

DISTRICT COURT, JEFFERSON COUNTY, COLORADO	
Court Address: 100 Jefferson County Parkway Golden, Colorado 8040	
In re the Marriage of: CHRISTY HARRINGTON, n/k/a CHRISTY RYAN, Petitioner, and SEAN HARRINGTON, Respondent.	COURT USE ONLY
	Case No. 99-DR-3717 Division 9
ORDER AFTER REMAND	

THIS MATTER comes before me for consideration of several post-decree, pre-hearing pleadings filed by parties and nonparties alike. I will address each of these motions individually. This matter was previously set for a hearing on February 25, 2009, but I have concluded (and the parties have similarly advocated) that an evidentiary hearing is not necessary to resolve the only remaining issues in this case as remanded to me by the Court of Appeals in case number 07-CA-379 (announced May 29, 2008) (*Harrington IV*): first, to reconsider Mr. Harrington's previous motions to disqualify William J. Fyfe as special advocate in this case and, second, a determination of whether Dr. Fyfe's fees have in fact been equally allocated between the petitioner and respondent, as ordered by the Court of Appeals in case number 04-CA-1161 (announced March 9, 2006) (*Harrington II*). I conclude that the first issue is moot and that the second issue can be answered in the affirmative and thus requires no further ruling.

I. Background

Respondent Sean Harrington (“father”) and petitioner Christy Ryan (“mother”) were married in 1993 and divorced in May 2000. They had one child, a daughter, born on June 12, 1995. In the permanent orders mother was allocated sole decision-making responsibility with respect to their daughter, and father was granted weekly supervised parenting time. In November 2001 the parties entered into an agreement modifying parental responsibilities and granting father unsupervised parenting time.

On August 21, 2003 Dr. William J. Fyfe was appointed special advocate pursuant to C.R.S. § 14-10-116(2)(b) ¹ (over the objection of father) based upon this court’s finding that the appointment, although pending appeal, was in the best interests of the parties’ minor child. This court ordered each party to pay half of Dr. Fyfe’s \$2,000 retainer and that any additional charges also be divided equally.

On April 22, 2004 Dr. Fyfe wrote to the court inquiring whether fees incurred for his review of documents submitted by father should be charged only to father or divided equally. Dr. Fyfe’s letter stated that reviewing father’s documents had been “difficult and labor intensive,” but neither irrelevant nor inappropriate. The attached invoice showed that each party had paid the initial \$1,000 retainer and that Dr. Fyfe had spent 6.5 additional hours reviewing father’s documents, for which his fee was \$845.

¹ This provision was deleted by the General Assembly in 2005, and the term “special advocate” was replaced by “child and family investigator.” See C.R.S. § 14-10-116.5 in the current Colorado Revised Statutes. An earlier-appointed special advocate, Natalie Van Note, issued a report dated September 10, 2001. Ms. Van Note was appointed on April 9, 2001 in conjunction with a post-decree motion to modify parenting time, and when the parties reached an agreement on that and other issues in November 2001, Ms. Van Note’s appointment terminated.

In response to Dr. Fyfe's letter this court issued an order on May 4, 2004 that father was responsible for "the outstanding \$845 and any future fees billed by the special advocate that are directly attributable to the Special Advocate's time spent reviewing documents submitted by [father]." On May 7, 2004 ² father, apparently relying on the earlier August 21, 2003 order, paid only one-half of the \$845.

On June 11, 2004 Dr. Fyfe submitted his report to the court. The report made substantive parenting time recommendations as well as observations about father's mental health.

On May 18, 2004 father filed his first motion for reconsideration of the May 4, 2004 order. In this motion father asked the court to vacate its order, to disqualify Dr. Fyfe for allegedly unethical conduct, and to require Dr. Fyfe to refund all fees paid to him by father. On May 24, 2004 this court denied the motion.

On June 9, 2004 father filed a second motion for reconsideration of the court's May 4, 2004 order wherein he cites "newly discovered evidence" under C.R.C.P. 59(d), referring to a May 25, 2004 phone call and a May 28, 2004 voice mail message that he said he had received from Dr. Fyfe. On June 21, 2004 this court denied that motion because it had not been filed within 15 days of the May 24, 2004 order.

On July 30, 2004 father filed a third ("amended") motion for reconsideration of the May 4, 2004 order and again sought disqualification of Dr. Fyfe as special advocate. Father relied on C.R.C.P. 59(d)(4) and 60(b)(5) as his authority and once again offered "newly discovered" evidence that he believed justified Dr. Fyfe's disqualification. This court denied that motion as well.

² Father's motion says that this payment was made on May 7, 2005 and indicates that such payment is reflected in Dr. Fyfe's January 19, 2005 invoice. I will assume that father made the payment in question in 2004 and that the date stated in his motion is merely a typographical error.

Father appealed the denial of his motions, and the Court of Appeals in *Harrington II* ³ reversed this court's May 4, 2004 order and remanded the case with directions to allocate the sums charged by Dr. Fyfe equally between the parties in accordance with the August 2003 order appointing him.

On August 3, 2006 the Court of Appeals issued another unpublished opinion (no. 04-CA-1986, referred to here as *Harrington III*), concluding that the trial court did not address father's allegation that the special advocate had engaged in unethical practices and should be disqualified. The Court of Appeals ruled that the trial court must reconsider father's motions to disqualify Dr. Fyfe and enter specific findings to support its determination.

On January 7, 2007 the trial judge denied father's amended motion for reconsideration of her May 4, 2004 order regarding Dr. Fyfe's fees and also denied his request to disqualify Dr. Fyfe as special advocate. However, still pending at that time was father's motion to disqualify the trial judge, filed August 16, 2004. On January 26, 2007 father filed a motion for substitution of the trial judge with this district's chief judge and requested that her January 7, 2007 order be vacated. ⁴ Father argued that the trial judge lacked authority to enter the January 7, 2007 order because all proceedings were suspended pending resolution of his motion for change of judge.

In her order of March 23, 2007 the trial judge found that father had not stated any basis to require her disqualification and denied the motion. She furthermore awarded attorney fees to mother.

³ A prior appeal (*Harrington I*) was an unpublished opinion issued on December 30, 2004 that addressed certain parenting time issues. All of the *Harrington* appellate opinions are "unpublished" in the sense that none has been "designated for official publication" pursuant to C.A.R. 35[f].

⁴ This issue has been mooted by the trial judge's subsequent recusal and the chief judge's reassignment of this case to me on August 8, 2007. In my order of September 17, 2008 I vacated both the 1/7/07 and 3/23/07 orders.

Father once again appealed, and in the most recent appeal (*Harrington IV*) the Court of Appeals vacated the trial judge's orders after the previous remand, concluding that because the motion for change of judge had not yet been ruled on, she lacked authority to enter those orders. The Court of Appeals instructed this court to reconsider father's motion to disqualify Dr. Fyfe consistent with the mandate in *Harrington III* and also to determine whether the earlier mandate in *Harrington II* had been carried out or whether it is no longer necessary and to "enter any orders the court deems necessary."

II. MOTION FOR SUMMARY JUDGMENT

On October 6, 2008 father filed a motion for summary judgment or, in the alternative, for judgment on the pleadings. On October 20, 2008 Dr. Fyfe, through his counsel, filed a response to father's motion that, given the relief requested therein, I deem a cross-motion for summary judgment. Father filed a reply on October 27, 2008. The parties agree (as do I) that the issues remanded to me can and should be resolved without an evidentiary hearing.

A.

Accordingly, father's motion for leave to undertake formal discovery, filed October 14, 2008, to which Dr. Fyfe filed a response and to which father replied (both on October 24, 2008) is **DENIED**. In his response Dr. Fyfe argues, and I agree, that father seeks to expand the scope of the proceedings "to further ascertain the nature and scope of the relationships, agreements and transactions between and concerning the CFI and the court and opposing party." The discovery that Mr. Harrington requests is outside of the scope of the remand from the Court of Appeals. Similarly, father's request for a case management order is **DENIED AS MOOT**.

On February 10, 2009 the court received a request for “expanded media coverage” of the February 25, 2009 hearing from “People For Equal Protection (PEP).” Since, as a result of this order, there will be no hearing, that request is also **MOOT**.

B.

Preliminarily father has filed an objection to the entry of appearance of David Yun, Esq. as attorney for Dr. Fyfe. Mr. Yun entered his appearance on behalf of Mr. Fyfe on October 1, 2008, and father filed an objection thereto on October 6, 2008. Dr. Fyfe filed a response to the objection on October 17, 2008, and father filed a reply on October 21, 2008.

In his objection father requests that I sanction Dr. Fyfe. Specifically, he requests that I disqualify Dr. Fyfe as special advocate in the instant action, that I order his removal from the “list” of special advocates, that I order Dr. Fyfe to refund all fees paid to him, and that father be reimbursed his expert witness costs and attorney fees.

Where, as here, monetary and punitive sanctions have been requested, the person that may potentially be subject to such sanctions is entitled to all the protections afforded by due process, including notice and an opportunity to be heard. *See Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). As part of due process I find that Dr. Fyfe has a right to be represented by counsel in these proceedings. Accordingly, father’s objection to the entry of appearance of counsel on behalf of Mr. Fyfe is **OVERRULED**.

1.

The first issue remanded to me is reconsideration of father’s May 18, 2004, June 9, 2004, and July 30, 2004 motions to disqualify Dr. Fyfe as special advocate in this case.

From my review of the file, I conclude this issue is **MOOT**. Upon issuing his only report in this case on June 11, 2004 Dr. Fyfe resigned from the case.⁵ Thus to order now that he be “disqualified” would be inutile or (to put it in the judicial vernacular) “would have no practical legal effect,” see *State Board of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 970 (Colo. 1997) (Stjernholm could not obtain damages against State Board members because they were entitled to absolute judicial immunity for their quasi-judicial actions).

2.

The second issue on remand is to ascertain that Dr. Fyfe’s fees have been allocated equally between father and mother, in accordance with *Harrington II*. Again, based upon my review of the *Harrington* court file (which comprises seven volumes after nearly a decade of litigation), I am able to conclude that they have been. As detailed above, each party paid an initial \$1,000 retainer plus half of the additional billing of \$845, for a total of \$1,422.50 each.

Although father now seeks a refund of the amounts paid to Dr. Fyfe, I have no authority to order that under *Harrington II*, which of course is the law of this case. See *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) (pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case and must be followed in subsequent proceedings before the trial court). Moreover, a person generally cannot recover attorney fees and costs from another person absent a specific contractual, statutory, or procedural rule authorizing that recovery. *Allstate Insurance Co. v. Huizar*, 52 P.3d 816 (Colo. 2002). Father has cited no such provision authorizing me to surcharge Dr. Fyfe. C.R.S. § 14-10-119 in the Uniform Dissolution of Marriage Act only applies to an allocation of fees and costs between the divorcing parties – not to special advocates.

⁵ Compare Chief Justice Directive (“CJD”) 97-02 (as revised 1/1/01) with CJD 04-08, Standard 14 (“Although it is the court’s responsibility to terminate the appointment upon the entry of permanent orders or post-decree adjudication, if the court fails to do so the CFI shall request the appointment be terminated”). CJD 04-08 did not become effective until September 1, 2004, which was after Dr. Fyfe’s resignation in this case. By now Dr. Fyfe’s report is but postlude.

I presumably have some authority over special advocates who are lawyers, by virtue of the Colorado Rules of Professional Conduct applicable to attorneys as officers of the court, *see, e.g., In re Marriage of Redmond*, 131 P.3d 1167 (Colo. App. 2005), but I have neither express nor inherent authority over a licensed psychologist such as Dr. Fyfe. Rather, he is subject to regulation by the State Board of Psychologist Examiners, C.R.S. §§ 12-43-302 *et seq.* and the administrative remedies provided therein, over which I have no jurisdiction.

Finally, although father asserts that Dr. Fyfe's conduct violated Chief Justice Directive 04-08, that directive postdates Dr. Fyfe's appointment in this case. *See* footnote 5 *supra*. To the extent that father also seeks to impose tort liability on Dr. Fyfe – ignoring the fact that he is not a party to this dissolution of marriage case ⁶ -- he has not sufficiently demonstrated that Dr. Fyfe, as a court-appointed advocate, should be stripped of his quasi-judicial immunity. *See generally Short by Ossterhous v. Short*, 730 F. Supp. 1307 (D. Colo. 1990); *Awai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993) (court-appointed therapists are afforded immunity for their evaluations and recommendations).

IT IS THEREFORE ORDERED that Mr. Harrington's motion for summary judgment is **DENIED**, and Dr. Fyfe's cross-motion for summary judgment is **GRANTED**.

⁶ Prior decisions in Colorado have frowned on allowing parties to litigate independent legal claims with dissolution of marriage proceedings. *See, e.g., Simmons v. Simmons*, 773 P.2d 602 (Colo. App. 1988) (joinder of claims sounding in contract or tort in dissolution actions would require trial courts to address many extraneous issues and thereby impinge upon the efficient administration of dissolution cases. *See also Marshall v. Marshall*, 2008 WL 879734 (Colo. App.) (if a parenting time dispute gives rise to a tort claim for damages, that claim must be brought not in the dissolution court, but in a court that has jurisdiction over the parties and subject matter).

III. MOTION FOR DECLARATORY JUDGMENT AND FOR CASE MANAGEMENT ORDER

On October 14, 2008 father filed a motion for declaratory judgment and for case management order. Father requests that I enter a declaratory judgment in his favor “concerning the ‘no contact order’ that [mother’s attorney Madeline] Wilson refers to” and for a protective order and injunctive relief against attorney Wilson. Apparently the “no-contact” provision is imbedded within the *November 2001* stipulated agreement (*see* footnote 5 *supra*) signed by both parties and their then counsel and approved by this court. Father’s request for a “declaratory judgment” is far afield from the limited issues before me from the Court of Appeals’ 2008 remand.

Nevertheless, father’s post-remand motion prompted a response from Ms. Wilson, filed by her counsel Brett Huff, Esq. on November 20, 2008. Father then filed a “supplement” to his motion on November 20th and on November 25th he filed a reply to Ms. Wilson’s response, wherein he escalates his claims by seeking sanctions under C.R.C.P. 11 and that I “refer the matter to the Attorney Regulation Counsel.”

On December 8, 2008 attorney Wilson filed her response to father’s motion for sanctions and moved to strike father’s motions under C.R.C.P. 12[f]. Father’s response to Wilson’s motion to strike was filed December 11th, and attorney Wilson’s reply was filed December 19th.

One would have thought that those seven filings, in the aggregate, effectively brought the matter to a point of decision by me. But father had the last word in the form of an “amended motion for punitive contempt” filed February 3, 2008 (an earlier “verified motion for punitive contempt in re Madeline Wilson” was summarily denied by the district court magistrate on December 19, 2008).

Again, father objects to entry of separate counsel for attorney Wilson, but for substantially the same reasons I gave above with respect to Dr. Fyfe and his retained counsel, I conclude that attorney Wilson is entitled to separate representation in the face of father's accusations against her and his request for punitive sanctions. His October 20, 2008 objection to Mr. Huff's entry of appearance on behalf of attorney Wilson is therefore **OVERRULED**.

Having now thoroughly perused the filings and counterfilings, I find father's contentions *vis-à-vis* attorney Wilson to be devoid of merit. Not only do they seek unmerited relief, they purport to rely on alleged conduct by attorney Wilson substantially predating the appeal issues that are the basis of the Court of Appeals' latest remand; or they relate to alleged acts taken in Texas where the child-related issues of this case have been transferred pursuant to the Uniform Child Custody Jurisdiction Enforcement Act and over which I clearly lack jurisdiction.

Absent fraud or malicious conduct – none of which has been demonstrated in father's filings – an attorney generally owes no duty to his or her client's adversary. *See Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149 (Colo. App. 1993). Furthermore, the Colorado Rules of Professional Conduct and disciplinary rules do not create a private cause of action. *See Weiszmann v. Kirkland and Ellis*, 732 F. Supp. 1540 (D. Colo. 1990).

I therefore conclude that father's motions for sanctions and punitive contempt against attorney Wilson lack substantial justification within the terms of C.R.S. § 13-17-102[2] in that they are substantially frivolous, substantially groundless, and substantially vexations, *see* C.R.S. § 13-17-102[4], and father knew or reasonably should have known it, *see* C.R.S. § 13-17-102[6].

The claims are frivolous because father makes no rational argument to support them based on the evidence or the law. *See W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984); *cf. Meeks v. Jewel Companies, Inc.*, 845 F.2d 1024 (7th Cir. 1988) (a frivolous motion or request for sanctions under Rule 38 of the Federal Rules of Appellate Procedure is itself subject to sanctions). The claims are groundless because father presents no credible evidence to support his complaints and accusations. *See Elrick v. Merrill*, 10 P.3d 689 (Colo. App. 2000). The claims are vexatious because I find them to be made in objectively bad faith in order to attempt to disqualify attorney Wilson from her representation of mother or to punish her for that representation. Bad faith includes conduct that is arbitrary, abusive, or stubbornly litigious, and may also include conduct that is disrespectful of truth and accuracy. *See Mitchell v. Ryder*, 104 P.3d 316 (Colo. App. 2004) (in mother’s negligence claim against child therapist, “this case presents a disturbing example of truly vexatious litigation clearly warranting the imposition of fees against both Mitchell and her counsel”).

IT IS THEREFORE ORDERED that father’s motion for declaratory judgment and for protective order is **DENIED**.

IT IS FURTHER ORDERED that father’s motions for sanctions and punitive contempt against attorney Wilson are **DENIED**, and that Wilson’s motion to strike is accordingly **DENIED AS MOOT**. Wilson is awarded reasonable attorney fees and related costs for having to respond to and defend against those motions. She may set a hearing thereon in order for me to consider at least the factors set forth in C.R.S. § 13-17-103[1] and to receive evidence, subject to cross-examination by father, with regard to those factors and with regard to the amount of fees and costs sought and the reasonableness thereof. *See Munoz v. Measner* (no. 08-CA-0425, Colo. App., 2/19/09). The starting point for determining reasonableness is the “lodestar” – the number of hours spent, how they were spent, and the applicable hourly rate. *See American Water Development v. City of Alamosa*, 874 P.2d 352, 386-88 (Colo. 1994).

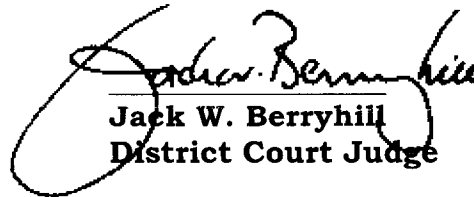
IV. MOTION TO WITHDRAW

On January 7, 2009 attorney Madeline Wilson filed a motion to withdraw as mother's counsel of record. No objection thereto has been filed.

IT IS NOW ORDERED that the motion is **GRANTED**.

DATED: February 24, 2009

BY THE COURT:


Jack W. Berryhill
District Court Judge