COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Ave., Denver CO 80203 Douglas County District Court Case No. 99 DR 0704 The Honorable Kenneth Barnhill, Judge	
In re the Custody of: TWM, Impartial, Upon the Petition of : CAROLYN TAYLOR, Petitioner / Appellee And concerning: GORDON STADNYCK, Respondent / Appellant	▲ COURT USE ONLY ▲ **Case No. 04 CA 2318**
Gordon Stadnyck P.O. Box 100157 Denver, CO 80250-0157 Phone number: (720) 297-8446	

OPENING BRIEF

TABLE OF CONTENTS

ISSUES PRESENTED FOR APPEAL 1

STATEMENT OF THE CASE 1

ARGUMENT 4

I. The contempt proceedings were procedurally defective 4

II. The trial court abused its discretion in *sua sponte* converting both the legal classification and subject matter of the contempt proceeding without providing father adequate notice to meet the issues 8

III. The trial court's abolition of parenting time and telephonic contact was an abuse of discretion. 13

CONCLUSION 16

CERTIFICATE OF MAILING 17

TABLE OF AUTHORITIES

Cases

Austin v. City and County of Denver, 156 Colo. 180 (Colo. 1964)....................12
Dep't of Health v. Donahue, 690 P.2d 243 (Colo. 1984)....................5
E.L.M.C., 100 P.3d 546 (Colo.App. 2004)....................13
Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970)....................12
Eichhorn v. Kelley, 111 P.3d 544 (Colo.App. 2004)....................9
Golden Lodge No. 13 v. Grand Lodge, 80 P.3d 857 (Colo. App. 2003)....................9
Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988)....................12
Harthun v. District Court, 495 P.2d 539 (1972)....................13
In re Marriage of Alverson, 981 P.2d 1123 (Colo.App. 1999)....................5
In re Marriage of Francis, 919 P.2d 776 (Colo. 1996)....................14
In re Marriage of Lamutt, 881 P.2d 445, 447 (Colo. App. 1994)....................5
In re Marriage of Roberts, 757 P.2d 1108 (Colo.App. 1988)....................10
In re Marriage of Short, 675 P.2d 323 (Colo. App.1983)....................14
In re Marriage of Stewart, 43 P.3d 740 (Colo. App. 2002)....................14
In re Marriage of Zebedee, 778 P.2d 694, 698 (Colo. App. 1988)....................10
In re Steving, 980 P.2d 540 (Colo. App. 1999)....................14
In the Matter of the Estate of Mary Beverly Elliot, 993 P.2d 474 (Colo. 2000)....................11
Kourlis v. Port, 18 P.3d 770 (Colo. App. 2000)....................9
Losavio v. District Court, 512 P.2d 266 (Colo. 1973)....................8
Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963)....................9
People ex rel. Murley, 124 Colo. 581 (Colo. 1951)....................8
People v. Baenziger, 97 P.3d 271 (Colo. App. 2004)....................7
People v. Vialpando, 804 P.2d 219 (Colo. App. 1990)....................7
Smith v. District Court, 150 Colo. 136, 371 P.2d 271 (1962)....................8
Taylor v. Hayes, 418 U.S. 488, 501-02, 41 L. Ed. 2d 897, 94 S. Ct. 2697 (1974)....................16
Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951)....................5
Young v. United States, 481 U.S. 787,107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)....................9

Statutes

Colo.Rev.Stat. § 14-10-129....................13, 15

Rules

Colo.R.Civ.P. § 107 (6)(d)(1)....................9
Colo.R.Civ.P. § 107(6)(d)(2)....................10
Colo.R.Civ.P. § 107(6)(d)(1)....................10

ISSUES PRESENTED FOR APPEAL

I. Whether the trial court abused its discretion in *sua sponte* converting both the legal classification and subject matter of the contempt proceeding without providing father with adequate notice to prepare to meet the issues.

II. Whether the contempt proceeding, resulting in both a suspended imprisonment term and termination of all parental contact, was, in fact, not a punitive contempt proceeding that was held absent the requisite procedural due process protections or, otherwise, an impermissible commingling of punitive and remedial contempt proceedings.

III. Whether an award of attorneys fees resulting from a punitive contempt proceeding was an error of law in contravention of Rule 107.

IV. Whether the trial court abused its discretion in abolishing all parental contact as a sanction of contempt and in failing to apply the requisite statutory standard.

STATEMENT OF THE CASE

The Petitioner-Appellee, Carolyn Taylor ("mother") and Respondent-Appellant, Gordon Stadnyck ("father") met in June 1996. The two had a child together, McKenna Taylor, born August 25, 1997. The mother and father were never married.

In October, 1997, mother instituted proceedings for collection of child support. **Vol. 1 at p. 35.** A stipulation for Permanent Orders executed by the parties on April 9, 1998 was approved by the trial court magistrate May 4, 1998 and provided for a support obligation of $770 monthly. **Vol. 1 at p. 83.** The trial court also awarded liberal parenting time to father with primary residential responsibility awarded to mother. **Vol. 1 at p. 88.**

Mother subsequently filed a contempt motion. A hearing was held and denied. **Vol. 1 at p. 95.** Father then applied for a modification of Permanent Orders. **Vol. 1 at p. 103.** A hearing was held on August 25, 1999, whereupon the trial court enlarged overnight parenting time. ***Id.*** On or

about June 22, 2000, mother filed for a civil restraining order in the county court on behalf of herself and the minor child and against father and alleging emotional endangerment. In support of her request, she proferred an affidavit containing primarily hearsay allegations from father's former wife (who contemporaneously filed for a civil restraining order against father just 3 days earlier). Neither restraining order was consolidated into the instant case and, therefore, does not appear in the record. Father's counsel did not want to make an appearance on a holiday (July 3rd 2000) and so insisted upon a stipulation to the permanent restraining order, despite father's objection. **Vol. 1 at p. 176.** Nevertheless, the supervised parenting time was ordered to occur at the home of mother (who had obtained the civil restraining order). The stipulation for appointment of special advocate, limited contact between mother and father and supervised parenting time had been ordered on June 30, 2000. ***Id.*** The SA wrote the court on January 20, 2001 stating that neither the parenting time supervisor, "nor [mother] can cite specific reasons at this time for [father]'s ongoing need for supervision." **Vol. 1 at p. 208.** On July 20, 2001, the trial court ordered a stipulation for parenting time, including overnights, by father. The SA again notified the trial court on October 18, 2001 recommending liberal parenting time to include an overnight weekend schedule, holidays, overnight vacation in December and improved communication between parents. **Vol. 2. at p. 225**

On November 2003, the then-special-advocate resigned, but recommended that a reassessment of the parenting time arrangement was, "in order." **Vol. 2, p. 255** On May 17, 2004, mother filed an emergency motion under § 14-10-129 (4) C.R.S. **Vol. 1 at p. 279.** After considering the SA's correspondence and conducting a hearing on the motion, the trial court

denied the motion and ordered "make-up" parenting time. **Vol. 1 at p. iii (Minute Order / Register of Actions).**

On or about July 2nd, 2004, mother's counsel filed a Motion for Citation of Contempt. **Vol. 1 at p. 336.** The Motion claimed two discreet violations: **(a)** that, "father has refused to pay the SA his Court Ordered retainer; and **(b)** that the father has refused to communicate with the mother through her voice-mail. ***Id.*** On the July 20, 2004, the trial court issued a contempt citation using the form proposed by mother's counsel and, which ordered father:

> "to appear . . . to show cause, if any, why he should not be punished for failure to obey previous orders of the Court, and the citation issued informed the Father that he is liable for a fine or imprisonment, or both, as a punitive, rather than remedial order, provided that he is found guilty of contempt of Court."

Vol. 1 at p. 362. During the contempt hearing, held on November 22nd 2004, the trial court reclassified the hearing as remedial, rather than punitive. **Vol. 7 at p. 135 (line 13).** The trial court did not address the disparity between the citation for punitive contempt proceedings and the proceedings being held at that time. The court advised father of certain rights under Colo.R.Civ.P. § 107 (d)(1), but did not advise him of the right to have the proceedings held before a different judge. **Vol. 7 at p. 62 (line 14).** Father was disallowed the opportunity to call the SA as at witness. **Vol 7 at p. 126 (lines 11 ~ 25)**

Father testified that he borrowed funds to pay the SA retainer the day before the hearing. **Vol. 7 at p. 102 (line 3); p. 103 (line 17); p. 104 (lines 2 ~ 3; 24 ~ 25).** Father's counsel provided an offer-of-proof in the form of a copy of the cashier's check that was provided to the SA. **Vol. 7 at pp. 91 ~ 92; 100 ~ 101.** The trial court acknowledged numerous times that the payment had been made in full. **Vol. 7 at p. 23 (line 21); p. 35 (line 20); p. 51 (lines 12 ~ 13).** Prior to the advisement or

commencement of the trial, the trial court found that father had found some way to finance collateral litigation in the federal court, **Vol. 7 at p. 24 (lines 4 ~ 5)** and also found that father managed to pay the costs of travel to another state to visit his other child.[1] **Vol. 7 at p. 24 (lines 1 ~ 4)**. The trial court found that the father's refusal to pay the special advocate and participate fully in the investigation process was intentional. **Vol. 7 at p. 132 (lines 5 ~ 6); p. 134 (lines 5 ~ 6)**, and that it constituted contempt. **Vol. 7 at p. 132 (line 23); p. 134 (line 3)**. The trial court awarded the mother attorneys' fees of $3,099.75 against father. **Vol. 7 at p. 135 (lines 6 ~ 8).** The trial court also imposed a suspended jail sentence of 30 days. **Vol. 7 at p. 135 (lines 16 ~ 17).** Additionally, the trial court suspended father's parenting time until father had completed his participation with the special advocate and, thereafter, limited only to supervised parenting time at the expense of father. **Vol. 7 at p. 136 (lines 3 ~ 8),** which the trial court described as an "incentive" for future obedience. **Vol. 7 at p. 136 (lines 8 ~ 13).** Finally, the trial court also terminated telephone contact between father and the minor child, stating as the reason, "I want Mr. Stadnyck's attention." **Vol. 7 at p. 138 (lines 23 ~ 24).** This appeal followed.

ARGUMENT

I. The contempt proceedings were procedurally defective

There has always been some ambiguity about whether contempt proceedings are actually "criminal" or merely quasi-criminal. *See, e.g., Eichhorn v. Kelley,* 111 P.3d 544 (Colo.App.

[1] This was pursuant to an Order by the same trial court judge, but in a different case.

2004), (discussing the common misperceptions and positing that, "conduct that is found to be offensive to the authority and dignity of the court pursuant to C.R.C.P. 107 is not criminal conduct, and contempt is not a statutory criminal offense. . . . The power to impose punitive sanctions for such conduct is an inherent and indispensable power of the court. It is not derived from statute and exists independent of legislative authority.") [citations omitted]. However, even where due process might not obligate the State to establish the procedural protections (such as those found in Rule 107), once the State creates them, a violation of those procedures is a due process deprivation. *See, e.g., Dep't of Health v. Donahue,* 690 P.2d 243 (Colo. 1984) (where state promulgates more stringent standards than would be constitutionally required, deprivation of those standards violates due process).

Although there is no fixed procedural formula for contempt proceedings, the "polestar" in determining the validity of contempt procedures is whether due process of law is accorded. *In re Marriage of Lamutt,* 881 P.2d 445, 447 (Colo. App. 1994). Contempt proceedings are entitled to the same procedural due process protections afforded to a criminal defendant, as the Colorado Supreme Court explained in *In re Marriage of Alverson*:

> although punitive contempt is not a common law or statutory crime, the possibility of incarceration associated with such proceedings is sufficient to require recognition and protection of many of the rights afforded to criminal defendants. . . A person charged with indirect punitive contempt is in much the same position as a defendant in a criminal proceeding: each faces the possibility of incarceration. In light of that fact, we conclude that the scope of the Fifth Amendment privilege afforded such an alleged contemnor should match that afforded a defendant in a criminal proceeding.

981 P.2d 1123 (Colo.App. 1999). Compliance with the procedural due process protections of Rule 107 is essential before jurisdiction to punish for contempt attaches. *Urbancich v. Mayberry,* 124 Colo. 311, 236 P.2d 535 (1951).

Halfway through the proceedings, the trial court held an advisement. In so doing, however, the trial court did not advise father of his right to have the matter heard before a different judge, as required under Colo.R.Civ.P. § 107(d)(1). *See also Harthun v. District Court,* 495 P.2d 539 (1972), for the requirement of a different judge for a trial of an indirect contempt charge. The trial court informed father that he may tender a plea of 'guilty' or 'not guilty,' **Vol. 7 at p. 61 (lines 24 & 25)** but did not obtain and enter such plea from father.

The trial judge stated, "Your presumption of innocence will continue throughout these proceedings." **Vol. 7 at pp. 62 (lines 1 & 2).** However, in spite of this proclamation, the trial judge had <u>already</u> made numerous findings of ultimate fact. As examples, the trial judge earlier stated, "I have no confidence that Mr. Stadnyck, at this point, would comply with any stipulation." **Vol. 7 at pp. 50 (lines 7 ~ 9).** The trial judge further explained (also <u>before</u> the trial began):

> Mr. Stadnyck has become far to [sic] embroiled with litigation in this jurisdiction and the Federal Court's. Mr. Stadnyck needs to learn a couple of things: Court orders have to be followed . . . this Court's authority extends termination or suspension of visitation if Mr. Stadnyck does not follow the Court orders . . . Mr. Stadnyck needs to pay Doctor Meehan, Mr. Meehan and, apparently, he has done so. He needs to pay his child support and, of no concern of yours, in the other case there's a pending contempt because he has not paid child support. He needs to pay child support in that case. And, lastly it's my understanding that Mr. Stadnyck has significant assets. It is my understanding that Mr. Stadnyck makes frequent trips to New York or Washington or wherever his other daughter is to visit. He's able to pay for that. Mr. Stadnyck is able to finance litigation in the Federal Court.

Vol. 7 at p. 23 (line 7) ~ p. 24 (line 5). In *People ex rel. S.G,* 91 P.3d 443 (Colo.App. 2004), a division of this Court found that, "a judge's opinion formed against a party from evidence before the court

in a judicial proceeding, even as to the guilt or innocence of a defendant, is generally not a basis for disqualification." *Id.* at **448.2 The proposition in *S.G.* stands entirely on the presumption that a, "trial judge disregards incompetent evidence." *Id.* *S.G.* is to be distinguished in that the trial judge in the case *sub judice* had already determined material issues of ultimate fact that should have been established by trial —a trial which had not yet begun. A trial before a biased judge constitutes a structural error. *People v. Baenziger,* 97 P.3d 271 (Colo. App. 2004).

Further, the decision in *S.G.* accorded the trial court wide latitude specifically in the matter of peremptory recusal, whereas the procedures prescribed by Rule 107 are not subject to discretionary application. Ordinarily, procedural errors that do not affect the substantial rights of the complaining party or do not unfairly affect the outcome are to be ignored. *People v. Vialpando,* 804 P.2d 219 (Colo. App. 1990). Here, the trial judge's predetermination, evidenced by his findings *ex ante*, illustrates why the General Assembly intended accused contemnors to have the right to have the matter heard before a disinterested judge.

Before anyone had even been sworn in, the trial judge declared, "the bottom line is in a few words that Mr. Stadnyck refused to talk with Mr. Meehan, refused to visit with him, refused to participate in the Special Advocate's investigation and refused to pay the retainer." **Vol. 7 at pp. 11 (lines 12 ~ 16).**

The trial judge's statements related a letter written to him by the special advocate **Vol. 7 at p. 9 (lines 15 ~ 16).** Over the objection of father's counsel, the special advocate was not made

[2] The court found that recusal was not required merely because the trial judge had issued, "a finding of probable cause to bind over the criminal case for trial and a finding that the proof was evident and the presumption great that [defendant] had committed the charged murders." *Id.*

available for cross-examination, from whom he sought to adduce testimony relative to father's alleged intent. **Vol 7 at p. 126 (lines 11 ~ 25)** Although intention is not necessary to constitute contempt, it goes to the gravamen of the offense. *People ex rel. Murley,* 124 Colo. 581 (Colo. 1951). Mother's counsel, however, did testify "on behalf of" the special advocate:

> and also, your Honor, Mr. Meehan did tell me that he wanted me to state in Court today that Mr. Stadnyck grieved him to months ago. ... and that he had not been paid until yesterday and he was not there to accept the money another person accepted it for him. He didn't have an appointment or anything he just walked in and said ...

Vol 7 at p. 35 (lines 3 ~ 23). Mother's counsel later again testified as to her hearsay conversations with the SA. **Vol 7 at p. 35 (lines 9 ~ 13).** Her assertion of, "personal knowledge of facts in issue," was a violation of the Rules of Professional Conduct § 3.4(e) and eclipsed father's opportunity to call and examine witnesses to prove his innocence or establish mitigating factors. *See, e.g., Losavio v. District Court,* 512 P.2d 266 (Colo. 1973) ("a situation involving a possible indirect contempt requires, as a minimum . . . the right to call and confront witnesses") (citing *Smith v. District Court,* 150 Colo. 136, 371 P.2d 271 (1962)).

II. The trial court abused its discretion in *sua sponte* converting both the legal classification and subject matter of the contempt proceeding without providing father adequate notice to meet the issues.

The contempt citation states unequivocally that the contempt proceeding was punitive. **Vol. 1 at p. 362.** Although father's counsel argued that the citation was "pure[ly] punitive," **Vol. 7 at p. 10 (lines 17 ~ 18)**, and that "There is no citation directing a

remedial order," **Vol. 7 at p. 28, (lines 24 ~ 24)**, the trial court characterized the proceedings as remedial. **Vol. 7 at p. 10 (line 9); Vol. 7 at p. 135, (lines 13 ~ 15).** As such, the trial court made not a finding of fact, but a conclusion of law, which is subject to review *de novo. Golden Lodge No. 13 v. Grand Lodge,* 80 P.3d 857 (Colo. App. 2003).

A cursory examination of the Record indicates that the trial court actually combined punitive sanctions with remedial sanctions. The "blending of remedial and punitive contempt sanctions," is impermissible. *Kourlis v. Port,* 18 P.3d 770 (Colo. App. 2000) at *772.

Punitive Aspect

Mother's counsel was appointed special counsel for the prosecution, **Vol. 7 at p. 58 (lines 21 ~ 24),** which occurred over the objection of father. **Vol. 7 at p. 57 (lines 15 ~ 16).** Although father's former counsel's reliance (during trial) to *Young v. United States,* 481 U.S. 787,107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) is now in question (pursuant to the decision in *Eichhorn v. Kelley, supra,* now awaiting the disposition of *certiorari* to the Colorado Supreme Court), what remains true is that appointment of counsel as prosecutor is unique to punitive contempt proceedings (*see* generally Colo.R.Civ.P. § 107 (6)(d)(1)). Further, mother's counsel sought imprisonment under a punitive, rather than remedial, context, arguing, "if [father] doesn't go to jail he'll never understand that this is not a game." (*See, e.g., Mendoza-Martinez,* 372 U.S. 144, 83 S. Ct. 554 (1963) (defining the traditional aims of punishment as, "retribution and deterrence.")). The trial court granted the relief sought. **Vol. 7 at p. 135 (lines 16 ~ 17).** The trial court also advised the father of certain rights that are enumerated specifically under the punitive

contempt provision of Rule 107. **Vol 7 at p. 62 (line 14).**[3] *See* generally Colo.R.Civ.P. § 107(6)(d)(1).

Remedial Aspect

Nevertheless and notwithstanding the language in the citation issued to father, the trial court characterized the proceedings (during trial) as remedial, apparently based on the premise of future performance. *In re Marriage of Zebedee,* 778 P.2d 694, 698 (Colo. App. 1988) ("[a] contempt order in which punishment is conditioned upon future performance of a duty is remedial in nature"). *See also In re Marriage of Roberts,* 757 P.2d 1108 (Colo.App. 1988) (When a trial court conditions a jail sentence upon compliance with a remedial order, the jail sentence became, in effect, a remedial rather than a punitive sanction). Additionally, mother's counsel, `though she had been appointed to prosecute the contempt, argued for attorneys' fees. **Vol. 7, p. 14 (lines 5 ~ 6); p. 26 (lines 15 ~ 17); p. 38 (lines 9 ~ 10).** Attorneys' fees are available only in remedial proceedings (*see* generally Colo.R.Civ.P. § 107(6)(d)(2)). The court granted the relief sought. **Vol. 7 at p. 135 (lines 6 ~ 8).**

To impose sanctions in the remedial context for the allegations that father was noticed to address that day, the court needed to find that the father had both the present duty to comply and the present ability to comply, as the Colorado Supreme Court explained in. *In the Matter of the Estate of Mary Beverly Elliot*:

> Case law has emphasized the requirement that when remedial sanctions are imposed, the court must make findings of fact regarding the actions constituting

[3] Among the many errors in the transcript, the court report mistakenly identified the advisement as given by father's former counsel, when it is clear from the context that it was actually given by the trial court.

> the contempt and the present duty and ability to perform the acts required to purge oneself of contempt. A past or future ability to comply are not sufficient grounds for a remedial contempt order.

[citations omitted]. , 993 P.2d 474 (Colo. 2000). The proceedings in the case at bar were brought specifically on the grounds that father had not yet paid the special advocate's full retainer.[4] **Vol. 7 at p. 13 (lines 18 ~ 22).** However, father had already paid the day prior, as the trial court acknowledged:

> I now understand that he has paid . . . All we need to know is whether or not [father] complied with Court order and paid the fee in the six months since the order issued. That's clear, he did not, until yesterday.

Vol. 7 at p. 124 (lines 1 ~ 9). Thus, the trial court's own findings indicate that the condition precedents for a finding under the remedial contempt provisions of Rule 107 did not exist, because the contempt that father had been charged with had already been purged.

Because neither **present** duty to comply nor **present** ability to comply had been established and, because the focus of the trial court's findings were on father's alleged willful **past** refusal to comply, the proceedings were, in fact, in the nature of punitive contempt.

Ad hoc subject matter "conversion"

Where the actions constituting criminal contempt occur outside the presence of the court, a contempt sanction may not be imposed until the accused has received adequate notice of the

[4] As previously noted, father, in good faith, contacted the special advocate in an attempted to set up a payment schedule, which the special advocate rejected. **Vol. 7 at pp. 126 ~ 127.** Father testified that the full payment had been made possible only by a loan made to him due to the exigency of the circumstances.

charge. *Griffin v. Jackson,* 759 P.2d 839 (Colo. App. 1988). The citation of contempt directed father to show cause why he should not be found in contempt for his failure to pay the special advocate retainer in full. The purpose of a contempt citation is to notify the respondent party of the charges he must be prepared to meet. *Austin v. City and County of Denver,* 156 Colo. 180 (Colo. 1964). Father appeared on September 22, 2004 prepared to address whether he had paid the special advocate's retainer. Instead, the trial court explained that the matter was no longer about the SA's retainer, but rather whether father had completed his participation in the SA investigation.[5] **Vol 7 at p. 10 (lines 4 ~ 6) & p. 16 (lines 22 ~ 25).** Father should have been, "convicted of no contempt other than that charged in the citation." *Eatchel v. Lanphere,* 170 Colo. 545, 463 P.2d 457 (1970). This is because, "the citation for contempt plays a very important role in enabling the person charged to understandingly shape his course and prepare his defense." *Id.*

Arguendo, even if father's failure to have fully participated the investigation was a proximate result of his earlier failure to pay the retainer in full, this does not satisfy the requisite finding that such failure was willful. In fact, the trial court acknowledged that father had contacted the special advocate on several occasions in an attempt to work out a payment schedule and that the special advocate turned him away: "[The father] has been notified [by the SA] that a payment plan over time is unacceptable and contrary to the policy of the Special Advocate." **Vol. 7 at p. 12 line 24 ~ p. 13, line 1.** "I . . . understand that Mr. Meehan would not accept partial payment, period." **Vol. 7 at p. 126 (line 25 ~ p.**

[5] Yet, a later time during the proceedings, the trial court reversed itself and stated, "[T]he issue before this Court is not in the contempt is not lack of cooperation. The issue in this contempt is failure to pay the fee." **Vol 7 at p. 96 (lines 18 ~ 21).**

127 line 1). "[Father] tried to make payments . . . and failed in that because Mr. Meehan is not in the loan business." **Vol 7 at p. 131, (lines 16 ~ 18).**

Here, the trial court characterized the special advocate's obstinacy, rather than father's, as the reason no progress had yet been made in the investigation. The fact that the special advocate is, "not in the loan business," and had rebuffed father's good faith attempts to work out a payment plan establishes neither the father's willful failure to substantively comply with the court's order nor conduct offensive to the dignity of the court. Reversal of a criminal contempt is proper when there is no finding fairly supported by the Record that father intended to inconvenience or delay the court. *Harthun, supra* at t 122-23, 495 P.2d at 541.

III. The trial court's abolition of parenting time and telephonic contact was an abuse of discretion.

In imposing a significant restriction on parenting time, the trial court was required to find that the child was in imminent danger as a direct and proximate result of parenting time with father. *See* generally Colo.Rev.Stat. § 14-10-129. *And see In the interest of E.L.M.C.,* 100 P.3d 546 (Colo.App. 2004) ("we further conclude that, consistent with existing federal limitations on a parent's fundamental right to direct the upbringing of the child, proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights"). Thus, the Endangerment Standard (rather than the Best Interests standard) applies. The Endangerment Standard, under the Uniform Marital Dissolution Act, describes "the statutory provisions of endangerment to a child's physical health or significant impairment to a child's

emotional development" *In re Marriage of Francis,* 919 P.2d 776 (Colo. 1996) (*See also In re Steving,* 980 P.2d 540 (Colo. App. 1999)). The determination of which statutory standard to apply is a question of law subject to *de novo* review. *In re Marriage of Stewart,* 43 P.3d 740 (Colo. App. 2002).

In the instant case, the trial court's finding of endangerment was attributable almost solely to the fact that father had pursued redress through collateral litigation. The court stated:

> I am concerned for your daughter, I am concerned for you because your approach to this entire matter has been to fight everybody. Everybody is against you, everybody oppresses you and nobody is there to try to help you. . . . I'm . . . concerned about the welfare of the child, because your activities in this case . . . indicate that there maybe some danger to the child if your [parenting time] is continued without the Court being able to rely on a report from the special advocate.

Vol. 7 at pp. 133 & 134. A significant restriction on parenting time based solely on a speculative notion of potential harm, such as this, is capricious and arbitrary. *See, e.g., In re Marriage of Short,* 675 P.2d 323 (Colo. App.1983) (evidence "must relate to more than just a possibility of future harm" to warrant the state's intrusion). *See also Shapiro, J.* Custody and Conduct, 71 Ind. L.J. 623, 642 (1996):

> [M]any courts engage in or permit speculation about potential future harm, rather than confining the inquiry to proven harm or even harm which is reasonably likely to occur. This dilutes the essential ingredient of a nexus test—the requirement that the parent[al] conduct cause harm.

The trial court also referenced [a] letter[s] of the special advocate and stated, "the Court has been advised by a physiatrist, psychologist special advocate that further visitation with the child maybe inimical to the interest of the child unless

there is a mental health evaluation." **Vol. 7 at p. 138, line 24.** The first letter referenced by the trial judge and appearing in the record at **Vol. 2, p. 255** states, in pertinent part:

> [A] reassessment of the father/daughter relationship is in order. I am not interested in re-assessing [the child]'s parenting plan, 1. given the real possibility that I may recommend a reduction in Dad's parenting time and [2.] that Dad has asked me to withdraw from the case.

***Id.* at para. 2.** The second letter referenced by the trial judge and appearing at **Vol. 2, p. 277** states, in pertinent part, "Due to Mr. Stadnyck's resistance, Ms. Taylor is increasingly concerned about the absence of an assessment of Mr. Stadnyck's mental status since he continues to have contact with their daughter." ***Id.* at para. 1.** Neither letter was competent evidence or sworn testimony subject to cross-examination and neither letter contained any allegation, let alone evidence, of imminent danger as required under § 14-10-109(4). Finally, there was no order prior to the contempt hearing of September 22, 2004, requiring a mental health evaluation.

The trial court abolished, not only father's parenting time, but also all form of contact, including telephonic contact, to get father's "attention,". **Vol. 7 at p. 138, line 24.** In fact, in apparent support of the trial court's repeated insistence that the proceedings had, indeed, been converted into remedial contempt, the trial court repeatedly characterized the imposed sanctions as intended to, "get Mr. Stadnyck's attention." **Vol. 7 at p. 140, line 17.**

The elimination of telephone contact, as the trial judge explained, had nothing to do with any imminent danger to the minor child, but rather, because "I want Mr. Standnyck's attention." **Vol. 7 at p. 138, line 23.** The Colorado Supreme Court explained in *the Matter of the Estate of Mary Beverly Elliot,* "[A] judge's power of contempt must be used with caution and

self-restraint to protect the rights of litigants and the administration of justice, not to protect his or her own dignity." 993 P.2d 474 (Colo. 2000).

The transcript is replete with numerous instances of the trial judge expressing indignation at the father for filing suit in federal court, failing to pay the special advocate's full retainer (in light of his refusal to accept father's partial payments), *etc.* A reasonable person would infer that the trial judge's frustration contoured the formulation of the contempt sanctions, because he had become personally "embroiled in a running controversy with an individual being held in contempt." *Elliot, supra* at **25 (internal quotes omitted) (citing *Taylor v. Hayes,* 418 U.S. 488, 501-02, 41 L. Ed. 2d 897, 94 S. Ct. 2697 (1974)).

CONCLUSION

The trial court's ruling, findings and orders, including the suspended sentence of imprisonment, the award of attorneys' fees and the revocation of parental contact arising from the September 22nd 2004 contempt proceedings should be reversed and the case remanded with instructions for the immediate reestablishment of the parental relationship.

.

Respectfully submitted this 22nd day of June 2005.

____
Gordon Stadnyck, APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of June 2005 a true and correct copy of the above and foregoing **OPENING BRIEF** was placed in the U.S. Mail, first-class postage prepaid, addressed to:

Madeline Wilson
Law Office of Madeline Wilson
501 So. Cherry St., # 610
Denver CO 80246-1328

Clerk of the Court
Douglas County Justice Center
4000 Justice Way, Suite 2009
Castle Rock, CO 80104

Courtesy copy sent, upon request, to the home address of:
Honorable Judge Kenneth Barnhill
10365 Read Mountain, East
Littleton, CO 80127

____