the trial court hold such a hearing.”). Accordingly, when sanctions have been requested, the person that is potentially subjected to sanctions is entitled to all the protections afforded by due process, including notice and an opportunity for explanation and defense. *Braley*, 832 F.2d at 1514.

7. In order to ensure that civil litigants are able to exercise their rights fully “due process requires that civil litigants be allowed to secure assistance of counsel.” *Aspen Properties Co. v. Preble*, 780 P.2d 57, 58 (Colo. App. 1989). “[A] civil litigant’s right to retain counsel is rooted in the Fifth Amendment guarantee of due process ... ‘the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’” *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)).

8. Here, Respondent requests that the Court sanction Dr. Fyfe and the Court has ordered a hearing for the purposes of ruling on Respondent’s request. Dr. Fyfe has a right to due process with regard to Respondent’s request for sanctions and that right includes the right to be notified of the sanctions hearing and represented by counsel at that hearing. *Aspen Properties Co.*, 780 P.2d at 58. Conducting a hearing without permitting Dr. Fyfe to secure the assistance of counsel essentially denies Dr. Fyfe his due process right to a hearing. *See id.*

9. Respondent also incorrectly asserts that Dr. Fyfe has no right to counsel because the proceeding does not implicate Dr. Fyfe’s substantial rights. Several of Dr. Fyfe’s substantial rights are implicated. First, Dr. Fyfe’s has a due process right to a hearing on Respondent’s request for sanctions which is implicated in this proceeding. *Eisenberg*, 936 F.2d at 1134. Second, Dr. Fyfe’s has a protected property interest in his placement on the list of court approved Special Advocates and a protected interest in his professional reputation and standing which will be jeopardized should the Court find in Respondent’s favor on his allegations of unethical conduct. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (“where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”). Third, Dr. Fyfe has a protected property interest in the ownership of the money which Respondent seeks to recover from him. *Denver Welfare Rights Organization v. Public Utilities Com.*, 190 Colo. 329, 333, 547 P.2d 239, 242 (1976) (holding that “the concept of property under the Due Process Clause extends ‘well beyond actual ownership of real estate, chattels, or money.’”).

10. Furthermore, Respondent incorrectly asserts that Dr. Fyfe is required to intervene as a party in order to be represented by counsel in this proceeding. *See Objection at 2*. This argument makes no sense. There is no need for Dr. Fyfe to file a motion to intervene when he is already a participant in the proceeding and Respondent’s pending motions are directed against him. If

Respondent's argument were true, Respondent would not be able to seek sanctions against Dr. Fyfe without adding him as a necessary party pursuant to C.R.C.P. 19(a). Because Respondent seeks sanctions against Dr. Fyfe, Dr. Fyfe is entitled to a hearing, an opportunity to defend himself, and to secure the assistance of counsel. *Aspen Properties Co.*, 780 P.2d at 58. Dr. Fyfe need not intervene as a party in order to be entitled to due process.

11. Finally, Respondent's request for a declaratory judgment is without any legal basis. C.R.S. § 13-51-106 (2007) provides that:

Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

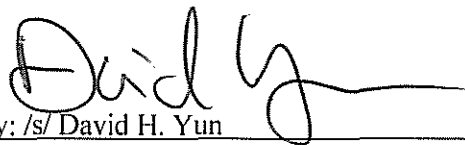
While this provision permits a court to issue a judgment declaring a party's rights under an "instrument, statute, ordinance, contract, or franchise," C.R.S. § 13-51-106 it does not permit a court to issue a declaratory judgment as to a party's rights in a judicial proceeding. Nor does Respondent provide any authority that the Court may issue such a declaratory judgment. There is, quite simply, no reason for this Court to declare that Plaintiff has the right to file tort or contract actions, or a right to a jury trial in those actions.

12. The Court of Appeals has issued a mandate specifying exactly the scope of the issues that must be resolved. "The law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court." *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983). Because the Court of Appeals remanded the case to this Court with directions to address specific motions, this Court must follow those directions. It should not allow Respondent to expand the scope of the proceedings. This is particularly true because the claims Respondent seeks to add have already been litigated on the merits in federal court and are time-barred by the statute of limitations.

WHEREFORE based on the foregoing, Dr. Fyfe requests that the Court deny the relief requested in Respondent's Objection to Entry of Appearance by Counsel on Behalf of the Court's Appointed Child and Family Investigator. A proposed Order is submitted along with this Response.

Dated this 17th day of October, 2008.

JAUDON & AVERY LLP


By: /s/ David H. Yun

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF DELIVERY

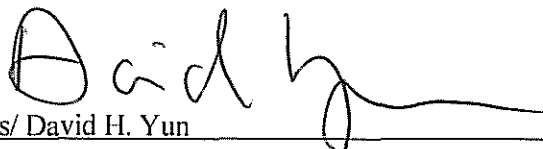
I hereby certify that a true and correct copy of the foregoing **SPECIAL ADVOCATE WILLIAM J. FYFE, ED.D'S RESPONSE TO RESPONDENT SEAN HARRINGTON'S OBJECTION TO ENTRY OF APPEARANCE BY COUNSEL ON BEHALF OF THE COURT'S APPOINTED CHILD AND FAMILY INVESTIGATOR** was electronically filed and served via E-Filing with LexisNexis File and Serve on October 17, 2008, to:

Brett N. Huff
Huff & Leslie, LLP
2480 Gray Street
Denver, Colorado 80214

Sean Harrington
P.O. Box 351855
Westminster, CO 80035

A correct copy of the foregoing was also e-mailed to the Respondent, per his request, at the following e-mail address:

esoxlucios@msn.com


/s/ David H. Yun

DISTRICT COURT, JEFFERSON COUNTY,
COLORADO
100 Jefferson County Parkway
Golden, CO 80401

In re the Marriage of:

**CHRISTY HARRINGTON, a/k/a CHRISTY RYAN,
n/k/a CHRISTY RYAN,**

Petitioner,

and

SEAN HARRINGTON,

Respondent.

▲ COURT USE ONLY ▲

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Div. 9 Ctrm: 5F

**ORDER RE: ENTRY OF APPEARANCE BY COUNSEL ON BEHALF OF THE
COURT'S APPOINTED CHILD AND FAMILY INVESTIGATOR**

THIS MATTER having come before the Court on the Entry of Appearance by Counsel on Behalf of the Special Advocate and Respondent's Objection thereto, and the Court being fully advised in the premises,

DOTH ORDER, ADJUDGE AND DECREE that the Entry of Appearance of Counsel on behalf of the Special Advocate, William J. Fyfe, Ed.D is accepted by the Court and the relief requested in Respondent's Objection is denied. The Court finds that Dr. Fyfe is entitled to be represented by counsel in this proceeding because Respondent seeks to impose sanctions against him. The Court also finds that Respondent's request for a declaratory judgment is contrary to the declaratory judgment statute and beyond the scope of the Court of Appeals remand in this matter.

DATED this ____ day of _____, 2008.

BY THE COURT:

District Court Judge

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Submitted by: Jared Ellis, Jaudon & Avery LLP
Authorized by: David H Yun, Jaudon & Avery LLP
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Court: CO Jefferson County District Court 1st JD
Division/Courtroom: 9 - Division 9
Case Class: Domestic Relations
Case Type: Dissolution of Marriage
Case Number: 1999DR3717
Case Name: HARRINGTON, CHRISTY and HARRINGTON, SEAN LEE

Transaction Option: File and Serve
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Documents List

2 Document(s)

Attached Document, 5 Pages Document ID: 17704588

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Document Type: Response
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Statutory Fee: \$0.00
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SPECIAL ADVOCATE WILLIAM J. FYFE, ED.D'S RESPONSE TO RESPONDENT SEAN HARRINGTON'S OBJECTION TO ENTRY OF APPEARANCE BY COUNSEL ON BEHALF OF THE COURT'S APPOINTED CHILD AND FAMILY INVESTIGATOR

Attached Document, 1 Pages Document ID: 17704613

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Document Type: Proposed Order
Access: Public
Statutory Fee: \$0.00
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Document title:

ORDER RE: ENTRY OF APPEARANCE BY COUNSEL ON BEHALF OF THE COURT'S APPOINTED CHILD AND FAMILY INVESTIGATOR

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 Sending Parties (1)

Party	Party Type	Attorney	Firm	Attorney Type
FYFE, WILLIAM J	Other	Yun, David H	Jaudon & Avery LLP	Privately Retained Attorney

 Recipients (2) **Service List (2)**

Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
Service	HARRINGTON, CHRISTY	Petitioner	Wilson, Madeline	Wilson, Madeline	Privately Retained Attorney	E-Service
Service	HARRINGTON, SEAN LEE	Respondent	Pro Se	Pro Se	Pro Se	U.S. Mail

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