

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6190	▲ COURT USE ONLY ▲ <hr/> trial court case No. 99 DR 3717 Div. 9 / Hon. Jack Berryhill
In re the Marriage of: Petitioner: CHRISTY RYAN and Respondent: SEAN HARRINGTON	
Sean L Harrington P.O. Box 351855 Westminster, CO 80035	
REPLY IN SUPPORT OF OBJECTION TO ENTRY OF APPEARANCE BY COUNSEL ON BEHALF OF CFI BILL J. FYFE OR, IN THE ALTERNATIVE, MOTION FOR REMOVAL TO THE GENERAL DOCKET	

COMES NOW, Respondent Sean L. Harrington (“father”), and respectfully submits the within Reply in support of his objection to an Entry of Appearance by counsel on behalf of CFI, Bill J. Fyfe.

INTRODUCTION

The objection raised by father concerning the apparent conversion of this case into an ordinary adversarial civil case by the CFI’s defective intervention is one of first impression in Colorado. Father’s concerns are well founded because, as Magistrate Elliot-Dumler and Judge Arkin explained:

As the investigative arm of the court, the CFI becomes a logical extension . . . of the court and, more specifically, of the particular judicial officer hearing the case. Perceived unfairness in the investigation invariably results in the judicial officer’s being viewed as a participant in a process that is deemed unjust.

The Role of the Child and Family Investigator and the Childs Representative in Colorado, First Ed. (Robert M. Smith ed., CLE in Colo., Inc., Supp. 2007) at C16-2.

Four years ago when these same issues pending before the Court were raised, Mr. Fyfe did not retain counsel, but instead placed his faith in an inappropriate fraternity that he enjoyed with a judge of this court, which judge he impliedly suggested would grant

whatever favor he sought.¹ Today, faced with the prospect of having this matter tried to an impartial bench, Fyfe seeks to avail himself of the full range of due process protections and without regard for his unique relationship to the Court. Yet, Mr. Fyfe wants to have his cake and eat it, too: He argues that father should be deprived of his entitlement to try his claims to a jury, to seek actual, nominal and punitive damages and to avail himself of the ordinary discovery rules not available under Title 14 domestic relations proceedings.²

First, Fyfe claims that his right to counsel is guaranteed by the Constitution. This argument fails, however, because this is a *sui generis* administrative matter and because right to counsel in civil cases—which is not without limits—must be balanced with the Court’s interests in preserving the jurisdictional scope of domestic relations proceedings.

In addition, Fyfe contends that the “protected property interests” at stake are significant. This contention, too, falls short because Fyfe has not articulated a protected property interest and the Court has not been asked to issue a “fine,” but rather has been asked to issue findings and reallocate fees and costs already disbursed.

Third, Fyfe argues that he need not comply with the Rules of Civil Procedure requiring a Motion to Intervene because he is already a party. This position is erroneous for two reasons: (1) Mr. Fyfe “resigned” from this case in 2004, thus by his own present definition, he is no longer a “participant”; and (2) if he does have a significant “protected property interests” to be adjudicated by the Court, he must be properly denominated as a party to the litigation and accept the risks and consequences therewith.

Finally, Fyfe asserts without citation to authority that father’s entitlement to a declaratory judgment does not extend to define the remedies available to father in vindicating his rights under the contract. This assertion is also flawed because the boundaries of declaratory judgment extend to all facets of contractual rights, including the means at law or in equity by which they may be enforced.

¹ In another case, District Court (Jefferson County, No. 97JV652) Fyfe told Rhonda Rivenburg—just as she had suggested challenging his conduct—that he knows “*every judge in the county.*”

² For the sake of clarify, these procedures will hereinafter be referred to as “*the full panoply of rights and procedural due process protections.*”

ARGUMENT

Fyfe has not demonstrated that his right to counsel outweighs the Court's interests in preserving the jurisdictional scope of domestic relations proceedings pursuant to statute.

Under C.R.S. § 12-10-107(6), “All issues raised by these proceedings shall be resolved by the court sitting without a jury.” In the 2005 case of *Marriage of Mockelmann*, the Court of Appeals reaffirmed the long-standing principle in Colorado that joinder of tort and contract claims are disallowed in most marital dissolution cases:

The separation of dissolution proceedings and interspousal damages claims is more efficient primarily because dissolution actions are proceedings in equity and not at law. Consequently, the joinder of such claims would inundate dissolution proceedings with extraneous issues that are difficult to address in the unique context of marital dissolution, such as the right to trial by jury, the adversarial nature of other types of civil cases, and the possibility of contingent fees.

121 P.3d 337 (Colo.App. 2005) (citing C.R.S. § 14-10-107(6); *In re Marriage of Lewis*, 66 P.3d 204, 205 (Colo.App. 2003); *Simmons v. Simmons*, 773 P.2d 602, 604-05 (Colo.App. 1988)). The appeals court explained that these policy considerations are significant when the subject matter of the dispute “falls outside the dissolution court’s jurisdiction” (*id.*) as has certainly happened here.

The question for this Court to therefore decide is not whether Fyfe is entitled to counsel of his own choosing, but whether that entitlement outweighs the Court’s interests in preserving the jurisdictional scope of these proceedings and the role of the CFI as an adjunct of the court (rather than an adverse party litigant).³ The right to counsel is not absolute and is, in fact, subject to the right of the court to impose reasonable rules to control the conduct of the trial.

In *Wheat v. United States*, the U.S. Supreme Court held that the “institutional interest in the rendition of just verdicts in criminal cases” trumped the presumption that a criminal defendant has the right to counsel of his choice. 486 U.S. 153, 160 (1988) (fn7).

³ 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 C14-5 (“the agendas of the judge and the CFI are closely aligned”). The CFI’s “role in the courtroom is to help the judge make good decisions.” *Id.* at C14-8. “As a witness, a CFI is the court’s assistant, period.” *Id.* “The CFI’s client is the court.” *Id.* at D1-5.

A court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain and prevent those conflicts from impeding the orderly administration of justice. *Id.*

Moreover, the burden of proof and constitutional protections present in most civil cases are not as high as they are in criminal cases. *A-1 Auto Repair v. Bilunas-Hardy*, 93 P.3d 598, 601 (Colo. App.1994); *cf People v. Hotle*, __P.3d__ (Colo. App. No. 06CA1617, Feb. 21, 2008) (there is no right to counsel or to a hearing for a defendant subject to a Motion to extend probation, because he is not faced with a “consequential significant deprivation of liberty”). Thus, unless this Court is prepared to remove these claims to the general docket, it would be improper to permit Fyfe to intervene as a party and avail himself of the full panoply of rights and procedural due process protections available in an ordinary civil case, whilst denying father his right to pursue damages for his contract and tort claims.

Fyfe has not articulated a protected property interest that requires a formal hearing, entry of appearance by counsel and other measures that would impermissibly expand the jurisdictional scope of the post-dissolution proceedings

Next, Fyfe asserts —without citation to authority— that he has a “protected property interest” in his placement on the list of court approved Special Advocates. This view is erroneous. “A protected property interest exists only when the [individual] has a legitimate claim of entitlement, as opposed to a unilateral expectation. Furthermore, a claim of entitlement must stem from an independent source, such as state law.” *Olson v. Hillside Community Church*, 42 P.3d 52, 55 (Colo.App. 2001). Here, Fyfe has no entitlement to have his name on the rolls of court-approved CFIs and there is no state law or court rule that guarantees this right or expectation. *Compare Carlson v. Industrial Claim Appeals Office*, 950 P.2d 663 (Colo.App., 1997) (doctor has no protected property interest in having his “name, reputation and practice” subjected to a medical utilization review); *Wilkerson v. People*, 830 P.2d 1121, 1124 (Colo.App., 1992) (no protected property interest in appointment to Parole Board); *People v. Lindsey*, 253 P. 465 (Colo.. 1927) (there is no property interest in a statutory public office); *Rather v. Conte*, 849 P.2d 884 (Colo.App., 1992) (no protected property interest in prison employment exists under Colorado law).

By way of example, Chief Judge Bailin (20th Judicial District) recently exercised her authority to remove an individual from the rolls of approved CFIs.⁴ In that instance, there was no docket number assigned for the action and no indication that the individual subject to her decision had an entitlement to a formal hearing. Rather, the decision to strike the CFI from that court's rolls was an administrative undertaking, not unlike the administrative undertaking that is requested in this case.

Fyfe also cites *Marriage of Mockelmann*, 944 P.2d 670 (Colo. App., 1997) for the proposition that 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. Although this has been true of attorney fees,⁵ it is not true of those other than attorney fees. See *Marriage of Eggert*, 53 P.3d 794 (Colo. App. 2002) (Because the parent coordinator's fees were addressed in the order of appointment, and because the specifics regarding the fees were adequately set forth in the pleadings, the court found no compelling reason to hold a hearing); see also, *Dep't of Public Health v. Caulk*, 969 P.2d 804, 812 (Colo.App., 1998) (“Here, a portion of the amount awarded represented damages for fees whose amount was definite and ascertainable from the invoices provided with the default judgment motion. As to these damages, as well as to the non-monetary relief awarded, defendant was not entitled to a hearing as a matter of right”). A substantial portion of the fees in question in this case are definite and ascertainable from the invoices and Mr. Fyfe has not contested the reasonableness of the attorney fee portion. In fact, he waived the opportunity to do so in the past when father submitted this request to the Court.

Fyfe's contention that he is already a proper party to the case and, therefore, need not comply with Rule 24 is contrary to both the facts of this case and state law

Next, Fyfe argues that he need not comply with Rule 24 by filing a Motion to Intervene, because “he is already a participant in the proceeding.” This contention is flawed for at least two reasons. The first is that Fyfe **resigned** from this case. See June

⁴ See September 10, 2007 memorandum of Judge Bailin, attached hereto and marked as [Exhibit “A.”](#)

⁵ See, e.g, *Rogers v. Westerman Farm Co.*, 986 P.2d 967 (Colo. App. 1998); *Zarlengo v. Farrer*, 683 P.2d 1208 (Colo. App. 1984); *Alessi v. Hogue*, 689 P.2d 649 (Colo. App. 1984); *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Cedar Lane Invs. V. St. Paul Fire & Marine Ins. Co.*, 883 P.2d 600 (Colo. App. 1994)

11, 2004 Special Advocate Report at 12, ¶ 11 (“*With this report, the SA has completed his court appointment and resigns effective today*”); and see Chief Justice Directive Standard 14 (“The Special Advocate shall request termination of the appointment when permanent orders or the post-decree adjudication is entered”) ; C.R.S. § 14-10-116.5(2) (“The child and family investigator shall comply with the applicable provisions set forth in chief justice directives”).

The second is that C.R.S. § 14-10-116.5 and CJD 04-08 both refer to “party” to the exclusion of the CFI. The proper means to be denominated a party litigant is to file a Motion to Intervene. See *Public Service Co. of Colo. v. Blue River Irrigation Co.*, 753 P.2d 737, 740 (Colo., 1988) (*en banc*) (The filing of an entry of appearance may be construed as a defective motion to intervene but, which is subject to a timely objection).

One case, *Marriage of Yates*, 148 P.3d 304, 312 (Colo.App. 2006) may provide some limited guidance: There, father argued that the special advocate acted improperly because she filed pleadings and participated as an attorney in the dissolution proceedings. The appeals court rejected the argument, noting that the special advocate was an attorney, that father’s attorney consented to her actions and that father cited no authority for the proposition that a special advocate may not respond to a party’s efforts to remove her. Here, father timely objects to the special advocate participation in the proceedings as a “party in interest” without complying with the Rules of Civil Procedure and without affording father the full panoply of rights and procedural due process protections that would otherwise be in place in a civil case of a court with general jurisdiction.

Fyfe’s claim that § 13-51-106 does not provide for declaratory judgment as to a party’s remedies under law or contract is erroneous

Mr. Fyfe urges that Section 13-51-106 (C.R.S. 2007) does not permit a court to issue a declaratory judgment as to a party’s rights in a judicial proceeding. He cites no authority for this parochial view of the statute.

“The Uniform Declaratory Judgments Law . . . is intended to provide a method to relieve parties from uncertainty and insecurity with respect to their rights, status, and legal relations, and such provisions are, therefore, to be liberally construed and administered.” *Buckley Powder Co. v. People*, 924 P.2d 1133 (Colo. App. 1996) (citations and quotations omitted). “One whose rights or status may be affected by statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the

issuance of a declaratory judgment exists.” *Silverstein v. Sisters of Charity*, 559 P.2d 716, 720 (1976).

Therefore, father is entitled —as a matter of law— to a declaratory judgment as to whether jurisdictional limits exists in domestic relations proceedings that affect either party’s rights to resolve the dispute with the full panoply of rights and procedural due process protections that exist in non-domestic relations civil proceedings.

Fyfe’s allegation that father’s claims have already been decided on the merits and are time-barred is legally and factually erroneous

Finally, Mr. Fyfe argues incorrectly that the claims father “seeks to add have already been litigated on the merits in federal court and are time-barred by the statute of limitations.” The claims that were asserted against Mr. Fyfe in federal court were dismissed **without prejudice** for want of jurisdiction. *See* August 9, 2007 Tenth Circuit Mandate in *Harrington v. Wilson, et al.* (“We **REMAND** to the district court to modify the dismissal to be without prejudice”). *Id.* at 5. “It is well settled in Colorado that a dismissal for lack of subject matter jurisdiction is not a judgment on the merits” *In re Estate of Murphy*, __P.3d__ (Colo. App. No. 07CA0901, August 7, 2008).⁶ Moreover, U.S. Magistrate Judge Watanabe —a former Colorado state district judge— wrote in his Report & Recommendations (adopted by Judge Edward Nottingham and subsequently by the Tenth Circuit):

The state court provides an adequate forum to hear such claims . . . Such claims include those against the Fyfe defendants. In the First Amended Complaint, plaintiff complains of the fees Fyfe has charged him and asserts that Fyfe did not “fulfill the obligatory tasks of a SA investigation.” More specifically, Fyfe allegedly did not “(1) perform a child-parent interaction evaluation; (2) perform a personal interview with Plaintiff; (3) perform an interview with Plaintiff’s spouse (the child’s stepmother); (4) conduct a meaningful interview of references, witnesses or mental health care providers; or (5) provide an indication that the evidentiary document for, which Fyfe had charged additional fees had actually been reviewed or considered.” The Fyfe defendants correctly note that these matters are

⁶ The same holds true for dismissals from federal court. *See, e.g., Ray v. Eyster*, 132 F.3d 152, 155 (3rd Cir. 1997) (When a trial court “determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so”); *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (Only a court with jurisdiction may render a disposition on the merits).

delegated to the state court. See § 14-10-116.5, C.R.S. (jurisdiction to appoint a Special Advocate, to define the subject matter and scope of the Special Advocate's duties, and to enter orders concerning the Special Advocate's fees). In fact, in the plaintiff's domestic case, plaintiff admittedly filed several motions asking to disqualify Fyfe on the grounds of bias and unethical conduct. Furthermore, Judge Tidball issued a ruling with respect to Fyfe's fees, which plaintiff appealed. On March 9, 2006, the Colorado Court of Appeals issued an opinion on the fee dispute, remanding "with directions that the sum shall be allocated equally between the parties pursuant to the August 2003 order appointing the special advocate." Plaintiff is now seeking to relitigate the rulings issued on these matters. This court should abstain from exercising jurisdiction.

September 7, 2006 magistrate's Report and Recommendations at 20.⁷

Therefore, although father had also asserted claims for bad faith breach of contract, breach of the covenant of good faith and fair dealing, violation of state and interstate anti-trust consumer protection laws, misrepresentation, extreme and outrageous conduct, civil conspiracy to extort fees, and common law fraud —claims that cannot ordinarily be prosecuted in a marital dissolution proceeding— Magistrate Watanabe concluded that **the instant case** was *both pending and* was the appropriate forum to pursue all of those claims against Fyfe. And, because this action has been docketed since December of 1999, this claims asserted in this case cannot be time-barred by the statute of limitations.

If the Court determines that Fyfe may intervene as a party and be entitled to full due process procedural protections, removal to the general docket is appropriate

The dispute between father and Fyfe, which has generated an attempt to intervene as a party litigant, points to the presence of issues that may be outside a dissolution court's jurisdictional scope. Moreover, as the *Mockelmann* panel implied, a party asserting those issues is entitled to a jury, to seek damages and for full access to the established adjudicatory procedures available in "other types of civil cases." Therefore,

⁷ Note, however, that Watanabe is the subject of a pending complaint filed in January with the Tenth Circuit Judicial Council that all or most cases where CFIs have been defendants were non-randomly assigned to him (for dismissal) in violation of the local rule concerning random computer assignment and that he was a member and presenter for the MDIC, a lobbying group to which the CFI defendants belong, but failed to disclose income and meals incident to his speaking engagements. See <http://www.knowyourcourts.com/Harrington/08-10-372-02.htm>. Of the 48 complaints that have disposed of in 2008, only two have not been dismissed, including the complaint against Watanabe. The other is against Nottingham. The complainant in both matters is the undersigned.

if this Court is inclined to permit Fyfe to intervene, father requests that case be removed to the general docket with an effective date of May 14, 2005 (the date of father's first Motion concerning Mr. Fyfe) under the relation-back doctrine or, alternatively, that father be entitled to a jury, usual discovery and granted leave to add his tort, contract and statutory claims for damages.

WHEREFORE, based on the foregoing reasons and the foregoing authorities, father objects to the intervention of Bill Fyfe in this domestic relations case as a party litigant and respectfully asks that the Court either limit or expand procedural due process protections to all approved parties equally and for other and further relief either at law or in equity to which father may show himself just entitled.

Dated this 20th day of October, 2008



Sean L. Harrington

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of October, 2008, I served a true and accurate copy of the foregoing *REPLY* by placing the same in the U.S. Mail, postage prepaid, and affixed hereto to the following:

First Judicial District Court
Division 9
100 Jefferson County Parkway
Golden, CO 80401

and by facsimile to: Law Office of Madeline Wilson at: 303-321-3196

and by electronic mail to: David H. Yun (DYun@jalegal.com)

and by electronic mail to: Brett N. Huff (bhuff@huffandleslie.com)





Twentieth Judicial District of Colorado

P.O. Box 4249
Boulder, CO 80306-4249
(303) 441-1817 Fax (303) 441-4824

Hon. Roxanne Bailin
Chief Judge

September 10, 2007

Mr. Jerome Greene
1825 Marine #12
Boulder, Colorado 80302-6465

Dear Mr. Greene:

Because of a complaint you filed concerning Dr. Wells, the CFI in your divorce case, and Judge Sandstead, the judge in your case, I have recently had the opportunity to review your divorce file. My investigation was included in a recent letter to you.

This led me to review your application as CFI in our district. In the past, I have reviewed and approved all applications for CFI status. It appears that I never saw yours because there is no written approval on the face of it and because I would certainly not have approved it.

Your application for CFI was filed with us on May 22, 2007, the day after Judge Sandstead denied your motion to lift the Winslow order, prohibiting you from filing pleadings without an attorney. It was also filed the day after you filed your complaint against Judge Sandstead and Dr. Wells. As I know from documents filed with Alicia Davis at SCAO, you recommended, as a CFI, that a board be established that could force the removal of judges in domestic relations cases; you also discussed filing a grievance against Judge Sandstead with the Judicial Conduct Commission prosecutor. You also advocated for flat fee payments to CFIs.

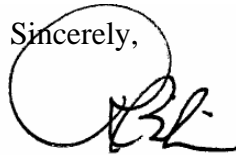
In addition, on June 11, 2007, you sent a letter to Charlene Llewellyn and Amy Waddle in our administration office thanking them for approving you as a CFI and setting forth certain parenting philosophies that you embrace, including your view that babies should not be allowed to cry themselves to sleep. You included an article about cortisol supporting your view. Although I have no quarrel with that basic philosophy, you then went on to use it to support your practice of having your child sleep with you, a practice that the CFI in your case called into question. Your letter to Ms. Llewellyn and Ms. Waddle makes it clear to me that the reason that you applied for a CFI listing is that you wanted to have an opportunity to support these specific beliefs in the context of the divorce cases of others.

EXHIBIT A

Your letter to Alicia Davis at SCAO indicates to me that you were using your position as a CFI to inject your views about Dr. Wells into the CFI system and to propose ideas that if acted upon, could result in the removal of Judge Sandstead from your case. Your own anger at the cost of your CFI report propelled your argument for a flat fee for CFIs.

It is my view that there is an irreconcilable conflict between your status as a litigant in our courts and your position as CFI listed on the 20th Judicial District list. You have already used your status as CFI for improper purposes, and it is likely that you will continue to use your position to pursue your own agenda. Therefore, I am removing your name from our CFI list immediately.

Sincerely,

A handwritten signature in black ink, appearing to be 'RB', written over a large, hand-drawn circle.

Roxanne Bailin
Chief Judge