

County Court X District Court El Paso County, Colorado Court Address: 20 East Vermijo Ave, PO Box 2980, CSC 80901 Telephone Number: (719) 448-7599	FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO DEC 4 2007 M.V. PERRY CLERK OF COURT ▲ COURT USE ONLY ▲
IN THE MATTER OF THE PETITION OF: Herman A. Lohse III (name of person seeking to adopt)	Case Number: 07 JA 121 Division Q Courtroom W 170
FOR THE ADOPTION OF A CHILD Attorney or Party Without Attorney Dale Kim Thorup (Biological Father/Father) 3053 Seven Arrows Ct. Canon City, Colorado 81212 Phone Number: (719) 275-1156	FATHER'S MOTION FOR REVIEW OF MAGISTRATE'S ORDER

DALE KIM THORUP, Respondent, (hereinafter "Father"), respectfully submits the following motion pursuant to C.R.S. 19-1-108 (a5), (a5.5), and Rule 59 of the Colorado rules of civil procedure.

Colorado laws state that it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal, Colorado laws and lawmakers urge parents to share the rights and responsibilities of child rearing and to encourage the love, affection, and contact between the children and the parents. C.R.S. § 14-10-124. "[T]he power of the state to sever the ties between parent and child should be exercised with extreme care and only when the evidence clearly establishes the necessity of so doing. A parent-child relationship may not be destroyed and a new one created by adoption solely because an official of the state may believe the child's welfare and the stepparent's convenience will be served by such actions." *People ex rel. S.S.T.*, 553 P.2d 82, 88 (Colo.App. 1976).

Unfortunately, the foregoing legislative declaration and public policies appears to have been lost on the magistrate's division. Accordingly, Father moves for post trial relief and the vacatur of the November 16, 2007 judgment of Magistrate Evelyn Hernandez Sullivan in Division Q that ordered the termination of the parent-child legal relationship between Father and his biological daughter, . In support thereof, Father states as follows:

- A) Father is the biological parent of _____, whose date of birth is April 25, 1996. _____ resides with her biological mother, Deborah Ann Lohse, and stepfather, Herman A. Lohse III at 11265 S. Holmes Road, Colorado Springs, CO 80908.

- B) Because of the harshness of permanently terminating parental rights, there must be strict compliance with §19-5-203(1)(d)(II). *In re I.R.D.*, 971 P.2d 702, 705 (Colo.App. 1998). The court must first determine whether the stepparent adoption is in the best interests of the child. *Id.* If the court answers that question in the affirmative, it must then consider whether the child is "available for adoption." *Id.*
- C) Father has not abandoned his daughter financially. Father has made the required child support monthly payments during the past twenty-one months. Petitioner's assertion in the scheduled hearing on November 16, 2007 in Division Q that Father has paid child support solely because of a contempt proceeding is without merit, because the contempt Order expired in April of 2007. In the absence of any contempt Order, Father has continued to pay child support in each of the subsequent seven months through November of 2007.¹ In *In re Petition of F.J.H.*, 628 P.2d 159, 161 (Colo.App.1981), the Court of Appeals opined:

Were we to adopt petitioner's interpretation of the statute, a parent who had failed to provide the full amount of annual support, but who had not otherwise abandoned his child, would suffer the same penalty as a parent who had completely abandoned his child. We do not believe that the General Assembly intended such a result.

628 P.2d at 161. Yet, it is this same interpretation of the statute that petitioner has offered and, which has been adopted by the magistrate, which was rejected by the Appeals Court.

The fact that respondent did make some payments in 1978 and 1979 and has now resumed the payments on a regular basis indicates his willingness to honor his parental obligations.

Id. Similarly, Father has made payments, which, combined with his undisputed weekly attempts at telephonic contact, indicate his willingness to honor his parental obligations, notwithstanding the petitioners' successful parental alienation campaign.

- D) Petitioner's speculation that Father is unlikely to pay child support in the future is not only contradictory to the attached FSR payment record but, also is nothing more than a speculative notion of future harm. *Compare 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 substantive due process deprivation) [emphasis in the original]; *People v. Bucholz*, 778 P.2d 300, 302 (Colo.App. 1989) ("the determination at a certification hearing as to whether a person is "gravely disabled" must focus on the individual's existing condition, and not on the

¹ The Family Support Registry (FSR) Payment History is attached hereto and marked as Exhibit A. "A copy of the record of payment maintained by the family support registry shall be admissible into evidence as proof of the payments made through the family support registry." C.R.S. 26-13-114 (10)

possibility of future relapse”); *Rowsey v. Rowsey*, 174 W. Va. 692, 329 S.E.2d 57 (1985) (A finding, “based on a speculative notion of potential harm is an impermissible exercise of discretion”).

- E) Father has not abandoned his daughter emotionally. Father has attempted to telephone her each Sunday night (consistent with the Court’s Order) for the past five-years. Both mother and stepfather deliberately alienated the minor child from Father and now purport that an eleven-year-old should have the authority to reject Father’s calls since April of 2005, inconsistent with the Court’s Order regarding the same.
- F) Father has not refused to obtain a parenting evaluation (as ordered by the court on May 21, 2003). Rather, he contacted Betty Studebaker of DHS on that same day to schedule the evaluation, however, DHS required an Order of Appointment prior to scheduling. Studebaker informed the court and Stephen Werner (replacement-attorney for Hal Lohse, who married his client (mother)) of the same. On June 30, 2003, nearly six weeks later, Father received a Report from Virginia Etheridge, GAL that preempted a DHS evaluation and recommended that Father obtain a parenting evaluation and psychological evaluation. The court adopted the Etheridge recommendations in its revised order of August 11, 2003. Although, on August 14, 2003, Father submitted the qualifications of Diane McKinna, M.A., L.P.C., N.C.C. for the psychological evaluation and Lori L. Meffley, M.S.W., L.C.S.W. for the parenting evaluation,² Etheridge discounted their qualifications on October 23, 2003, and offered no alternatives. Despite Father’s good faith attempts to comply with the Order, he was obstructed from complying with the court orders requiring a parenting evaluation by DHS or parenting and psychological evaluations by licensed professional counselors.
- G) Father further asserts that Petitioner Hal Lohse stated under oath at the stepparent adoption hearing that the minor child decided only a few months ago to not accept telephone calls from her biological aunts and grandparents. He stated further that he permitted the child to reject telephone calls from her biological family, which was in willful violation of the applicable Court Order requiring those important family connections be maintained.
- H) Father was disallowed from providing testimony of the minor child’s biological aunts during the November 16, 2007 stepparent adoption hearing, which would have contradicted Petitioner’s assertions that _____ did not want to speak with them; which would have impeached the petitioner’s credibility; and, which would have affected the outcome of the trial. Because natural parents have a fundamental liberty interest in the companionship, care, custody, and management of their

² McKinna and Meffley are among the most highly recommended professionals in Fremont County (where Father resides); approved by all of the courts in Fremont and Pueblo Counties to do court-ordered psychological and parenting evaluations; and endorsed by Rex D. Filer, Ph.D Dr. Filer is a professor with the Counselor Education Program at Adams State College, LPC, a Licensed Counseling Psychologist and former Director of the State Board of Licensed Professional Counselor Examiners.

children, a court must provide parents with fundamentally fair procedures if termination of parental rights is sought. *In Re Petition of J.D.K.*, 37 P.3d 541, 543 (Colo.App. 2001). Procedural due process requires notice and an opportunity to be heard. *Id.* The opportunity to be heard includes father's witnesses.

- I) The GAL, Virginia Etheridge, never spoke with Father or the paternal family prior to submitting her July 31, 2007 report to the court endorsing Petitioner's adoption. Father was never provided with a copy of the *ex parte* letter allegedly submitted by the minor child to the GAL and Court. According to *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), "In order to provide competent representation, a CLR must maintain contact and ongoing communication with the child, and any other parties, persons, or professionals necessary to ensure that the child's best interest are continually met." *Id.* at § A1.6. Pursuant to Chief Justice Directive 04-06 §D(4), a GAL should, "at a minimum . . . Personally meet[] with and observe the child(ren)'s interaction with the parents, proposed custodians or foster parents including kinship care providers." Similarly, the well-established, nationally adopted *Guidelines for Child Custody Evaluations in Divorce Proceedings* were developed and built upon the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct.³ 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."
- J) According to *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), Virginia Etheridge should not have issued an investigatory Report and Recommendation to the court.

Although the position of the child's legal representative (CLR) was established, along with the special advocate (now the child and family investigator, or CFI) in 1997 when the Colorado Legislature eliminated the guardian ad litem (GAL) from domestic relations (Title 14) cases, much more attention has been paid over the years to the development, training, and regulation of the CFI role than to its litigating counterpart. Together, the CLR and CFI jointly make up the totality of what the GAL used to be—the CFI is the investigative, reporting, and testifying role, and the CLR fulfills the role of representing the child's best interests.

³ These Guidelines are found at <http://www.apa.org/practice/childcustody.html> (last visited 12/29/2007)

14-10-116 C.R.S. specifically prohibits the CLR and SA (CFI) from being the same person at the same time, and while the statute does not specifically address the point, the legislative intent appears to keep the two roles completely separate by not allowing any migration from one to another.

Many judicial officers, recalling that the history of the CLR comes from the historically muddied role of the GAL, will automatically expect the CLR to investigate the family situation and issue a written report---and may even include that requirement in the appointment order. That, however, places the CLR in an awkward position, since issuing a report would raise the due process question of how the parents could challenge the report without calling the CLR as a witness---which is prohibited by 14-10-116 (2)(a) C.R.S.---as well as raising the nagging question of why a CFI was not appointed (simultaneously, or instead of a CLR) to accomplish the investigation, write a report, and be available to testify.

Id. at B1-1 through B1-2. Accordingly, the Etheridge Report should be stricken and, to the extent that it was relied in upon in basing any decision terminating Father's parental rights, the decision should be reconsidered.

Wherefore, for the foregoing reasons and the foregoing authorities, Father requests that the court overturn Magistrate Sullivan's "Order Terminating Parent-Child Legal Relationship" dated November 16, 2007.

Dated: December 3, 2007

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CERTIFICATE OF DELIVERY

I certify that on December 3, 2007 (date) the original of this Motion was filed with the Court; and a true and accurate copy of this **FATHER'S MOTION FOR REVIEW OF MAGISTRATE'S ORDER** was served on the other party(ies) by placing it in the United States mail, postage pre-paid and addressed to the following:

Herman A. Lohse III
11265 S. Holmes Rd
Colorado Springs, Colorado 80903

Father