

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6190	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <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 MOTION FOR LEAVE TO UNDERTAKE FORMAL DISCOVERY	

COMES NOW, Respondent Sean L. Harrington (“father”), and respectfully submits his Reply in support of his Motion for leave to undertake formal discovery, pursuant to C.R.C.P. 16.2(f)(4).¹

1. This matter is before the Court on father’s Motion for leave to undertake formal discovery. Although this Motion may now be moot in light of the fact that Mr. Fyfe did not dispute any of the facts alleged in father’s summary judgment Motion, if this Court determines that a hearing is necessary to further develop the record, father is entitled to discovery to further that end. *See Tidwell v. City & County of Boulder*, 83 P.3d 75, 77 (Colo. 2003) (*en banc*) (held: the trial court erred when it disallowed plaintiff from engaging in discovery and from presenting material facts at a hearing).

2. Father has pointed out in previous filings that the issues before this Court are of a traditional adversarial nature. Nevertheless, because they have occurred within a domestic relations case, the Rules impose certain limitations that have the potential to deprive the parties of established adjudicatory procedures unless the Court crafts an equitable solution. One of these limitations is C.R.C.P. 16.2(f)(4).

¹ 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.

3. Rule 16.2 is intended to provide an abbreviated framework aimed towards minimizing conflict between real parties to a dissolution proceeding, by streamlining and formalizing the discovery that is required in such cases. *See* Rule 16.2(a).²

4. Rule 16.2(f)(4) is based on the presumption that the real parties to a dissolution action had already engaged in the formalized, streamlined discovery procedures. *See* Committee Comment (“This Rule is premised upon an expectation that regular status conferences will be conducted informally, that the parties will provide all necessary disclosures and that formal discovery, if authorized, will be tailored to the specific issues of the case”). In this case, there has been no “regular status conferences” or “all necessary disclosures” between Bill J. Fyfe and father, because Rule 16.2 does not contemplate the court’s adjunct (the CFI) becoming a party to a case and the dissolution court presiding over adversarial claims between a CFI and a real party to the case.

5. Fyfe asserts the argument that leave to undertake formal discovery in this post-dissolution proceeding should be disallowed because father is preparing for “trial.” Response at ¶ 1. This argument fails because the terms “trial” and “post dissolution proceeding” are used interchangeably. *See, e.g. Marriage of Rozzi*, __P.3d__ (Colo.App., No. 07CA0467, June 12, 2008) (interchanging the term, “post-dissolution proceeding” and “trial”); *Marriage of Slowinski*, __P.3d__ (Colo. App., Nos. 05CA0465, 05CA2523, 06CA1830, February 21, 2008) (same); *Marriage of Hatton*, 160 P.3d 326, 328, 331 (Colo. App. 2007) (same). *And see Schupper v. Smith*, 128 P.3d 323, 326 (Colo. App. 2005) (discussing the meaning of the terms “hearing” and “proceeding . . . which provide an opportunity for formal discovery”).

² “It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible.” C.R.C.P. 16.2(a)

6. Fyfe, relying on the recent decision from the appeals court in 07CA0379 (“*Harrington IV*”), contends that the Mandate Rule prevents father from engaging in discovery to develop the record in preparation for the February 25, 2008 hearing. ¶ 2.

7. When a case is remanded for further proceedings consistent with the appellate court's opinion, it is a general remand, which authorizes the trial court to make new findings and conclusions so long as there is no conflict with the ruling of the appellate court. *Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686, 687-688 (Colo. App. 1988). Conversely, 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). This doctrine has been interpreted as disallowing a trial court from entering findings or taking actions that **contravene** an appeals court's remand and holdings. *Young v. Golden State Bank*, 589 P.2d 1381, 1382-83 (Colo. App. 1978). It does not mean the trial court loses its ordinary discretion or jurisdiction over the cause in the absence of some specific instruction from the appeals court to the contrary. *Musgrave, supra*.

8. The remand instructions in *Harrington IV* (07CA0379) directed the trial court to carry out the mandate in *Harrington III* (04CA1986) and also to ascertain whether the mandate in *Harrington II* (04CA1161) had been carried out or whether it was moot. In *Harrington III*, the appeals court stated:

Here, the record does contain affidavits concerning the conversations father had with the special advocate after the May 2004 order, but it appears that the trial court did not consider them . . . the trial court summarily denied father's request to disqualify the special advocate. However, in the absence of specific findings, we are unable to evaluate the propriety of the court's determination or ascertain if the court considered whether any of

the standards previously applicable to special advocates (or currently concerning child and family investigators) were violated . . . Thus, we conclude that a remand is necessary for such review under the standards applicable to a motion filed pursuant to C.R.C.P. 60(b)(5).

Thus, this was a general remand; the Court of Appeals intended for this Court to make all determinations necessary to determine “**whether any of the standards previously applicable to special advocates (or currently concerning child and family investigators) were violated.**” *Id.* Nothing in this general remand was intended to preclude this Court from conducting a hearing (trial), reviewing the record or hearing new evidence as necessary to make such determinations.

Moreover, the Court of Appeals added to its general remand in 07CA1986 in noting that this case was not moot, citing *Reifschneider v. City & County of Denver*,³ for the proposition that the need to deter inappropriate conduct did not disappear and to address father’s claim that he had necessarily incurred fees as result of challenged conduct.⁴

9. Fyfe next argues that the UCCJEA deprives this Court of jurisdiction to consider the evidence that father seeks to develop concerning Mr. Fyfe. Response at ¶ 5. Not only is this contention contrary to the limited remand and the law of the case, but it also is inconsistent with the UCCJEA: Although Texas became the “Home state” when mother fled to and resided there for more than six months and, although a Texas district court has now exercised jurisdiction regarding conservatorship and access to the minor child, Colorado has not lost jurisdiction over unrelated post-dissolution issues, including enforcement of the CFI’s fees, and addressing ethical violation allegations raised pursuant to Chief Justice

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

⁴ *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.

Directive 04-08 and resolving outstanding fee disputes. *See* UCCJEA, section 102(3)(d) (“By excluding proceedings involving monetary obligations, this Act continues the notion of divided jurisdiction. A court may well have jurisdiction to dissolve the marriage or to make an order for child support without having jurisdiction to make a custody determination”).

10. Consistent with the UCCJEA, a the Court of Appeals has held in this case (*Harrington IV*) and other cases that, while a custody issue may be decided in another state, there is no legal basis for a trial court to defer to another state on issues of maintenance and child support. *In re Doria*, 855 P.2d 28, 30 (Colo. App. 1993). Similarly, in *Marriage of Zinke and Wavra*, the appeals court held that the UCCJA relates only to child custody and visitation—not to child support. 967 P.2d 210 (Colo.App. 1998). The *Zinke* panel recognized the universal principle that the issuing state has continuing, exclusive jurisdiction to modify its order once a support order has been issued. Child and Family Investigator fees are in the nature of child support. *See The Role of the Child and Family Investigator and the Child's Representative in Colorado*, First Ed. (Robert M. Smith ed., CLE in Colo., Inc., Supp. 2005) at § D1.6 (“The fees of a guardian *ad litem* are in the nature of child support . . . Because the CFI and CLR are the post-1997 guardians *ad litem* of C.R.S. § 14-10-116, their fees are not dischargeable in bankruptcy”) (citing *In re Miller*, 55 F.3d 1487 (10th Cir. 1995)).


11. Fyfe next argues that father’s requested discovery concerning the CFI’s “relationships, agreements, or transactions among the Special Advocate, the court, and the Petitioner” are neither relevant nor are before the Court on remand. Response at ¶ 7. As noted above, the appeals court has asked this trial court to determine “whether any of the standards previously applicable to special advocates (or currently concerning child and family investigators) were violated.” Father’s May 18th 2004, June 9th 2004, July

30th 2004 and February 6th 2007 Motions all concern the the CFI's relationships, agreements and transactions and the standards applicable thereto.

12. The Colorado Supreme Court has unequivocally held that the purpose of discovery is to advance the search for truth. *People v. District Court*, 793 P.2d 163, 168 (Colo.1990). In addition, the purpose of discovery—which is a basic established adjudicatory procedure—“is to include production of all relevant evidence, to eliminate surprises at trial, and to simplify issues.” *Marriage of Nimmo*, 891 P.2d 1002, 2008 (Colo. 1995) (*en banc*). Under C.R.C.P. 26, discovery is permitted for ‘any matter, not privileged, which is relevant to the subject matter involved in the pending action...’” *Id.*

WHEREFORE, based on the foregoing reasons and the foregoing authorities, father requests an Order from this Court permitting him to undertake formal discovery concerning the CFI's alleged conduct, including the relationships, agreements and transactions pertaining thereto.

Dated this 24th day of October, 2008


Sean L. Harrington

CERTIFICATE OF MAILING

I hereby certify that on the 24th 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)