

<b>DISTRICT COURT, JEFFERSON COUNTY, COLORADO</b> 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6190	<hr/> <b>▲ COURT USE ONLY ▲</b> <hr/> trial court case No. 99 DR 3717  Div. 9 / Hon. Jack Berryhill
In re the Marriage of: <b>Petitioner:</b> CHRISTY RYAN and <b>Respondent:</b> SEAN HARRINGTON	
Sean L Harrington P.O. Box 351855 Westminster, CO 80035	
<b>REPLY IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR  JUDGMENT ON THE PLEADINGS</b>	

COMES NOW, Respondent Sean L. Harrington (“father”), and respectfully submits the within Reply in support of his Motion for Summary Judgment against CFI, Bill J. Fyfe.<sup>1</sup>

**INTRODUCTION**

In his Motion for Summary Judgment or, in the alternative, Judgment on the Pleadings, father contended there is no genuine issue as to any material fact and, therefore, he is entitled to summary judgment as a matter of law. In the alternative, father argued that Judgment on the Pleadings is appropriate because the only other party to the case, Christy Ryan, who had argued unsuccessfully on behalf of the CFI in appeal Nos. 04CA1161, 04CA1986 and 07CA0379, had confessed the allegations through her repeated failure to respond.<sup>2</sup>

In his response, Mr. Fyfe does not dispute the facts or the record, but rather argues that father has misapprehended the law that applies to those facts. He thusly states, “*Fyfe agrees with [father] . . . that no hearing is necessary to resolve [father’s] claims against Mr. Fyfe.*” Response at 3. Therefore, the facts alleged in father’s Motion should be deemed admitted, as a matter of law, and Fyfe’s response should be construed as a cross-Motion for Summary Judgment.

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<sup>1</sup> With this Reply, father does not waive his pending objection to the Entry of Appearance on behalf of the CFI, absent leave from this Court and without having complied with Rule 24.  
<sup>2</sup> As of the date of this writing, mother has filed no response to the Summary Judgment Motion.

Fyfe first claims that father's "Request for Disqualification is moot." This argument fails, however, because the concept of "disqualification" was employed broadly by father in the context of the relief sought (*e.g.*, to be spared from the continuing harm that Fyfe's work product is causing).

Fyfe also contends that father's request for relief based on Fyfe's bad faith breach of contract is moot because father was never required to pay the fees that Fyfe attempted to extort and because Fyfe allegedly billed in compliance with the court's order. This contention is without merit because Fyfe had already invoiced father for the additional fees in violation of the contract and Order of Appointment *before* he had procured the May 4<sup>th</sup> 2004 Order approving his conduct; he then billed father again in January, 2005 for yet more fees, which fees were in violation of even the May 4<sup>th</sup> Order. Moreover, Fyfe's breach of conduct caused father economic and non-economic losses and constituted violations of the state's Consumer Protection Act laws ("deceptive and unfair trade practices").

Third, Fyfe argues that there is no "legal basis" for father's request for a refund of fees or an award of attorney fees or expert witness fees. This argument is also fails for several reasons: (1) the appeals court has interpreted state law to vest a trial court sitting in equity with discretion to reallocate (reverse) a CFI's fees; (2) the attorney fees sought are for those father expended on his attorney (not on behalf of the non-lawyer father); and (3) a prevailing party in Colorado is entitled to an award of costs (Colo.R.Civ.P. 54(d)) and which includes expert witness fees. *See Steele v. Law*, 78 P.3d 1124 (Colo. App. 2003).

Next, Fyfe admits that he had resigned from the case, yet —despite the fact that mother's attorney had argued his cause in all three appeals and despite the fact that he did not file a Motion to Intervene and despite the fact that he maintained *ex parte* contact with the court about this case *after* his resignation— Fyfe now complains that he was not afforded an opportunity to participate as a party litigant. This posturing is unavailing because Fyfe had constructive notice of the issues presented to this Court, but forfeited his opportunities to address these issues formally because he did not file a Motion to Intervene. *See C.R.C.P. Rule 24*. Moreover, as a matter of law, Fyfe is answerable to the Court as an adjunct of the court (not a party litigant) and there is no procedural rule

requiring that the proper parties provide service to non-parties under Rule 5 for any and every pleading where they may be implicated.

Finally, Fyfe urges that father is not entitled to declaratory judgment because he believes that this Court is has no authority, discretion or jurisdiction over the subject matter other than the four corners of the appeals court's remand or, alternatively, that father has allegedly failed to articulate an injury-in-fact or, alternatively, that father has misapprehended the declaratory judgment statute. These arguments bear stretch marks. Colorado's appellate courts have made clear that the declaratory judgment act is to be construed liberally. Moreover, this court has continuing jurisdiction over the subject matter of post-dissolution matters, where such jurisdiction has not been specifically abrogated by court rule or statute or mandate. The appeals court has not limited the scope of this court's continuing jurisdiction, except over jurisdiction that was lost to Texas under the UCCJEA.

## ARGUMENT

**Father's request for "Disqualification" of CFI is not moot, because father enhanced and clarified his request for the Court to discipline the CFI and for other such relief as is appropriate under these circumstances.**

The Court of Appeals has already ruled that this matter is not moot, citing *Reifschneider v. City & County of Denver*,<sup>3</sup> for the proposition that the need to deter inappropriate conduct did not disappear and a party has necessarily incurred fees as result of challenged conduct.<sup>4</sup> Although Mr. Fyfe has "resigned" from this case in 2004, that has not prevented him from maintaining an *ex parte* relationship with the Court in his

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<sup>3</sup> 917 P.2d 315, 319-20 (Colo. App. 1995)

<sup>4</sup> *Marriage of Harrington*, No. 07CA379 (Colo.App., May 29, 2008) (unpublished pursuant to C.A.R. 35(f)) at 4-5. As noted by the appeals court, father is seeking the reimbursement of fees paid to Fyfe, fees paid to Dana Cogan, M.D. and attorney fees paid to attorney Karen Renne, Ph.D. Father is also asking this Court to enter specific findings regarding Mr. Fyfe's conduct and to remove him or recommend his removal from the rolls of divorce industry experts used by the Court.

efforts to affect father's rights and influence the outcome of these proceedings, which he has not denied.<sup>5</sup> Moreover, resigned status does not mean that "disqualification" cannot be sought: Father's request for "disqualification" has been clarified in subsequent pleadings to request that the Court disqualify Fyfe *from further participation* in these proceedings, that Fyfe's SA Report be deemed inadmissible, that the court find that Fyfe's conduct was unethical and that the Court discipline Fyfe under the Court's administrative capacity to serve the important public policy purpose of deterring unethical conduct. Even if father had not provided clarification or had otherwise misconceived his remedy, father is not deprived of a remedy and the Court is not deprived of the power to act. *See In re Legislative Reapportionment*, 374 P.2d 66 (1962) ("if the allegations of the petition are such as to invoke both the jurisdiction of the court and to entitle the petitioner, on the face thereof, to some relief, the mere fact that one misconceives his remedy will not deprive the court of jurisdiction to act").

**Father's request for relief based on breach of contract is not moot, because father has suffered both economic and non-economic losses that have not yet been remedied**

*The Law of Contract*

Father calls to the Court's attention that the Law of Contract does not cease to apply merely because this is a domestic relations proceeding. Fyfe does not dispute that the contract entered into between himself and father was a private, enforceable contract, as affirmed by the appeals court in 04CA1161. Fyfe does not dispute that he failed to perform his obligations under the contract or that he willfully breached the contract by violating its terms on not one but two separate occasions, relying instead on the fraternity he enjoyed with the judge and the imbalance of power he had over father. Rather, Fyfe argues that his invoice was in compliance with the Court's May 4<sup>th</sup> 2004 Order, which had not yet been reversed by the Court of Appeals. This is impossible. Fyfe's invoice was dated and sent to father on April 14<sup>th</sup> 2004, nearly a month earlier. There was no

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<sup>5</sup> *See* ICON Event ID # 398 (Fyfe's January 21, 2005 *ex parte* letter to Judge Tidball with attached invoice reflecting an additional \$845 for "report writing" billed at a rate of 100% to father in violation of **both** the Order of Appointment **and** the May 4<sup>th</sup> 2004 Order). Presumably, these additional fees have never been waived and remain outstanding.

Order authorizing the breach of contract at that time. He violated the contract a second time in January, 2005, by charging fees to father at a rate of 100% in violation even of the May 4<sup>th</sup>, 2004 Order. *Supra* at note. 5.

### ***Payment without Performance***

Next, Fyfe argues that, because father never paid the fees that Fyfe attempted to extort, father was not injured. This argument overlooks not only the non-economic injuries that father suffered, but also the fact that father paid Fyfe for services that he never received and for services that were below the generally accepted standard of care in the Denver metropolitan community. “In a breach of contract action, the objective is to place the injured party in the position it would have been in but for the breach. The prevailing party is therefore entitled to recover the amount of damages necessary to accomplish that result.” *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo.App. 2000). Because Fyfe willfully breached the contract and also did not perform the contractual services that he promised (*see* Summary Judgment Motion at ¶¶ 5 & 13), father should be reimbursed what he paid to Fyfe under the general rule that the parties be returned to the *status quo ante*.

### ***Equitable Enforcement***

*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) provides, in pertinent part:

#### **§ D1.5.4—Small Claims Action**

Many mental health professional CFIs — in addition to the order of appointment — have detailed written agreements with parties regarding fees and payment procedures. This agreement is a contract, and could be enforced in small claims court if the amount due is \$7,500 or less. The outcome would result in a judgment, which would be enforced as described above. Before choosing to go this route, the CFI should consider whether it would be wiser to proceed before the district court judge, who is already familiar with the case, the parties, and the CFI, or to start anew with a county court judge who knows nothing about the case history.

*Id.* at D1-9. Thus, while Fyfe — a co-author to this publication — is free to assert his right to enforce such contracts, he now argues that the other party to the contract should have no remedies for enforcement. The reasoning constitutes an

abuse of power that the Court has delegated to him. Unless otherwise agreed, a valid contract empowers both parties to an equity-in-arms to vindicate their rights under the Law of Remedies. *See* A.A.S. Zuckerman, Interlocutory Remedies in Quest of Procedural Fairness, 56 *The Modern Law Review*, 3 (May, 1993) at 325.

### ***Non-economic Loss***

The Colorado Supreme Court has recognized that certain common law claims that sound in tort and are expressly designed to remedy economic loss may exist independent of a breach of contract claim. *See Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000). Non-economic damages are available in contract breach actions in extraordinary contractual circumstances where the breaching party's conduct was "willful and wanton." *Carothers v. Archuleta County Sheriff*, 159 P.3d 647, 657 (Colo. App. 2006). Father has unambiguously alleged that Fyfe's conduct was willful and wanton and—significantly—Fyfe has not disputed that either in this case or in the federal case (D.Colo. No. 05-cv-01858).

**Fyfe's position that a court sitting in equity has no discretion to reallocate fees when the CFI has failed to perform the services for which he was ordered (or when his conduct violated ethical rules) is manifestly contrary to the Inherent Powers Doctrine**

### ***Inherent Powers Doctrine***

Fyfe asserts that father has misapprehended *Marriage of Redmond*, 131 P.3d 1167 (Colo. App. 2005) because the appeals court drew a distinction that the trial court's basis for reversing fees in the case was for a violation of the Colorado Rules of Professional Conduct. He argues that "A crucial fact that [father] fails to mention is that Smith was an attorney." Response at 8. This is untrue, as father's Summary Judgment Motion states:

The Court of Appeals clarified that this authority includes requiring an **attorney** child and family investigator refund fees—including attorney fees—to a parent aggrieved by his conduct, if the trial court determines that Rule of Professional Conduct had been violated

*Id.* at 16 [emphasis added]. In fact, it is Fyfe who misapprehends the case.

The *Redmond* panel was concerned with **which particular Rule of Professional Conduct** was the basis for the trial court’s decision, noting that attorney CFIs are subject only to RPC 8.4(c) but not RPC 5.3. *Id.* At 1171. The *Redmond* panel concluded its opinion stating:

we do not address whether her concerns about the quality of Smith's work as a special advocate would independently warrant a trial court order requiring Smith to refund all fees paid to her . . . [b]ecause Redmond did not raise this issue on appeal.

*Id.* at 1172. Therefore, Fyfe’s claim that “*The Court of Appeals expressly concluded that the language of C.R.S. § 14-10-116.5(3) . . . did not permit a court to deny a special advocate’s fees*” is an unfaithful portrayal of *Redmond*.<sup>6</sup>

Indeed, Fyfe urges this Court to adopt reasoning leads to an absurd result: namely, that “courts have inherent supervisory powers over attorneys as officers of the court.” (131 P.3d 1169), but that courts have no supervisory powers over non-attorney special advocates. This wrongly assumes that non-attorney special advocates are not officers of the court when, in fact, the Colorado Supreme court recognized that “the term 'officers of the court' refers to a broader group, including attorneys, investigators, and other employees of the court.” *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) (citing *People v. Proffitt*, 865 P.2d 929, 933 (Colo.App.1993). *See also Kahre v. Kahre*, 916 P.2d 1355, 61 (Okl. 1995) (“A guardian *ad litem* becomes an officer of the court . . . The guardian *ad litem* in a custody dispute is an arm of the court”); *Meyers v. Contra Costa County Dep’t of Social Servs.*, 812 F.2d 1154, 1159 (9<sup>th</sup> Cir. 1987) (counselors employed by a family court whose duties included mediation of custody and visitation disputes, investigating matters pertaining to such disputes, and providing reports to the court are “officers of the court” because they are “performing a judicial function at the direction of the court”).

This Court’s supervisory authority derives from its broad inherent powers. *See In re Court Facilities for the Routt County Combined Court*, 107 P.3d 981, 984 (Colo.App.

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<sup>6</sup> Although the *Redmond* panel observed, “Nothing in the former § 14-10-116, the current § 14-10-116.5, or CJD 97-02 **expressly** mentions a court's power to deny a special advocate his or her fees if the court determines that it has lost confidence in the special advocate or that the special advocate's report is of no value,” this, of course, is not the same as holding that a trial court is deprived of equitable discretion to re-allocate fees. 131 P.3d at 1169. [emphasis added]

2004) (“[C]ourts necessarily possess certain inherent powers, which . . . consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective”). “This inherent authority extends beyond the power to control litigants, lawyers, and court personnel” (*People v. McGlotten*, 134 P.3d 48, 489 (Colo.App. 2005)) and includes the authority to impose sanctions. *See Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902, 907 (Colo. 1992) (*en banc*). Under these inherent powers, “a judge, a master and an arbitrator all have clear authority to impose sanctions for conduct which interferes with the functions of the court.” *Id.* And, because a trial court relies so heavily on the candor and diligence of a CFI,<sup>7</sup> one who discharges those duties negligently or fraudulently or abuses for venal purposes the power the Court has delegated certainly interferes with the functions of the court.

As discussed in father’s Motion for Summary Judgment, the statutory model in Colorado has vested the trial courts as the **sole** entity with authority to discipline CFIs. *Id.* at 18-20. *And see* Smith, Littman & Montgomery, *Child and Family Investigator Standards in Colorado—Part II*, 35 Colo.Law. 8 (August, 2006) (“Statewide budget constraints made impossible the creation and staffing of a regulatory body specifically for CFIs. Thus, the oversight role falls, by default, to the appointing court”). Both Chief Justice Mullarkey and the Director of D.o.R.A. have reinforced this. *See* exhibits “A” and “B” to father’s Summary Judgment Motion. Therefore, this Court’s duty to supervise and discipline CFIs is especially vital to preserve the integrity of the process and to protect parties and their children from harm.

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<sup>7</sup> *See* Colo. D.o.R.A. 2003 Sunset Review at 41 (“Judges rely extensively on the recommendations made by these appointees. This is also a reason to instill greater accountability.”); *and see* March 23, 2005 memorandum of 4<sup>th</sup> Judicial District magistrate Robert Erler (“The Court values the education and experience that psychologists have that makes them uniquely qualified to do custody/parenting time evaluations.”) (available from: [http://www.knowyourcourts.com/ColoPsychBoard/documents/2005-03-23\\_memo-fromMagErler-toPsychBoard.pdf](http://www.knowyourcourts.com/ColoPsychBoard/documents/2005-03-23_memo-fromMagErler-toPsychBoard.pdf)); *see also* Galatzer-Levy & Kraus, *The Scientific Basis of Child Custody Decisions* (Wiley & Sons, Inc. 1999) at 4 (“the position of the court’s supporting services is so significant, that court-appointed special masters, mental health professionals and third-party neutrals’ opinions are almost always adopted by the courts”); Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 Fam.L.Q. 53, 59-62 (1992) (The guardian *ad litem* fills a void for the court. Without the guardian *ad litem*, the trial court has no practical means to ensure that it receives the information it needs to make informed decisions);

By way of example, Fyfe’s conduct is by no means limited to this case. In another case, (No. 2001DR991, 20<sup>th</sup> Judicial District Court), Fyfe engaged in the same behavior, conspiring *ex parte* with the mother: “*On my fees for this latest round of accusations, etc., I will apportion some of this solely to [father] once the paperwork is done.*” See Exhibit “D” to father’s February 6<sup>th</sup> 2007 Rule 59 Motion (ICON Even # 440).

***Applicability of Chief Justice Directive 04-08 and C.R.S. § 14-10-116.5***

Chief Justice Directive 04-08 (a/k/a “the CFI Standards”) are “are intended to provide guidance to special advocates.” *Id.* at 1. The standards merely codify professional practice guidelines that already existed in case law and the industry. For example, CJD 04-08 Standard 3 (The Child and Family Investigator Serves as an Investigative Arm of the Court) —particularly relevant to this case— has been codified in case law for many years.<sup>8</sup> Nevertheless, Fyfe asserts that the Directive “*is inapplicable to this case because it became effective on September 1, 2004, months after Dr. Fyfe completed his report and resigned.*” Response at 10. Fyfe explains, “*special advocates were required to comply with Chief Justice Directive 97-02, not Chief Justice Directive 04-08.*” *Id.* This argument is a non sequitur: CJD 97-02 was repealed effective May 1, 2004. Some of the alleged conduct in question occurred between the repeal of CJD 97-02 and the effective date of CJD 04-08 (September 1, 2004).<sup>9</sup> Fyfe would thusly reason that he wasn’t subject to **any** guidelines or ethical standards during this window of time. Even if that view could be adopted by any Court, a portion of Fyfe’s conduct was continuing through the year 2005 (*supra* at note 5), four months after CJD 04-08 became effective. And, notably, the CFI Standards that became CJD 04-08 were first developed and published by the

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<sup>8</sup> See *Yonker by and through Helstrom v. Thompson*, 939 P.2d 530, 533 (Colo. App. 1997) (“[A] guardian *ad litem* is an agent of the court”) (quoting *Miller v. Clark*, 356 P.2d 965, 966 (1960); Colo. Rev. Stat. § 14-10-116, (1996 Cum. Supp.); *Short v. Short*, 730 F. Supp. 1037, 1038 (D. Colo. 1990) (“[T]he guardian *ad litem* serves as an adjunct of the court.”)); *Hughs v. Long*, 242 F.3d 121, 125 (3rd Cir. 2001) (“[C]ourt-appointed experts hold a unique role in judicial proceedings . . . Because they work on behalf of the court.”); *In re Estate of Milton* (Iowa 2003) (“a guardian *ad litem* acts as an officer of the court, not as the ward’s attorney”); *Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989) (“guardian *ad litem* . . . acts as an actual functionary or arm of the court”).

<sup>9</sup> Fyfe’s SA Report was filed in June of 2004.

Metropolitan Denver InterDisciplinary Committee (MDIC) in **2001** at the same time that **Fyfe was the Secretary of the MDIC.**

In addition, as set forth in *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):

Mental health professionals serving as CFIs are expected to adhere to the requirements of the ethical standards of their own profession. Generally, a profession's ethical principles apply specifically to active members of that professional organization. For example, a psychologist who is a member of the American Psychological Association and/or the Colorado Psychological Association would be expected to adhere to the American Psychological Association's current ethical principles (Ethical Principles of Psychologists and Code of Conduct) when serving as a CFI.

*Id.* at A1-10. *See also* Intro. to CJD 04-08. (“The standards do not, however, exhaust the ethical and professional considerations that should inform a special advocate in his or her duties”). Finally, the version of Section 14-10-116 that was then in effect provided:

a special advocate shall comply with the applicable provisions set forth in the chief justice directive 97-02, concerning the court appointment of guardians *ad litem* and other representatives and of counsel for children and indigent persons in titles 14, 15, 19 (dependency and neglect only), 22, and 27, C.R.S., **and any subsequent chief justice directive or other practice standards established by rule or directive of the chief justice** pursuant to section 13-91-105 (1) (a), C.R.S., concerning the duties or responsibilities of guardians *ad litem* and special advocates in legal matters affecting children.

§ 14-10-116 (C.R.S. 2003) (emphasis supplied). The proposition that Fyfe was not subject to any standards or guidelines proscribing unethical, tortious or extortionate conduct is singularly untenable and does not pass the straight face test.

### ***Attorney Fees***

Next, Fyfe argues that father is not entitled to recover attorney fees because he is a non-lawyer *pro se* litigant. In fact, as set forth in father’s February 7, 2007 Motion for Reduce Fees to Judgment and separately filed Attorney Fee Affidavit, father is requesting

fees that father incurred and paid to his attorney in the amount of \$3,750.00 for litigation that necessitated by Fyfe's conduct. A portion of those fees, \$3,000.00, are sought in connection with father's first two successful appeals concerning Fyfe's unethical conduct. Because the trial court is in a better position to determine the reasonableness of attorney fees incurred by attorneys on appeal (*Stauffer v. Stegemann*, 165 P.3d 713, 719 (Colo. App. 2006)), father requests those fees, in addition to the \$750.00 expended at the trial court level and in connection with father's attorney's time in communicating with Fyfe's attorney, mother's attorney and Dana Cogan, M.D. *See, e.g., Giampapa v. Am. Family Mut. Ins. Co.*, 12 P.3d 839 (Colo. App. 2000) (In the absence of any statute, rule, or precedent limiting the trial court's jurisdiction to award prevailing party appellate attorney fees, an application to the trial court was appropriate) (*rev'd on other grounds*, 64 P.3d 230 (Colo. 2003)).

### ***Quasi-judicial immunity***

Fyfe argues that he is immune from tort liability. Response at 11. However, C.R.S. § 14-10-11 provides, in pertinent part:

The general assembly hereby finds and declares that, due to the need to continue to encourage court appointments of persons to serve the best interests of children in domestic relations proceedings involving the allocation of parental responsibilities, it is the intent of the general assembly that **quasi-judicial immunity continue to be granted for a child and family investigator** acting within the course and scope of an order of appointment pursuant to Colorado case law.

The immunity applies only to conduct **within the course and scope** of an order of appointment. *Id.* In *Short v. Short*, 730 F. Supp. 1037 (D. Colo. 1990), quasi-judicial immunity was presumed because, unlike here, that plaintiff, "did not allege that guardian *ad litem* acted outside her role or that she conducted herself maliciously or in bad faith." 730 F. Supp. at 1038-39. Nevertheless, the court noted that, "quasi-judicial immunity does not necessarily shadow every court appointment . . . immunity attaches only to conduct within the scope of a guardian *ad litem's* duties." *Id.* at 1038. *And see Awai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993) ("[I]t is still necessary to establish that the

acts performed were intimately related and essential to the judicial decision-making process.”).

In summation, Fyfe was **not** appointed by the court to: (1) breach the fee contract in bad faith and attempt to extort fees; (2) fail to provide any or all of the services for, which one had been paid; (3) barter prospective favorable parenting-time recommendations in exchange for an implied waiver of suit in federal court; (4) retaliate against a party, who does not surrender to his extortion; or (5) waive collection-enforcement of attempted-extorted fees in exchange for a withdrawal of a licensing board grievance.

Further, when Fyfe entered into a private contract, he voluntarily submitted to the Law of Contract, thereby waiving quasi-judicial immunity over that subject matter. *Cf. Malcolm K. H. v. Phegley*, 589 N.W.2d 455 (Wis. App. 1998) (implied finding that contract breach claims could be prosecuted against GAL but, that quasi-judicial immunity covers negligent acts of GAL); *Ace Flying Service, Inc. v. Colo. Dep't of Agriculture*, 314 P.2d 278, 280 (Colo. 1957) (held: “when a state enters into authorized contractual relations, it thereby waives immunity from suit”).

Finally, the venal motive present here abrogates the immunity. *See Cok v. Cosentino*, 876 F.2d 1, 4 (1<sup>st</sup> Cir. 1989) (“allegations of theft or personal profiteering,” would have invalidated quasi-judicial immunity of GAL). *And see* Flamm, Richard E., *Judicial Disqualification - Disqualification of quasi-judicial personnel*, § 29.7.2 (Little, Brown & Co. 1996) (Evident partiality may be found to exist where the subject of a grievance concerns the quasi-judicial appointee’s own employment). In contrast to judges, CFI appointees have a pecuniary interest in the cases that they are involved in, because they derive a substantial portion of their income from the parties that they investigate (whereas judges derive no income from the parties whose rights they adjudicate). Because absolute immunity transcends to an appointee’s quasi-judicial function, the principles of the peremptory recusal doctrine accompany it. Accordingly, if the subject of the litigation is an individual’s employment (fees or a grievance filed with the professional regulatory authority), quasi-judicial immunity does not attach, whereas, if the claims deal with his determination of facts, quasi-judicial immunity might apply. *See Kubat v. Kubat*, 238 P.2d 897 (1951) (disqualification is peremptory when a judge has a, “pecuniary interest in the outcome of the litigation, rather than to a determination

of facts and legal questions presented.”); *see also* *Zoline v. Telluride, Lodge Ass’n*, 732 P.2d 635 (Colo. 1987) (same); *and see* Colo.Rev.Stat. § 13-1-22, Colo.R.Civ.P. 97 and Code of Jud. Conduct, Cannon 2. *Accord* Colo.Rev.Stat. § 20-1-107(2) (as applied to district attorneys).

### **Fyfe’s Failure to Intervene at an Earlier Time Does not Defeat a Motion for Summary Judgment**

The entirety of Fyfe’s argument that “*the Court should not grant summary judgment on the basis of waiver because [father] failed to serve Mr. Fyfe with his . . . motions*” (Response at 12-13) is based on the premise that Mr. Fyfe is a proper party to the case. Fyfe urges that father’s argument that Fyfe waived earlier opportunities to litigate claims that were properly and timely before the court “makes no sense.” *Id.* Frankly, what doesn’t make sense is that Fyfe admits that he **resigned** from the case, had constructive knowledge of the claims against him, maintained *ex parte* contact with the Court, took no steps to become a proper party to the case (which he believes he is entitled), now intends to take no steps to become a proper party to the case, yet maintains that he is, in fact, a “participant” to the proceedings.<sup>10</sup> As more fully set forth in father’s Objection to Entry of Appearance on behalf of the CFI, Mr. Fyfe is not a proper party to this case and has not even attempted to comply with the Rules of Civil Procedure to be denominated as such. His role as an adjunct of the court presents unique problems. “As a legal representative and attorney, the CLR may file appropriate motions with the court, whereas the CFI, who may or may not be an attorney, may not file motions with the court pursuant to CJD 04-08.” *The Role of the CFI and CLR in Colorado, supra* at A1-6. *See also* Smith, Littman & Montgomery, *Child and Family Investigator Standards in Colorado—Part II*, 35 Colo.Law 8 (August, 2006) (“A non-attorney CFI is not expected . . . to hire a lawyer to draft and file motions on his or her behalf”).

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<sup>10</sup> Fyfe Response to Objection to Entry of Appearance at 3, ¶ 10.

**Fyfe’s Parochial View of the CUDL contravenes both legislative intent and Colorado appellate courts’ holdings and does not surmount father’s entitlement to declaratory judgment**

***The Mandate Rule***

In pressing that father should not be able to pursue declaratory relief in this proceeding (Response at 14), Fyfe first states that the law of the case, as represented by the four corners of the mandate, deprives this Court of jurisdiction or discretion other than to fulfill the letter of the mandate. Indeed, “When an appellate court remands a case with specific directions to enter a particular judgment or pursue a prescribed course, a lower court has no discretion except to comply with such directions.” *Colo. State Bd. of Med. Exam’rs v. McCroskey*, 940 P.2d 1044, 1046 (Colo. App. 1996). But that is not the case here. He cites *Young v. Golden State Bank*, 589 P.2d 1381, 1382-83 (Colo. App. 1978) for the proposition that “*If a trial court makes findings on issues not remanded by the appellate court, it exceeds the scope of the remand.*” Response at 14. The appeals court held nothing of the sort. Rather, the Court held that the trial court entered findings that were *contrary to* the appeals court’s remand and earlier holdings. In *Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686, 687-688 (Colo. App. 1988) (also cited by Mr. Fyfe), the appeals court posited precisely the opposite of what he now argues:

Claimant contends that the Panel went beyond this court's mandate by considering issues in addition to those mentioned in the decision in *Musgrave I*. . . We do not agree that the order of remand limited the Panel to making findings solely on the issue of claimant's acquiescence to changed working conditions

. . .

when a case is remanded for further proceedings consistent with the appellate court's opinion, it is a general remand. A general remand authorizes the trial court to make new findings and conclusions so long as there is no conflict with the ruling of the appellate court. The order in *Musgrave I* was a general remand and authorized the Panel to reexamine the record and to make new findings and conclusions.

762 P.2d 687-88. *Harrington IV* directed the trial court to, among other things, comply with the earlier mandates of *Harrington II* and *Harrington III*. The former was a specific instruction remand, whereas the latter, like *Musgrave I*, was a general remand. Further, the appeals court’s mention of “father’s request for sanctions against the special advocate for his alleged unethical conduct, including reimbursement of the special

advocate’s fees, expert fees, and attorney fees” (*Id.* at 4-5) indicated the appeals court’s intent to permit father to seek relief in the nature of sanctions.

Next, Fyfe’s proposition that the transfer of custody to the Texas court deprives this Court from entering declaratory judgment as to Fyfe is another non sequitur: The Texas court is ill-prepared to make findings concerning Fyfe’s conduct and has no statutory authority over Fyfe. Moreover, for that court to pass on the propriety of Fyfe’s conduct or work product would necessarily require Fyfe to appear in Texas, an endeavor that Fyfe would certainly challenge through a Special Appearance and claim of insufficient minimum contacts.

### ***Injury-in-fact***

Next, Fyfe claims that father has no legal standing, because he allegedly has failed to articulate an injury-in-fact. This claim is meritless. Father has established that Fyfe’s willful and wanton breach of contract has caused both economic and non-economic losses. Father has alleged—and it is not in dispute—that both mother and her attorney have relied on Fyfe’s report, which was never adopted by the Court, for their continuing violation of the Order of this Court (§§ 1.10 and 1.14 of the November 6, 2001 stipulated ordered Agreement), Colorado state law (*e.g.*, C.R.S. §§ 14-10-123.8 and 14-10-104.5), Texas state law (Tex. Fam. Code §§ 42.002 ~ .003) and the common law (*e.g.*, §§ 46 and 700 of the Restatement (Second) of Torts)). This has resulted in five (5) years of loss of contact between father and his child. Fyfe’s characterization of this loss as a “speculative and indirect” injury is execrable.

### ***Chief Justice Directive 04-08 and the APA Code of Conduct***

Once again, Fyfe argues that the directive did not apply to him. As discussed above, his conduct continued through 2005, after the CJD was implemented and, further, the CJD merely codifies the established professional practice standards and guidelines that were already in place in the profession and case law.

Fyfe further presses that the APA Code of Conduct is not contemplated by the Colorado Uniform Declaratory Judgment Law (CUDL) statute, as that applies to contracts. C.R.S. § 13-51-106. He cites no authority for this proposition—because there is none. In *ZAB, Inc. v. Berengery Corp.*, 136 P.3d 252 (Colo. 2006) (*en banc*), the

Colorado Supreme Court declared that, “trial courts have the broad power to declare rights, status, and other legal relations.” *Id.* at 256. Here, father had an expectation that Fyfe, who holds himself out as a psychologist, would not only fulfill the contractual promises that he made, but also that he would comply with the applicable professional code of conduct in that performance.<sup>11</sup> This expectation was not only reasonable, but has been codified in the present version of C.R.S. § 14-10-116.5 (“The child and family investigator shall comply with applicable provisions set forth in chief justice directives, and any other practice or ethical standards established by rule, statute, or licensing board that regulates the child and family investigator”); *see also* C.R.S. § 12-43-222(1)(g) (“A person licensed, registered, certified, or regulated under . . . this article is in violation of this article if such person . . . Has acted or failed to act in a manner that does not meet the generally accepted standards of the professional discipline under which such person practices”).

#### ***Admissibility of the Cogan Affidavit***

Next, Fyfe contends that Dr. Cogan’s Report does not state that Dr. Fyfe violated the APA Code of Conduct and, further, that Dr. Cogan’s report “*may not be used as a basis for summary judgment because ‘[u]sworn expert witness reports are not admissible to support or oppose a motion for summary judgment.’*” Response at 16-17. If Mr. Fyfe had actually reviewed Dr. Cogan’s Report prior to filing his Response, he would have made neither allegation, because: (1) Dr. Cogan’s Report is a sworn affidavit;<sup>12</sup> and Dr. Cogan found that Mr. Fyfe violated the APA Code of Conduct. *See* Affidavit of Cogan (Exhibit E to ICON Event ID # 440) at ¶¶ 22, 26-27, 29-33.<sup>13</sup> Fyfe insists, however, that the Court may not take Judicial Notice of the Cogan Affidavit when, in fact, “A court may take Judicial Notice of any matters in its own records and files.” *Sakal v. Donnelly*, 494 P.2d 1316, 1317 (1972). CRE Rule 201, cited by Fyfe, only governs judicial notice of adjudicative facts. C.R.E. 201(1). Under this rule, a court may not take judicial notice

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<sup>11</sup> Fyfe’s *curriculum vitae* provided to father states, “Dr. Fyfe is also a member of the American Psychological Association and the Society of Colorado Psychologists.” A copy of Fyfe’s CV is attached hereto and made part hereof by reference as [Exhibit “A”](#)

<sup>12</sup> Page 1 (of 9) is captioned “Affidavit” and Page 9 (of 9) bears the notary’s seal and signature.

<sup>13</sup> For the Court’s convenience, a copy of Dr. Cogan’s Affidavit is attached hereto and made part hereof by reference as [Exhibit “B”](#)

of a fact that is “subject to reasonable dispute.” Significantly, Fyfe has not disputed any of Dr. Cogan’s findings in his Response to father’s Summary Judgment Motion and mother, a proper party to this case, never contested the Report in the 21 months since it was filed with this Court.

***Daubert and Admissibility under C.R.E. 702***

Next, Fyfe claims that “Colorado does not require courts to consider or apply the *Daubert* factors.” Response at 17. Although the *Daubert* factors are hortatory, this is immaterial. Mother has left Colorado and relies on the Fyfe Report. As explained above, a court in another jurisdiction is ill-equipped to pass on the conduct and work-product of a court appointee from another state over whom that court would have no supervisory authority. This is especially troublesome when—as has already happened in Texas—a psychologist in another jurisdiction without knowledge of Mr. Fyfe’s unethical practices references the Fyfe report as admissible hearsay within his or her own report.

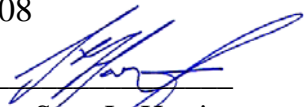
***Contractual Duties in Conformity with the Court’s Appointment Order***

Finally, Fyfe contends that father may not seek declaratory judgment as to whether Fyfe’s conduct exceeded the scope of his court appointment. Because the declaratory relief that father seeks concerns Fyfe’s performance under the contract—namely, that he would perform certain services in conformity with the appointment Order— father is entitled to a declaratory judgment that his conduct, as a matter of law, was not within the scope of the appointment.

**CONCLUSION**

An opponent to a Motion for Summary Judgment must come forward with “specific facts showing that there is a genuine issue for trial.” Here, Mr. Fyfe has admitted the facts either expressly or through a failure to deny. All that is left for the Court to do is to apply the law to those undisputed facts. For the foregoing reasons and based on the foregoing authorities, father moves this Court for an Order granting his Motion for Summary Judgment in its entirety.

Dated this 22<sup>nd</sup> day of October, 2008

  
Sean L. Harrington

## CERTIFICATE OF MAILING

I hereby certify that on the 22<sup>nd</sup> 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](mailto:DYun@jalegal.com))

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





## Columbine Counseling Center

**Bill J. Fyfe, Ed.D.** is a state licensed psychologist. Dr. Fyfe specializes in relationship problems (couples and/or family) and outpatient psychotherapy with adolescents and adults. Dr. Fyfe is the vice president and member of the Board of Governor's for the Colorado State Interdisciplinary Committee (CIDC). He is a past board member and past secretary of the Metropolitan Denver IDC, as well as a former board member of the Colorado Association for Sex Therapies (CAST).

Dr. Fyfe chaired the 12th Annual Child Custody Conference at Keystone in 1988 co-sponsored by Denver and Boulder IDC's, the Family Law Section of the Colorado Bar Association, and Colorado Legal Education (CLE). In 1999 he co-chaired the 23<sup>rd</sup> Annual Breckenridge IDC Conference On Children and Divorce. Dr. Fyfe co-chaired of the 2001 CIDC Conference On Children and Divorce and is on the Planning Committee for the 2002 CIDC Conference.

Dr. Fyfe is also a member of the American Psychological Association and the Society of Colorado Psychologists. He earned his doctorate in psychology from the University of Northern Colorado in 1978. Before establishing a private practice in Lakewood in 1983, Dr. Fyfe was an assistant professor at New Mexico State University. He maintained a psychotherapy practice in Las Cruces, New Mexico from 1979-1982. Prior positions include Outreach Coordinator for Horizon House Psychiatric Center, Drug Rehabilitation Program, 1972-1976, and Assistant Director of Services, Operation Concern, Teenage Consultation Center, 1970-1972.

Dr. Fyfe lectures on a variety of topics including adolescent development, high conflict divorce, couples issues and brain development in children.

Dr. Fyfe serves as a court appointed Parental Responsibility Evaluator, Special Advocate and Parenting Coordinator in high conflict divorce cases. Dr. Fyfe has testified numerous times across the state in divorce cases and criminal matters.



11) Dr. Fyfe asked Mr. Harrington to sign a document entitled “Special Advocate Contract for Service” (sic) which he signed on December 30, 2003. This document indicates that Mr. Harrington was to pay 50 per cent of the amount that Dr. Fyfe billed.

12) As Dr. Fyfe notes in his report, “The SA has reviewed an enormous number of documents provided by Sean Harrington.” Toward the bottom of page six of the report, Dr. Fyfe states, “During the SA investigation a dispute arose in which the SA requested that Sean pay for the additional time assessing his submitted material. Mr. Harrington resisted and the court ordered payment. This only added to conflict between Mr. Harrington and those involved in making recommendations and decisions concerning the family. Sean filed a grievance against the SA during this investigation. He has refused to pay the court ordered fees. The SA decided to write off these fees and finish the investigation in the best interest of Shelby.”

13) Dr. Fyfe wrote a letter to the Honorable Jane Tidball, the district court judge who heard issues pertaining to the divorce case, stating, “Attached you will find a list of the documents I have received from Sean Harrington. Reviewing these documents has been a difficult and labor intensive task as they are replete with footnotes, addendum (sic), and legal terminology. The sheer volume of these documents has led me to conclude that Mr. Harrington should be responsible for the fees incurred...”

14) On page 12 of his SA report, Dr. Fyfe addresses how he believes the cost of a parenting coordinator should be split between the parents. “Costs for the PC should be set at 80% for Sean and 20% for Christy. The court should strictly monitor payments for services.”

15) According to an Order signed by Judge Tidball on January 31, 2005, “On May 4, 2004, the Court entered an Order requiring that the Respondent pay all future fees directly attributable to the Special Advocate’s time spent reviewing documents submitted by Mr. Harrington...”

16) In my experience, it is unusual for a special advocate to ask the Court to reapportion his or her fees. A reapportionment of special advocate fees is usually considered at final orders upon the motion of one or both of the parties.

17) Dr. Fyfe first informed Mr. Harrington that he wanted the client to pay for all of the time he spent reviewing records that he submitted. He did so without court authority, and his request was contrary to the Court’s order. When Mr. Harrington refused to deviate from the Court’s order, Dr. Fyfe contacted Judge Tidball.

18) According to Section 6.04(b) of the Ethical Principles of Psychologists and Code of Conduct 2002 promulgated by the American Psychological Association, “Psychologists’ fee practices are consistent with law.”

19) Dr. Fyfe requested that the Court reapportion his fees after performing the work for which he believed Mr. Harrington should be totally responsible (i.e. a review of records that took 6.5 hours, according to Dr. Fyfe's billing statement) without giving Mr. Harrington the opportunity to either withdraw the records before the fee was incurred or contact the Court for direction.

20) In my opinion, Dr. Fyfe's advocating for the interests of one parent (Ms. Ryan) over the other (Mr. Harrington) is an indication of bias on his part. In my opinion, bias of this sort usually leads to problems in an SA's relationship with the "unsupported parent" as occurred in this case.

21) In my opinion, Dr. Fyfe's requirement that Mr. Harrington be totally responsible for payment of the time that the SA reviewed records that he provided would be likely to inhibit the flow of written information used by the SA when performing the investigation.

22) A review of Dr. Fyfe's billing statement reveals that he charged Mr. Harrington an additional 6.5 hours time to prepare a report on June 7, 2004. It is my understanding that he did not bill Ms. Ryan a similar amount and that Mr. Harrington has been asked to pay 100 per cent of Dr. Fyfe's fee for report writing. I have not been provided a copy of Ms. Ryan's billing statement. If it is true, however, that Dr. Fyfe billed Mr. Harrington for report writing and not Ms. Ryan, it would be my opinion that the SA has violated the Court's order regarding additional charges to Mr. Harrington (which only describes how charges for reviewing records provided by the father should be apportioned), and would therefore be a violation of Section 6.04(b) of the Ethical Principles of Psychologists and Code of Conduct 2002 promulgated by the American Psychological Association and below the standard of care for special advocates in the Denver metropolitan area.

23) As was noted above, Mr. Harrington filed a grievance against Dr. Fyfe during the course of the special advocate evaluation. Dr. Fyfe continued to serve as the special advocate despite the grievance.

24) A review of the transcript of a voice message that Dr. Fyfe left on Mr. Harrington's voice mail on May 28, 2004, reveals that Dr. Fyfe stated, "'Going through the file, I realized there is another matter that is important to me that needs to be addressed immediately. Ah, apparently, you have -er- filed a grievance against me with the grievance board. Um, most likely it would be kicked out because they don't take jurisdiction on special advocate matters because of the court related nature of the - of the - of my work..."

"But I still need you to send a letter to them saying that we have settled this. And I would like you to carbon me at: 303 232 1473.

"Let's take care of this right away so I can ah expedite my work with the file. Thanks."

25) When a grievance is filed against a special advocate, he or she should, in my opinion, determine whether or not the SA is capable of continuing to provide services in an unbiased fashion. In my experience, it is very difficult for a special advocate to remain unbiased once a grievance has been filed.

26) The American Psychological Association states in section 3.06 of its “Ethical Principles of Psychologists and Code of Conduct 2002”, “Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologist or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.”

27) In my opinion, a special advocate should never ask a person he or she is evaluating to notify the Grievance Board that they have reached a settlement regarding an issue in dispute because such a request is coercive given the power imbalance between the SA and the complainant within the domestic case. For Dr. Fyfe to have asked Mr. Harrington to contact the Grievance Board on his behalf is, in my opinion, an inappropriate violation of a professional boundary and below the accepted standard of care for mental health professionals serving as special advocates.

28) Furthermore, Dr. Fyfe appears to manipulate Mr. Harrington by linking his request that Mr. Harrington write a letter to the Grievance Board with his moving forward with his responsibilities as a special advocate. In my opinion, his attempt to manipulate Mr. Harrington is below the accepted standard of care for a mental health professional serving as a special advocate in the Denver metropolitan area.

29) Section 9.01(a) of the Ethical Principles of Psychologists and Code of Conduct 2002, promulgated by the American Psychological Association states, “Psychologists base the opinion contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings.”

30) Section 9.01(b) of the Ethical Principles of Psychologists and Code of Conduct 2002 states, “Except as noted in 9.01(c), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements and conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions and recommendations.”

31) Dr. Fyfe did not meet with Mr. Harrington face-to-face despite Mr. Harrington’s willingness to travel to Denver from out of state. Dr. Fyfe’s billing records indicate that

he spoke with Mr. Harrington on three separate occasions for one hour each time. These “meetings” occurred by telephone.

32) It is generally accepted in the psychological and psychiatric communities in the Denver metropolitan area that a valid psychological evaluation of an individual requires a face-to-face meeting between the evaluator and the person being evaluated. In my opinion, Dr. Fyfe’s failure to meet with Mr. Harrington face-to-face falls below the accepted standard of care of special advocates in the Denver metropolitan area.

33) Dr. Fyfe did not document in his report why he did not meet with Mr. Harrington face-to-face. He similarly did not clarify the probable impact that the lack of face-to-face meetings had on his conclusions and recommendations. In my opinion, his failure to document the limitations of his evaluative process and the probable impact of his not conducting face-to-face meetings with Mr. Harrington falls below the aspirational guidelines promulgated by the American Psychological Association.

34) Dr. Fyfe met with Ms. Ryan (Mr. Harrington’s former spouse) face-to-face on three separate occasions.

35) When Dr. Fyfe wrote his report, Mr. Harrington was newly married to Ms. Tanittha Rungwattanajinda. It is standard practice for special advocates in the Denver metropolitan area to include step-parents in the investigation process, particularly when parenting time is an issue.

36) On page 9 of his SA report, Dr. Fyfe states, “Sean is in a new marital relationship. The SA determined that a phone interview with is (sic) wife would be insufficient in order to provide additional data at this time...” Thus, Dr. Fyfe appears to consider telephone interviews an insufficient method of obtaining data.

37) According to his billing statement, Dr. Fyfe did not interview Ms. Rungwattanajinda face-to-face. In my opinion, his failure to include Ms. Rungwattanajinda in the investigation process falls below the accepted standard of care for special advocates in the Denver metropolitan area.

38) It is generally accepted in the psychological and psychiatric communities in the Denver metropolitan area that a valid evaluation of a parent-child relationship requires the direct observation of that relationship by the examiner.

39) Dr. Fyfe did not observe Mr. Harrington with his daughter, Shelby. He similarly did not observe Shelby with Ms. Rungwattanajinda. In my opinion, his failure to observe Shelby with her father and stepmother is below the accepted standard of care for special advocates in the Denver metropolitan area.

40) Even though Dr. Fyfe did not observe Shelby with her father and stepmother, he observed her with her mother on two separate occasions. In my opinion, Dr. Fyfe's having observed one parent and the child but not the other parent with the child is an indication of bias.

41) According to Appendix A of his special advocate report, Dr. Fyfe reviewed certain documents during the course of his investigation that were used when he arrived at his conclusions and recommendations. I have attached a copy of this document as Exhibit C.

42) Assuming that Dr. Fyfe listed all of the documents he used to arrive at his conclusions and recommendations in Appendix A of his special advocate report, he did not use the following documents even though they were provided by Mr. Harrington:

a) A report prepared by Christopher Gordon, M.D. who evaluated Mr. Harrington psychiatrically during April, June, and July of 2001.

b) A report prepared by Aaron S. Townsend, Ph.D., a clinical psychologist who treated Mr. Harrington during a hospital stay at the Colorado Mental Health Institute at Fort Logan, dated July 10, 2000, and other Fort Logan records.

c) Letters written by Mr. Harrington to Dr. Fyfe dated January 2, February 10, March 17 (two letters), April 23, and April 28, 2004.

43) On page 7 of his report Dr. Fyfe states, "Christy has raised significant issues about Sean's mental health. These issues have been evaluated thoroughly by the SA... It is noted that the SA came to view Sean as emotionally intense, highly defended, extremely narcissistic, rigid, idiosyncratic in his thinking and paranoid."

44) On page 17 of his report Dr. Fyfe states, "Sean's mental health difficulties have been well documented. His allegation that he is functioning better now appears to have some merit... The SA however found Sean to be argumentative, paranoid, and narcissistic..."

"The SA notes that there are two contrasting viewpoints concerning Sean's mental health. One is the conclusion reached by the first SA that Sean moved from a serious disorder to an adjustment disorder. Apparently his treating psychiatrist reported this to Ms. VanNote at the time of her investigation. There is, however, a later letter from the same psychiatrist (Dr. Gordon) indicating that Sean has significant mental health difficulties, which may lead to the likelihood of a long term disability. On a positive note, this has not been the case. Sean has been able to maintain employment. He does however remain secretive and wholly convinced of a conspiracy. For example, he would not allow the SA to know his address or reveal his local phone number to (sic) because he is convinced that mother and/or her attorney would use this information to harass him in some manner. Sean also described devoting 'thirty to forty hours per week' (to) further develop his legal position. This obsessive behavior is, at the very least, poor decision-making on Sean's

part, and most likely indicative of the kind of psychological problems Sean exhibits, i.e., manic behavior, obsessive rumination, and narcissistic preoccupation...”

45) On page nine of his report Dr. Fyfe opines, “The SA believes that father clearly has mental health problems, which should be assessed by a local psychiatrist in order to determine the appropriateness of ongoing treatment and/or medication. It is further noted that father does not handle disappointment or frustration well...”

46) On the top of page ten of his report Dr. Fyfe opines, “...His intense focus on himself is narcissistic and hints at a personality disorder, although, as stated above, the exact diagnosis should be determined locally over time.”

47) On page ten of his report Dr. Fyfe states, “Sean should immediately select a psychiatrist from his health plan who would conduct an evaluation of his overall mental health functioning...”

48) When evaluating a parent’s mental status, it is generally accepted within the Denver mental health community that an evaluator should interview the parent, obtain mental health records, and speak with at least the parent’s last treating psychotherapist.

49) Dr. Fyfe did not perform a psychological evaluation of Mr. Harrington during the course of his special advocate investigation.

50) Dr. Fyfe did not obtain records from psychiatric hospitals to which Mr. Harrington had been admitted including West Pines, Lutheran Hospital, St. Joseph’s Hospital, and a psychiatric hospital in Massachusetts.

51) Dr. Fyfe did not speak with any of the mental health professionals who were treating or previously treated Mr. Harrington.

52) In my opinion, Dr. Fyfe did not perform a psychological evaluation of Mr. Harrington sufficient to allow him to render an opinion regarding Mr. Harrington’s mental status within reasonable psychological probability.

53) In the “Recommendations” section of his report, Dr. Fyfe presents a fairly detailed plan regarding the reunification of Mr. Harrington and his daughter including a recommendation that the visits be supervised at least initially.

54) In my opinion, Dr. Fyfe did not have sufficient information regarding Mr. Harrington’s mental status at the time of the investigation to make a determination regarding the nature of his psychological illness and whether or not his symptoms were of sufficient severity to warrant supervised parenting time.

55) In my opinion, Dr. Fyfe should have obtained all of Mr. Harrington's psychiatric records from the previous five years and spoken with at least Dr. Gordon before formulating his opinion regarding the nature and severity of Mr. Harrington's psychiatric illness.

56) In my opinion, Dr. Fyfe should have had a clear picture of Mr. Harrington's psychiatric difficulties before making a parenting time recommendation.

57) In a memo to Dr. Fyfe dated January 2, 2004, Mr. Harrington identifies Dr. Robert Cherney as a potential witness. In my opinion, Dr. Fyfe should have spoken with Dr. Cherney, a clinical psychologist who met with Mr. Harrington and Shelby during the summer of 2001 before making a parenting time recommendation.

58) Mr. Harrington informed Dr. Fyfe that he believed that Ms. Ryan was attempting to alienate Shelby from him.

59) To rule out the presence of "parental alienation" (or efforts to alienate), a special advocate should make a determination regarding whether or not the parent in question suffers from a psychiatric disorder.

60) On page 17 of his report Dr. Fyfe states, "The SA found mother to be reasonable and logical in her presentation. She did not present, as Sean has alleged, as an alienating parent..."

61) There is no indication in Dr. Fyfe's report or the other records I reviewed that the SA either performed a psychological evaluation of Ms. Ryan or obtained information from other mental health professionals who had performed an evaluation of her mental status. In my opinion, Dr. Fyfe's omission of an assessment of Ms. Ryan's mental status falls below the accepted standard of care of special advocates in the Denver metropolitan area.

62) On page 10 of his report Dr. Fyfe states, "The current SA has concluded that the past SA erred in not properly expressing concern about father's emotional and mental health functioning. The SA also believes that data was readily available in order for her to consider Sean's problematic behavior, which was apparent through interaction with Sean during the SA investigation..."

63) Dr. Fyfe's order of appointment does not instruct him to evaluate the work of Ms. VanNote, the first special advocate assigned to the case. His statement that she erred regarding her assessment of Mr. Harrington's mental status despite having had readily available data is beyond the scope of his appointment, and so is inappropriate.

64) Dr. Fyfe's report criticizes Mr. Harrington but does not address the role that Ms. Ryan has played in the problems leading to the high degree of conflict between the

parents. In my opinion, Dr. Fyfe's omission of significant discussion regarding her contribution to the problem is an indication of bias.

FURTHER YOUR AFFIANT SAYETH NOT.

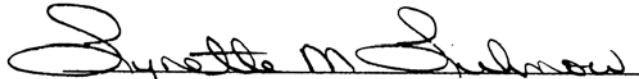


\_\_\_\_\_  
Dana L. Cogan, M.D.

Subscribed and sworn to before me this 4th day of May 2005, by Dana L. Cogan, M.D.

WITNESS my hand and official seal.

My Commission expires: 6-11-05.



\_\_\_\_\_  
Notary Public