



## METRO VOLUNTEER LAWYERS

A PROGRAM OF THE DENVER BAR ASSOCIATION

In collaboration with the Adams/Broomfield, Arapahoe, Denver, Douglas/Elbert, and First Judicial District Bar Associations

# Post Decree Issues

12:00 – 12:10 pm

### **Introductions**

12:10 - 12:30 pm

### **Modifying Parenting Time**

Presented by **Katharine Lum** from **Lass Moses Ramp & Cooper**

- Discussion on modification of parenting time, standards, what to look for.

12:30 - 12:50 pm

### **Child Support Modification**

Presented by **Diane Wozniak** from **Sherman & Howard**

- Discussion on the elements of modifying child support and calculating child support.

12:50 – 1:10 pm

### **Grand Parent Rights**

Presented by **Andrew Hart** from **Pelegrin & Radeff**

- Discussion on dealing with a case when a grandparent wants to intervene

1:10 – 1:30 pm

### **Dealing with the Family**

Presented by **James Garts** from **Robinson & Henry**

- Dealing with a case when the other side has a new partner and delegating decisions to friends, family, and step-parents/girlfriends/boyfriends,

1:30 – 1:50 pm

### **Options for Enforcement**

Presented by **Karen Lamprey** from the **Law Office of Karen Lamprey**

- Discussion on the benefits and pitfalls of contempt versus motions to enforce.

1:50 -2:00 pm

### **Conclusion and Questions**

# **MODIFICATION OF PARENTING TIME**

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## MOTIONS TO MODIFY PARENTING TIME

### When can the Court Modify Parenting Time?

**General Rule** (C.R.S. § 14-10-129(1)(a)(I)): the Court may modify parenting time whenever doing so would be in the best interests of the child.

- “Best interests” factors are found at C.R.S. § 14-10-124(1.5).
- When helping clients prepare a Motion to Modify Parenting Time under the “best interests” standard, focus on the changes since the last allocation of parenting time.
  - What has changed since the last parenting time order that would lead a court to conclude that a different schedule is now in the child’s best interests?
- Help your client orient his or her focus/areas of concern to the best interests of the child.

### Exceptions to the General Rule—particular types of modifications:

- **“Restrictions.”** A court may not modify a parenting plan so as to “restrict” a parent’s parenting time unless the Court finds that parenting time would **“endanger the child’s physical health or significantly impair the child’s emotional development.”** C.R.S. § 14-10-129(1)(b)(I).
  - What Constitutes a “Restriction”?
    - In general, a “restriction” will involve a substantial qualitative or quantitative difference in parenting time.
  - Courts must make specific findings supporting the restriction.
  - Cases defining “restriction”: *In re Marriage of Parr and Lyman*, 240 P.3d 509 (Colo. App. 2010) (which talks about the qualitative aspects inherent in a restriction); *In re Marriage of West*, 94 P.3d 1248 (Colo. App. 2004) (talks generally about evaluating the qualitative and quantitative nature of the change and the reason for making those changes).
- **Substantial Change in Parenting Time combined with Change to the Majority-Time Parent** (C.R.S. § 14-10-129(2)). A court may not modify parenting time so as to substantially change the parenting time, as well as to change the parent with whom the child resides the majority of the time unless the Court finds, based upon

facts that have arisen since the most recent parenting time order, a modification is necessary to support the child's best interests, and

- Change in circumstance of the child; or
- Change in circumstance of the parent the child resides with a majority of the time.
- In applying these standards, the Court shall retain the current allocation of parenting time unless:
  - Parties agree to the modification;
  - The child has been integrated into the family of the moving party with the consent of the other party;
  - The party with whom the child resides the majority of the time is relocating (see below);
  - **The child's present environment endangers the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.**
    - When the endangerment standard is in play, it is important that you help your client focus on what has changed since the last parenting time order that is putting the client's child in physical or emotional jeopardy during the other parent's time.
- Moving into or out of a 50-50 parenting time schedule does not require heightened findings beyond a child's best interests. *In re Marriage of Stewart*, 43 P.3d 740 (Colo. App. 2002).
- Relocation (C.R.S. § 14-10-129(2)(c)).
  - If a majority-time or "50-50" parent is relocating in a way that substantially changes the parenting time between the child and the other parent, the court needs to consider additional factors set forth in C.R.S. § 14-10-129(2)(c), as well as the "best interests" factors from C.R.S. § 14-10-124(1.5).
- Watch Out For the 2 year rule. If your client previously filed a motion to modify parenting time that requested a substantial change in parenting time and a change in the majority-time, your client cannot file another motion like that within 2 years of resolution of the prior motion unless the court finds, on the basis of affidavits, that that the child's present environment may **endanger the child's physical**

**health or substantially impair the child's emotional development.** C.R.S. § 14-10-129(1.5).

- Conviction of Certain Crimes (C.R.S. § 14-10-129(3)).
  - If a parent has been convicted of certain crimes, the other parent may file and objection to parenting time with the court. The offending parent may then file a response to the objection. If the offending parent does not file a response, his or her parenting time shall be suspended until further order of the court. If the offending parent does object, the court shall hold a hearing within 35 days of the objection.
  - The burden is on the offending parent to prove that parenting time is in the best interests of the child.

## **MOTIONS TO RESTRICT PARENTING TIME**

**Motions to restrict parenting time is the family attorney's equivalent of the emergency button.**

**When to file a Motion to Restrict:** Child is in imminent physical or emotional danger due to the parenting time or contact by the other parent. C.R.S. § 14-10-129(4).

- Motions to restrict must be heard and ruled upon within 14 days of filing. The Court must hold a hearing on the motion unless it finds that the allegations in the motion, if taken as true, do not support any set of facts or circumstances that give rise to the conclusion that the children are in imminent physical or emotional danger.
- Motions to restrict are Self-Executing. Upon the filing of a Motion to Restrict, all parenting time between the non-filing parent and the child shall be supervised by an unrelated third party or by a licensed mental health professional for the 14 days following filing or until heard by the Court, whichever is sooner.
  - If the court does not hear the motion within 14 days then, unless there is otherwise an agreement of the parties, the automatic supervision of parenting time goes away.
- Be very careful about filing motions to restrict. Judges will not hesitate to assess fees against a party who they believe has misused this process.
- If you are going into a Motion to Restrict Hearing, prepare to answer the question "what comes next?" if the other party's parenting time is restricted following the hearing.

**COLORADO CHILD SUPPORT: POST DECREE MODIFICATION**  
**C.R.S. § 14-10-115, C.R.S. §14-10-122**  
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I. MODIFICATION [C.R.S. §14-10-122]

- A. Substantial and continuing change of circumstances that results in at least a 10% change of the support amount due.
- B. Retroactive to change in the case
  - 1. Mutually agreed upon or court ordered change to parenting time schedule; presumptive 5-year limit unless substantially inequitable, unjust, or inappropriate.
  - 2. To date of filing unless hardship. C.R.S. §14-10-122(1)(d).

II. TIMING OF MODIFICATION

- A. Generally, child support may be modified only as to installments accruing subsequent to the filing of a motion for modification. C.R.S. §14-10-122(1)(a).
- B. Retroactivity. If there has been a mutually agreed upon change of physical care, child support will be modified as of the date when the physical care changed unless the Court finds that retroactive modification would cause undue hardship or substantial injustice. Said modification back to the change in physical care applies to the obligor but may also apply to the obligee. In re Marriage of Emerson, 02 CA 1585 (Colo. App. 2003); C.R.S. §14-10-122 (5) (2014).
- C. 5-year Limitation. Effective January 1, 2017, subsection (5) of C.R.S. §14-10-122 was modified to create a presumptive five-year limit for retroactive modification based upon an agreed-upon change of physical custody. Previously no limitation existed.
- D. Impact of parties' agreements and prior child support order.
  - 1. The parties may not preclude or limit the Court's authority regarding child support. In re the Marriage of Rosenthal, 903 P.2d 1174 (Colo. App. 1995).
  - 2. In other words, the prior child support order doesn't control, but is just one factor that the Court can look at when ruling on a request for modification; i.e. the Court is not bound by parties' agreements for support and parenting time. In re the Marriage of Micaletti, 796 P.2d 54 (Colo. App. 1990). In re the Parental Responsibilities of M.G.C.-G., Cabello and Gomez, 228 P.3d 271 (Colo. App. Feb. 18, 2010).

E. Interest. Interest accrues on an order retroactively modifying child support from the date the order is entered, not from the date the modification is made effective. In Re Armit, 878 P.2d 101 (Colo. App. 1994). *See also*, In re Marriage of Oberg. 900 P.2d 1267 (Colo. App. 1994).

### III. REASONS FOR MODIFICATION

A. Change of circumstances. Modification requires a showing of changed circumstances that are substantial and continuing as to make the terms unfair. C.R.S. §14-10-122(1)(a). Less than a 10% change in the amount of support due per month is deemed *not* to be substantial and continuing change of circumstances. C.R.S. §14-10-115 and 122(1)(b). The substantial and continuing change of circumstances standard is applicable to postsecondary education support orders. In re the Marriage of Chalat, 94 P.3d 1191 (Colo. 2005).

B. Medical insurance. Child support may be modified on the ground that a previous child support order does not contain a provision regarding medical support, such as insurance coverage, payment for medical insurance deductibles and co-payments or unreimbursed medical expenses. C.R.S. §14-10-122(1)(a).

C. Death of the obligor. The death of the payor does not automatically terminate child support. The Court may modify, revoke or commute to a lump sum payment the amount of support, to the extent just and appropriate in the circumstances. C.R.S. §14-10-122(3).

D. Termination of child support. Emancipation of one child on a flat order does not automatically modify the order. In Re Ferguson, 507 P.2d 1110 (Colo. App. 1993); In re the Marriage of Schmedeman, 190 P.3d 788 (Colo. App. 2008). It is the Obligor's burden to file a Motion to Modify with the Court at the time of emancipation of any child who is not the last unemancipated child. *Id.*

E. Social Security benefits. Child support obligation of non-custodial parent must be reduced by amount of any social security benefits paid to or for benefit of child on his or her behalf, but support obligation of non-custodial parent can be reduced only prospectively from date that motion for modification of support is filed. In Re Wright, 924 P.2d 1207 (Colo. App. 1996).

IV. INCOME. [C.R.S. §14-10-115(5)] "Income" means actual gross income of a parent, if employed to full capacity, or potential income, if unemployed or underemployed. Generally speaking, "income from any source," unless an exclusion applies.

- A. Salaries
  - 1. Frequency of pay to determine monthly average
    - a) If semi-monthly, multiply gross paystub amount by 2
    - b) If bi-weekly, multiply gross paystub amount by 26; divide by 12
    - c) Apply same formula to taxes and other deductions.
- B. Wages & Tips
- C. Commissions
- D. Payments received as an independent contractor for labor or services
- E. Bonuses
  - 1. IRM Finer, 920 P.2d 325 (Colo. App. 1996). Primary goal is to include regularly received income, not speculation as to future events. May not be error to exclude consideration of a prior bonus in calculating child support where there is a factual basis for finding there is no guarantee of future bonuses.
  - 2. **Practice Pointer:** Future exchanges of financial information will help determine the regularity of bonuses.
- F. Dividends, Interest, Capital Gains
  - 1. IRM Glenn, 60 P.3d 775 (Colo.App. 2002). Unrealized capital gains are not income.
  - 2. IRM Upson, 991 P.2d 341 (Colo.App. 1999). Capital gains realized from post-property division appreciation, such as the earnings received from the sale of the former family home, are to be considered income. Court said the gain will not be realized (and included) in income if rolled over into a new home.
  - 3. IRM Bregar, 952 P.2d 783 (Colo.App. 1997). Deduct taxes paid on capital gain to determine income.
  - 4. IRM Zisch, 967 P.2d 199 (Colo.App. 1998). Gain is income in year received; interest on principal thereafter.
- G. Pensions and retirement benefits [C.R.S. §14-10-115(5)(II)(E)]
  - 1. Excluded unless a parent takes a distribution from the account;
  - 2. May be considered as income if not taken when:
    - a) distribution may be taken;
    - b) is not subject to IRS penalty for early distribution; and
    - c) parent not employed full time and account was not received as property.
- H. Severance pay
- I. Trust income
- J. Annuities
- K. Self-employed personal expenses as business deductions
- L. Social security benefits
- M. Worker' compensation
- N. Unemployment insurance benefits

- O. Disability insurance benefits
- P. Other insurance funds that replace wages (health, accident, disability, casualty)
- Q. Monetary Gifts (can be inheritance)
  - 1. In re A.M.D., 78 P.3d 741 (Colo.2003). Monetary gifts include monetary inheritances. Two part test to determine whether inheritance is a gift: 1) Is the inheritance monetary? If yes, go to 2<sup>nd</sup> prong. If no, analysis ends – not income. 2) If the inheritance is monetary, must determine the use of the money:
    - a) If the recipient uses the principal as a source of income to meet living expenses or increase standard of living, the expended principal should be included in that year’s income;
    - b) If the recipient saves or invests the inherited funds, the principal is not included in gross income, but the interest generated by the principal is considered income. If the principal is not adequately invested to earn a reasonable rate of return, the court may be required to impute interest.
  - 2. IRM Armstrong, 831 P.2d 501 (Colo.App. 1992). The sum that an inheritance could be expected to yield may be included in the calculation of gross income.
- R. Lottery winnings
  - 1. IRM Bohn, 8 P.3d 539 (Colo.App. 2000). Income in year received; interest on investment(s) in subsequent years.
  - 2. IRM McCord, 910 P.2d 85 (Colo.App. 1995). Increase in c/s based on combined imputed earnings based on parent’s past employment history (parent became voluntarily unemployed after winning \$2M), and additional income based on monthly lottery income.
- S. Self-employment, rent royalties, proprietorship, closely held businesses, partnerships
  - 1. C.R.S. §14-10-115(5)(III)(A), (B)
  - 2. IRM Eaton, 894 P.2d 56 (Colo. App. 1995). Gross income = gross receipts minus “ordinary and necessary expenses” required to produce such income. “Ordinary and necessary expenses” does not include amounts allowable by the IRS for accelerated depreciation.
- T. In-kind payments (expense reimbursements)
  - 1. Test: If significant and reduce parent’s personal living expense.
  - 2. Examples: company cars, cell phones, insurance
  - 3. IRM Long, 921 P.2d 67 (Colo. App. 1996). Expense reimbursements or in-kind payments shall be counted as income if they are significant and reduce personal living expenses.

4. IRM Davis, 252 P.3d 530 (Colo. App. 2011) Prior to actual distribution, employer contributions to a spouse's retirement account or pension plan do not constitute gross income for child support purposes.

5. In re Parental Responsibilities of L.K.Y., 2013 COA 108. Military housing and food allowance provided to custodial parent who elected to live off-base was “gross income,” for purposes of calculating basic child support obligation, following termination of domestic partnership; allowance constituted “in-kind” payment that reduced parent’s living expenses.

U. Spousal maintenance received

V. Overtime, if required as condition of employment

V. EXCLUSIONS FROM GROSS INCOME [C.R.S. §14-10-115(5)(a)(II)]

A. Child support payments received

B. Government assistance programs – SSI, food stamps

C. Income from second job unless intertwined

1. IRM Marson, 929 P.2d 51 (Colo.App. 1996)

2. IRM Salby, 126 P.3d 291 (Colo.App. 2005)

D. Overtime unless mandatory

1. IRM Rice v. Foutch, 987 P.2d 947 (Colo.App.1999) – construction job required overtime until job completed as scheduled.

2. IRM Dunkle, 194 P.3d 462 (Colo. App. 2008) – voluntary overtime pay excluded from income.

E. Social security benefits received by the minor children or on behalf of the minor children as a result of the death or disability of a stepparent.

F. Significant other’s income (post decree)

1. IRM Nimmo, 891 P.2d 1002 (Colo. 1995)

2. IRM Bowles, 916 P.2d 615 (Colo.App. 1995)

VI. POTENTIAL INCOME AND ABILITY TO EARN

A. Unemployed/Underemployed [C.R.S. §14-10-115(5)(b)(III)] – A parent shall not be deemed “underemployed” if:

1. The employment is temporary and is reasonably intended to result in a higher income within the foreseeable future (C.R.S. §14-10-115(5)(a)(III)(A); or

2. The employment is a good faith career choice which is not intended to deprive a child of support and does not unreasonably reduce the support available to the child (C.R.S. §14-10-115(5)(a)(III)(B); or

3. The parent is enrolled in an education program which is reasonably intended to result in a degree or certification within a reasonable period of

time, which will result in a higher income, so long as the educational program is a good faith career choice which is not intended to deprive the child of support and which does not unreasonably reduce the support available to a child. C.R.S. §14-10-115(5)(a)(III)(C). *Applied in In re the Marriage of Ehlert*, 868 P.2d 1168 (Colo. App. 1994).

B. Exclusions [C.R.S. §14-10-115(5)(b)(I)]

1. Physical or mental incapacitation
2. Caring for a child under age 30 months, joint responsibility
3. Good faith career change
4. Felons– not underemployed if sentenced one year or more

C. Termination from Employment

1. Misconduct – not underemployed solely due to being fired for misconduct. Must look to reasonableness of his/her attempts to obtain comparable employment and pay following the termination. [People v. Martinez, 70 P.3d 474 (Colo. 2003)]
2. Drug use/addiction - Although termination of parent's employment caused by drug use cannot be considered voluntary for purposes of imputing income for child support purposes, parent who has been involuntarily terminated from a position for drug use may subsequently become voluntarily unemployed or underemployed based on actions taken after the termination, and thus, failure to treat the addiction could, in the trial court's discretion, be considered in this regard. *In re Marriage of Atencio*, 47 P.3d 718 (Colo.App. 2002).

D. Shirking Obligation – income imputed to a parent who shirks his or her child support obligation by unreasonably foregoing higher paying employment. In re Marriage of Krejci, 297 P.3d 1035 (Colo.App. 2013).

1. IRM Bregar, 952 P.2d 783 (Colo.App. 1997) – attorney turned cattle rancher not reasonable.
2. IRM Mackey, 940 P.2d 1112, 1114 (Colo.App.1997) - income should be imputed to mother who significantly reduced her earnings to stay home with the children.
3. IRM Elmer, 936 P.2d 617 (Colo.App. 1997) – licensed attorney opted for inactive status and worked seasonally in apple orchard.

E. Full time work week

1. Might not be 40 hours – Nurses? Teachers?
2. IRM Foss, 30 P.3d 850 (2001) – no imputation to mother caring for child with cerebral palsy and working 32 hours/week.

VII. SPOUSAL MAINTENANCE \*\*\*CHANGE IN LAW\*\*\*

A. If the maintenance actually paid by a party *is deductible* for federal income tax purposes by that parent, then the actual amount of maintenance paid by that

parent must be deducted from that parent's gross income. C.R.S. §14-10-115(3)(a)(I).

B. If the maintenance actually paid by a party *is not deductible* for federal income tax purposes by that parent, then the amount of maintenance deducted from that parent's gross income is the amount of maintenance actually paid by that parent *multiplied by 1.25*. C.R.S. §14-10-115(3)(a)(I).

VIII. OTHER CHILDREN, C.R.S. §14-10-115(6) - reductions to gross income

- A. IRM Davis, 252 P.3d 530 (Colo.App. 2011)
- B. Other child support payments
- C. Other child in obligor's care

IX. ADJUSTMENTS

A. Health Insurance Premiums – one or both parents can be ordered to maintain or purchase medical or medical and dental insurance coverage for the children and order payment for deductibles and co-payments. C.R.S. §14-10-115(10)(a).

1. Amount is for cost incurred for adding children to coverage.

Example: Premium is \$100 for employee and \$225 for employee + children. Children's portion is \$125.

2. If can't calculate, divide number of covered persons into total premium.

Example: Premium is \$200 for employee and any dependents. If there are 3 children, amount = \$150 (3/4 of the total cost).

B. Extraordinary medical expenses [C.R.S. §14-10-115(10)(h)(I) & (II)]

1. Usually better to handle off the worksheet unless truly chronic

2. Threshold of \$250 per child annually; 1<sup>st</sup> \$250 obligation of obligee.

C. Other extraordinary expenses

1. Education, C.R.S. §14-10-115(11)(a)(I)

a) IRM Elmer, 936 P.2d 617 (Colo.App. 1997) – reasonably necessary expenses to provide for learning disability.

b) IRM West, 94 P.3d 1248 (Colo.App. 2004) – parochial school tuition; must have adequate findings of reasonableness of tuition in accord with the standard of living kids would have enjoyed had the marriage not dissolved.

2. Travel costs. C.R.S. §14-10-115(11)(a)(II). For child or child and accompanying parent if child < 12. Costs can be included even if exact amount is somewhat speculative. IRM Anderson, 895 P.2d 1161 (Colo.App. 1995).

3. Athletic/Extracurricular Activities

- a) Rare to include in calculation; must be supported by findings concerning reasonableness and necessity; typically handle off worksheet.
- b) IRM Laughlin, 932 P.2d 858 (Colo.App. 1997). Ongoing ice skating fees included in c/s calculation; court found related to education.
- c) IRM West, 94 P.3d 1248 (Colo.App. 2004).
- 4. Children's cars/expenses
  - a) IRM Wells, 252 P.3d 121 (Colo.App. 2011). Payment for car and repairs as reasonable and necessary cost of attending school.
  - b) IRM Long, 921 P.2d 67 (Colo.App. 1996). Increased automobile insurance premiums not extraordinary expense.
- 5. Post-Secondary Education
  - a) IRM Chalot, 112 P.3d 47 (Colo. 2005). Agreements to pay for college in a Separation Agreement no longer enforceable as contract term. Showing of substantial and continuing changed circumstances required to modify all post-secondary support orders.
  - b) IRM Ludwig, 122 P.3d 1056 (Colo.App. 2005). Children's accounts.

## X. OVERNIGHTS

- A. Worksheet A = obligor parent has 92 or fewer overnights per year
- B. Worksheet B = each parent has > 92 overnights
  - 1. Both parents contribute to children's expenses
  - 2. "Shared physical care"; C.R.S. § 14-10-115(3)
  - 3. IRM Redford, 776 P.2d 1149 (Colo. App. 1989) – each parent keeps the child overnight for > 25% of the time and both parents contribute to the expenses of the child in addition to the payment of child support
- C. "Split Physical Care" = Each parent has majority parenting time for one or more children
  - 1. Calculate child support worksheet for each child
  - 2. Offset the two amounts to determine who has obligation
- D. Separate Schedules
  - 1. Occurs when parenting time schedule is different for each child; times may overlap.
  - 2. If cumulative overnights for all children is less than 25% of year, follow Worksheet A.
  - 3. In re Marriage of Quam, 813 P.2d 833 (Colo. App. 1991) – provides formula.

## XI. EXTRAPOLATION AND DEVIATION

### A. Extrapolation

1. IRM Boettcher, 2018 COA 34. Post-decree modification; not an abuse of discretion and not a deviation to order a c/s amount higher than the highest guideline amount when combined monthly incomes exceed max guideline. Parties' presumptive obligation could not be less than highest level of statutory schedule although it could be more.
2. IRM Foss, 30 P.3d 850, 852 (Colo.App.2001). May extrapolate – discretionary standard.
3. IRM Van Inwegen, 757 P.2d 1118 (Colo.App.1988). Shouldn't mechanically extrapolate when combined monthly income exceeds \$30,000/month.
4. IRM Nimmo, 891 P.2d 1002 (Colo.1995). Nothing in the child support statute precludes the trial court from ordering a support payment that exceeds the known needs of the child.

### B. Deviation [C.R.S. §14-10-115(8)(e)]

1. IRM Payan, 890 P.2d 264 (Colo.App. 1995), IRM Finer, 920 P.2d 325 (Colo.App. 1996). Court may deviate when application of guidelines would be inequitable, unjust, or inappropriate. Must make specific findings for reasons for the deviation.
2. IRM Van Inwegen, 757 P.2d 1118 (Colo.App.1988). Court may deviate even if no factors in (8)(e) exist.
  - a) Added in 2017 – one parent spends substantially more time with child than reflected by # of overnights (think parent who works night shift)
  - b) Gross disparity in income, consistent overtime pay not included, extraordinary costs associated with parenting time, etc.

XII. TERMINATION OF CHILD SUPPORT(after 1997)

- A. Emancipation – occurs at age 19 unless:
1. Parties agree in written stipulation;
  2. Child is physically or mentally disabled;
  3. Child is still in high school or equivalent program; support continues until the end of the month following graduation;
  4. Child marries (c/s can be reinstated if marriage is dissolved and still eligible); or
  5. Child enters into active military duty.
- B. Death of payor – does not automatically terminate a child support obligation. Can be modified, revoked, or commuted to lump-sum payment. C.R.S. §14-10-122(3).

XIII. ANNUAL EXCHANGE OF FINANCIAL INFORMATION

- A. **Effective January 1, 2017:** The parties shall exchange information relevant to child support calculations on changes that have occurred since the previous child support order. C.R.S. §14-10-115(14)
- B. **Prior to January 1, 2017:** Annual exchange of financial information between parties may be stipulated or ordered by the Court including verification of insurance and its costs. C.R.S. §14-10-115(14).

XIV. OTHER

- A. Arrears. Interest = Statutory rate + 4%. [C.R.S. §14-14-106]
- B. Life Insurance. Court may order that life insurance be maintained by a parent obligated to pay child support. IRM Icke, 540 P.2d 1076 (Colo. App. 1975).
- C. Dependency Exemptions / Child Tax Credits
1. Unless otherwise agreed, allocated in proportion to parents' contributions to the costs of raising the children. C.R.S. §14-10-115(12).
  2. IRM of Staggs, 940 P.2d 1109 (Colo. App. 1997). The “costs of raising children” means the percentage split as set forth in the Guidelines.
  3. A parent shall not be entitled to claim a child as a dependent if he or she has not paid all Court-ordered child support for that tax year or if claiming the child as a dependent would not result in any tax benefit. C.R.S. §14-10-115(12).
  4. Practice Pointer – address more broadly in separation agreement to account for changes in tax law
- D. Payment to child support registry. C.R.S. §14-10-117, C.R.S. §26-13-114.
- E. Income assignment. C.R.S. §14-14-111.5

## **HYPOTHETICAL: KELLEY AND BEN POST-DECREE**

**HYPO A.** Kelley and Ben divorced 2 years ago. They have two children who are twins (age 11): Mindy and Joey. The parties share parenting time equally.

Kelley was previously married and has one child, Scotty (age 14), from her first marriage. Kelley pays \$100 in child support for Scotty.

At the time of the divorce, Kelley earned a salary of \$2,500 every two weeks. Kelley receives a yearly bonus based on company performance. Her bonus for 2018 was \$2,400.

Ben operates a Food Truck on the 16<sup>th</sup> Street Mall. Ben grossed \$40,000 in the last 12-months and had overhead of \$10,000.

Kelley covers the family's health insurance. Premiums are \$300 per month no matter how many participants. Scotty is covered under Kelley's plan.

Mindy is in after school care, which is \$200 per month.

### **What is the child support obligation?**

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**HYPO B.** Ben's food truck is stolen! The Food Truck wasn't insured, and Ben is unable to replace it for at least 12 months. Ben quickly gets a job as a chef at a Denver restaurant for \$12 per hour. Ben works approximately 30 hours per week at the restaurant. He drives for Lyft for 10 hours per week earning an additional \$10 per hour. Health insurance remains the same.

### **Should Ben be imputed income? How is Kelley's child support obligation affected?**

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**HYPO C.** One year later, Ben has his Food Truck up and running. His strong fanbase has allowed him to generate \$4,000 per month in income after reasonable and necessary expenses. The kids have been splitting parenting time with Kelley having majority parenting time with Mindy and 156 overnights with Joey; and Ben having majority parenting time with Joey and 156 overnights with Mindy. Ben and Kelley agree to this change in the parenting schedule. Kelley's income is the same. Kelley pays maintains health insurance for both children. Mindy no longer requires after school care.

### **To whom is support paid and how much?**

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## INPUTS

HYPO A.     Kelley's Income:

Salary	$\$2,500 \times 26 \div 12 =$	\$5,416
Bonus	$\$2,400 \div 12 =$	200
Total		<u>\$5,616</u>

Court ordered c/s paid to Scotty's father = \$100

Ben's Income: \$40,000 gross - \$10,000 costs = \$30,000  $\div 12 =$  \$2,500

After school child care = \$200

Healthcare insurance premium:  $\$300 \div 4 = \$75 \times 2 =$  \$150

HYPO B.     Ben's income:

$\$12 \times 30 \text{ hours} \times 52 \text{ weeks} =$	$\$18,720 \div 12 =$	\$1,560
$\$10 \times 10 \text{ hours} \times 52 \text{ weeks} =$	$\$ 5,200 \div 12 =$	\$ 433
Total Monthly Income =		<u>\$1,993</u>

HYPO C.     Kelley's income = \$5,616

Ben's income = \$4,000

Worksheet B (CRS 14-10-115, effective August, 2018)

In re: KELLEY IMARIGHT and BEN FREELoader

Case Number: 2019 DR 1

## HYPO A

Child's Name	Date of Birth
Joey	1/1/2008
Mindy	1/1/2008

This Worksheet is for 2 children living most of the time with: Mother. Overnight time with Father: 182 (49.863%)

		Mother	Father	Combined
1. MONTHLY GROSS INCOME	\$	5,616.00	2,500.00	
a) Plus maintenance received from spouse of this marriage	+	.00	.00	
b) Less support to others for other children - court ordered	-	100.00	.00	
c) Less support to others for other children - no court order	-	.00	.00	
d) Less §(6)(a)(II) deduction for non-joint children	-	.00	.00	
e) Less maintenance paid to spouse of different relationship	-	.00	.00	
f) Less maintenance (as adjusted) to spouse of this marriage	-	.00	.00	
2. MONTHLY ADJUSTED GROSS INCOME	=	5,516.00	2,500.00	8,016.00
3. Each parent's PERCENTAGE SHARE OF INCOME		68.81%	31.19%	
4. Amount from Guideline Schedule				1,631.96
5. BASIC CHILD SUPPORT OBLIGATION (1.5 x line 4)				2,447.94
6. Each parent's proportional share of basic support obligation (% Share of income of each [line 3] x Basic support obligation [line 5])	=	1,684.43	763.51	
7. OVERNIGHTS with each parent		183	182	
8. PERCENTAGE TIME with each parent		50.137%	49.863%	
9. Portion of own share owed to other (overnights adjustment) (Each parent's support share [line 6] x Other parent's time percentage [line 8])	=	839.91	382.80	
10. ADJUSTMENT EXPENSES paid (or to be paid) by each parent				
a) Work related child care (Before tax credit: 200 / 0)	\$	160.00	.00	
b) Education related child care	+	.00	.00	
c) Health insurance (children's share)	+	150.00	.00	
d) Extraordinary medical expenses	+	.00	.00	
e) Other extraordinary expenses	+	.00	.00	
f) Items that reduce need (e.g. child income)	-	.00	.00	
Total Adjustment Expenses (Total of Line 10(a) through Line 10(f) above)	=	310.00	.00	310.00
11. Fair share of adjustment expenses (% Share of income of each [line 3] x Total adjustment expenses [line 10])	-	213.31	96.69	
12. Adjustment expenses paid in excess of fair share (Expenses paid by each [line 10] minus Fair share of such expenses [line 11])	=	96.69	N/A	
13. Total owed by each to other (Support owed to other [line 9] minus expenses paid in excess of fair share [line 12])	\$	743.22	382.80	
14. Recommended Support Order (Mother pays Father)	=	<b>\$360.42</b>		

Prepared by: \_\_\_\_\_  
 Sherman & Howard

June 4, 2019

Worksheet B (CRS 14-10-115, effective August, 2018)

In re: KELLEY IMARIGHT and BEN FREELoader

Case Number: 2019 DR 1

## HYPO B

Child's Name	Date of Birth
Joey	1/1/2008
Mindy	1/1/2008

This Worksheet is for 2 children living most of the time with: Mother. Overnight time with Father: 182 (49.863%)

		Mother	Father	Combined
1. MONTHLY GROSS INCOME	\$	5,616.00	1,993.00	
a) Plus maintenance received from spouse of this marriage	+	.00	.00	
b) Less support to others for other children - court ordered	-	100.00	.00	
c) Less support to others for other children - no court order	-	.00	.00	
d) Less §(6)(a)(II) deduction for non-joint children	-	.00	.00	
e) Less maintenance paid to spouse of different relationship	-	.00	.00	
f) Less maintenance (as adjusted) to spouse of this marriage	-	.00	.00	
2. MONTHLY ADJUSTED GROSS INCOME	=	5,516.00	1,993.00	7,509.00
3. Each parent's PERCENTAGE SHARE OF INCOME		73.46%	26.54%	
4. Amount from Guideline Schedule				1,586.08
5. BASIC CHILD SUPPORT OBLIGATION (1.5 x line 4)				2,379.12
6. Each parent's proportional share of basic support obligation (% Share of income of each [line 3] x Basic support obligation [line 5])	=	1,747.70	631.42	
7. OVERNIGHTS with each parent		183	182	
8. PERCENTAGE TIME with each parent		50.137%	49.863%	
9. Portion of own share owed to other (overnights adjustment) (Each parent's support share [line 6] x Other parent's time percentage [line 8])	=	871.46	316.58	
10. ADJUSTMENT EXPENSES paid (or to be paid) by each parent				
a) Work related child care (Before tax credit: 200 / 0)	\$	160.00	.00	
b) Education related child care	+	.00	.00	
c) Health insurance (children's share)	+	150.00	.00	
d) Extraordinary medical expenses	+	.00	.00	
e) Other extraordinary expenses	+	.00	.00	
f) Items that reduce need (e.g. child income)	-	.00	.00	
Total Adjustment Expenses (Total of Line 10(a) through Line 10(f) above)	=	310.00	.00	310.00
11. Fair share of adjustment expenses (% Share of income of each [line 3] x Total adjustment expenses [line 10])	-	227.73	82.27	
12. Adjustment expenses paid in excess of fair share (Expenses paid by each [line 10] minus Fair share of such expenses [line 11])	=	82.27	N/A	
13. Total owed by each to other (Support owed to other [line 9] minus expenses paid in excess of fair share [line 12])	\$	789.19	316.57	
14. Recommended Support Order (Mother pays Father)	=	<b>\$472.62</b>		

Prepared by: \_\_\_\_\_  
 Sherman & Howard

June 4, 2019



Worksheet B (CRS 14-10-115, effective August, 2018)

In re: KELLEY IMARIGHT and BEN FREELoader  
 Case Number: 2019 DR 1 - 13

## HYPO C-2

Child's Name	Date of Birth
Joey	1/1/2008

This Worksheet is for one child living most of the time with: Father. Overnight time with Mother: 156 (42.740%)

		Mother	Father	Combined
1. MONTHLY GROSS INCOME	\$	5,616.00	4,000.00	
a) Plus maintenance received from spouse of this marriage	+	.00	.00	
b) Less support to others for other children - court ordered	-	100.00	.00	
c) Less support to others for other children - no court order	-	.00	.00	
d) Less §(6)(a)(II) deduction for non-joint children	-	.00	.00	
e) Less maintenance paid to spouse of different relationship	-	.00	.00	
f) Less maintenance (as adjusted) to spouse of this marriage	-	.00	.00	
2. MONTHLY ADJUSTED GROSS INCOME	=	5,516.00	4,000.00	9,516.00
3. Each parent's PERCENTAGE SHARE OF INCOME		57.97%	42.03%	
4. Amount from Guideline Schedule				1,163.60
5. BASIC CHILD SUPPORT OBLIGATION (1.5 x line 4)				1,745.40
6. Each parent's proportional share of basic support obligation (% Share of income of each [line 3] x Basic support obligation [line 5])	=	1,011.81	733.59	
7. OVERNIGHTS with each parent		156	209	
8. PERCENTAGE TIME with each parent		42.740%	57.260%	
9. Portion of own share owed to other (overnights adjustment) (Each parent's support share [line 6] x Other parent's time percentage [line 8])	=	579.37	313.53	
10. ADJUSTMENT EXPENSES paid (or to be paid) by each parent				
a) Work related child care (Expense has not been reduced for child care credit)	\$	.00	.00	
b) Education related child care	+	.00	.00	
c) Health insurance (child's share)	+	150.00	.00	
d) Extraordinary medical expenses	+	.00	.00	
e) Other extraordinary expenses	+	.00	.00	
f) Items that reduce need (e.g. child income)	-	.00	.00	
Total Adjustment Expenses (Total of Line 10(a) through Line 10(f) above)	=	150.00	.00	150.00
11. Fair share of adjustment expenses (% Share of income of each [line 3] x Total adjustment expenses [line 10])	-	86.96	63.05	
12. Adjustment expenses paid in excess of fair share (Expenses paid by each [line 10] minus Fair share of such expenses [line 11])	=	63.05	N/A	
13. Total owed by each to other (Support owed to other [line 9] minus expenses paid in excess of fair share [line 12])	\$	516.32	313.53	
14. Recommended Support Order (Mother pays Father)	=	<b>\$202.79</b>		

Prepared by: \_\_\_\_\_  
 Sherman & Howard

June 4, 2019

## Non-Parent Parenting Rights

**Created by:**

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- I. Troxel v. Granville, 530 U.S. 57 (2000)
  - a. Recognizes that fit parents are presumed to act in their children’s best interests and that the fundamental liberty interests of parents to the care custody and control of their children
    - i. When the state interferes with a fit parent’s rights to care custody and control, it must give special weight to the parent’s determination of the child’s best interests. At 58.
  - b. Plurality opinion rested on the “sweeping breadth” of a Washington statute that allowed any third party to seek visitation with children at any time, the plurality opinion noted it did not need to address all statutes regarding nonparent visitation. At 73.
  - c. Troxel notes that no one challenged the fitness of the parent at issue, and that that was important, as fit parents are presumed to act in their children’s best interests. At 68.
  - d. The presumption in favor of parents applies at all stages
    - i. In re B.J., 242 P.3d 1128, 1135 (2010) (court had ordered, over Father’s objection, parenting time with nonparents, at CFI’s request/recommendation) (“In an APR proceeding initiated by non-parents, the constitutional presumption in favor of the parent’s decision applies to the case at its outset, and endures throughout the proceeding unless overcome in accordance with due process standards. There is no investigatory exception.”)(citations omitted)
    - ii. In re B.R.D., 280 P.3d 78 (Colo. App. 2012) (Dad and nonparents had agreed to sole decision-making and primary residential caretaking to non-parents, Dad sought to modify)
      1. Application of the Troxel presumption ends up shifting the burden of proof in a motion to modify APR proceeding brought by a parent against a nonparent with APR to nonparents
- II. Does the client have standing?

- a. 14-10-123(1) "A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law:
  - i. (a) - parents
  - ii. "(b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents;"
  - iii. (c) By a person other than a parent who has had the physical care of a child for a period of one hundred eighty-two days or more, if such action is commenced within one hundred eighty-two days after the termination of such physical care;"
    1. The care need not be exclusive of the parent - In re E.L.M.C. 100 P.3d 546 (Colo. App. 2004)
    2. But see
      - a. In re Interest of L.F., 121 P.3d 267, (Colo. App. 2005) where court distinguished the care by grandmother as that of a daycare provider acting at the parent's direction and not a person who had physical care. Parents never relinquished primary caretaking responsibilities.
      - b. In re the Interests of D.T., 292 P.3d 1120, 1122 (Colo. App. 2012) ("A nonparent who serves a role similar to a babysitter or nanny, and provides care under the direction and supervision of the child's parent, does not have standing under section 14-10-123(1)(c)."
    3. In making the physical care determination for purposes of standing, the court must consider the "nature, frequency, and duration of the contacts between the child and nonparent and between the child and parent." D.T. at 1122.
      - a. Consider who goes to parent teacher conferences, who chooses the school, who is authorized to obtain doctor care, does the parent have rules for how nonparent provides care (ie- sleeping arrangements, guidelines on toys.) In re D.T. at 1122
    4. Standing can be lost. In re C.T.G., 179 P.3d 213 (2007) (stepfather relies on temporary order for parenting time for years, then seeks permanent order for parenting time after parents cease visits, "any arguable standing he might have had was lost.")

- iv. (d) – deals with cases that started in the Dependency and Neglect system, and provides for a way for orders to be certified to the domestic court for future proceedings
  - v. In re the Interests of B.B.O., 277 P.3d 818 (Colo. 2012) establishes that standing in 14-10-123(1)(b) and (c) turn on “who has or recently had physical care of the child.” At 820
    - 1. Standing provisions of 14-10-123(1)(b) and (c) are to be construed according to the plain language of the statute, which is clear. At 823
    - 2. Noted that standing requirements determination is separate from the best interests determination. At 822
    - 3. Parental consent is not required to establish non-parent standing. At 824
- III. After Standing Is Established: Three Part Test for When A Court **May** Allocate Parental Responsibilities to a Non-Parent Presumption in Favor of Legal Parents – In re the Interests of B.J., 242 P.3d 1128 (Colo. 2010) explains and establishes how the test balances the legal parents Troxel rights against the statutes permitting nonparents to seek APR for a child.
- a. In re M-W clearly delineates the test as it must be met by the nonparent, 292 P.3d 1158, 1161 (Colo. App. 2012):
    - i. “First, a presumption exists favoring the parental determination.”
    - ii. “Second, to rebut this presumption, the nonparent must show by clear and convincing evidence that the parental determination is not in the child’s best interests.”
    - iii. “Finally, the ultimate burden rests on the nonparent to establish by clear and convincing evidence that the nonparent’s requested allocation is in the child’s best interests.”
- IV. Special Factors
- a. In any order allocating rights to a non-parent over the objection of a parent, the Court’s factual findings and legal conclusions must identify those “special factors” on which it is relying. M-W, at 1161.
    - i. ELMC – “mother permitted and encouraged her domestic partner to participate in raising the child, and the child recognized both parties as her parents.” M-W at 1162
    - ii. M-W (factors identified as unique by appellate court)– Nonparent was psychological parent, child encouraged to identify nonparent ex-partner as his father during mother’s relationship with nonparent, and the child believed nonparent was his father, biological father was completely absent during first two years of child’s life, PRE recommended nonparent have primary parental responsibilities M-W at 1162
    - iii. Psychological parent – In re the Interests of E.L.M.C. at 560 – discusses risk of emotional harm to child whose relationship with a psychological parent is significantly curtailed or

terminated. Discusses four factor test for determination of whether a nonparent is a psychological parent

1. “the legal parent consented to and fostered the nonparent’s formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the child lived together in the same household; (3) the nonparent assumed obligations of parenthood by taking significant responsibility for the child’s care, education, and development, including contributing towards the child’s support, without expectation of financial compensation, and (4) the nonparent has established a parental role with the child a bonded dependent relationship parental in nature.”  
At 560.

- V. Parents being fit is not dispositive that their decisions are in the child’s best interests
  - a. Parents fitness is one of all the considerations of best interests factors pursuant to 14-10-124(1.5) M-W at 11162
  - b. Parents must be fit to be entitled to the Troxel presumption – fit parents are presumed to act in the child’s best interests
- VI. Circumstances at the time of the hearing are what matter
  - a. See M-W – court of appeals lists special circumstances at time of trial that would have supported APR to nonparent, but notes that the circumstances may have changed, and at remand the current circumstances of the child are to be considered. At 1163.
- VII. Rights of Child In APR Proceedings 14-10-123.4(1) “The general assembly hereby declares that children have certain rights in the determination of matters relating to parental responsibilities, including: (a) The right to have such determinations based upon the best interests of the child; (b) The right to be emotionally, mentally, and physically safe when in the care of either parent; and (c) The right to reside in and visit in homes that are free of domestic violence and child abuse or neglect.”
  - a. Do Kids Have Liberty Interest in Maintaining Third Party Parent Relationships?
    - i. See eg Troxel at 89 (Stevens, J. dissenting) (“While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do the children have these interests, and so, too, must their interests be balanced in the equation.”)
    - ii. And see *In re B.R.D.* at 84, discussing weighing a non-custodial parent’s Troxel rights against “the boy’s interest in maintaining a relationship with the [nonparents].”
- VIII. Special Consideration When Person Seeking APR is a Grandparent 14-10-123.3

- a. “Whenever a grandparent seeks parental responsibility for his or her grandchild pursuant to the provisions of this article, the court entering such order shall consider any credible evidence of the grandparent’s past conduct of child abuse or neglect. Such evidence may include, but shall not be limited to, medical records, school records, police reports, information contained in records and reports of child abuse or neglect, and court records received by the court pursuant to section 19-1-307 (2)(f), C.R.S.”
- IX. There is another type of action.
- a. Grandparent (or Great Grandparent) visitation:
    - i. Under 19-1-117, C.R.S.: “(1) Any grandparent or great-grandparent of a child may, in the manner set forth in this section, seek a court order granting the grandparent or great-grandparent reasonable grandchild or great-grandchild visitation rights when there is or has been a child custody case or a case concerning the allocation of parental responsibilities relating to that child. § 19-1-117, C.R.S.
      - 1. The statute was amended as a reaction to In re M.D.E., 297 P.3d 1058. (holding that the plain language of the then existing version of § 19-1-117, C.R.S. limited standing to grandparents – thereby precluding grandparents for petitioning for visitation.)
      - 2. It does not matter if the grandparent is adoptive or biological. See, In re R.A., 66 P.3d 146 (Colo. App. 2002)
      - 3. Who is a “grandparent?” “A person who is the parent of a child’s father or mother, who is related to the child by blood, in whole or by half, adoption, or marriage... except that the grandparent does include the parent of a child’s legal father or mother whose parental rights have been terminated in accordance with sections 19-5-117 and 19-1-104(1)(d)” § 19-1-103(56)(a-b), C.R.S.
    - ii. Generally, there just needs to be, or have been, a case involving the custody of the child, See, § 19-1-117, C.R.S.
      - 1. Can even be tangential such as a divorce, declaration of invalidity, or legal separation § 19-1-117(1)(a-c), C.R.S.
        - a. Paternity case. See, F.H. v. K.L.M., 740 P.2d 1006 (Colo. App. 1987)
        - b. D & N. See, In Interest of J.W.W., 936 P.2d 599 (Colo. App. 1997)
      - 2. However, be careful that the parent’s have not been terminated. See, In re B.D.G., 881 P.2d 375 (Colo. App. 1993). If there is a D&N, the grandparent needs to intervene prior to termination. See, In Interest of J.W.W., 936 P.2d 599 (Colo. App. 1997).
    - iii. Same test and presumption as Title 14 action.

1. There is 1) a presumption in favor of the parents determination; 2) Presumption can be rebutted by clear and convincing evidence that the parenting is unfit to make the grandparent visitation decision or that the parent's decision is not in the children(s)' best interest; and 3) if that burden is met, the burden shifts to the parents to produce evidence supporting their (the parent's) decision. See, In re Adoption of C.A., 137 P.3d 318, 327-328 (Colo. 2006). Ultimately, the burden is on the grandparents to show that the parental determination is not in the best interest of the children by clear and convincing evidence.
  - iv. The time is not contingent on the parent's parenting time. § 19-1-117(5), C.R.S.
- X. How do you file one of these cases?
- a. Under Title 14?
    - i. An original Allocation of Parental Responsibilities ("APR") action.
      1. Service, under C.R.C.P. Rule 4.
    - ii. If there is an APR or other type of case already in process
      1. If there is an APR:
        - a. Petition pursuant to § 14-10-123, C.R.S.
        - b. Motion to Intervene.
          - i. Permissive Intervention pursuant to C.R.C.P. Rule 24(b). (As opposed to intervention as a matter of right.)
        - c. Service?
      2. If there is a guardianship:
        - a. Petition pursuant to § 14-10-123, C.R.S.
        - b. Motion to Intervene.
        - c. Motion to Consolidate.
          - i. C.R.C.P. Rule 42. Consolidation is appropriate where there is a common question of law or fact.
        - d. Service?
        - e. Standard of proof: Where a fit parent formally relinquished care and custody of a child to a non-parent, the parent is still entitled to a presumption under Troxel, but the non-parent may overcome the presumption by a preponderance of the evidence. See, In the Matter of D.I.S., 249 P.3d 775 (Colo. 2011)
  - b. Under Title 19?
    - i. What if there is a case in process?
      1. Permissive intervention, C.R.C.P. Rule 24(b). In re K.L.O.-V., 151 P.3d 637 (Colo. App. 2006)

- ii. What if there is not a case in process?
      - 1. Can still file even if the “custody” case is closed.
    - iii. Either way, unless you can show good cause, you can only file a grandparent (or great-grandparent) action once every two years. § 19-1-117(3), C.R.S. Also, note that the court can award reasonable attorney fees to the prevailing party.
- XI. Can the Court award child support?
  - a. There is no statute creating a duty of support for a non-parent (unless the non-parent ends up adopting the child.)
  - b. A psychological parent can be ordered to pay child support. A “court has the authority to impose a child support obligation on a psychological parent.” In re A.C.H., 2019 COA 43, ¶ 35
- XII. What about modification?
  - a. Title 14
    - i. Standard of Proof: There is a four part test to determine whether to modify the existing allocation of parental responsibilities: 1) There is a presumption in favor of the parent’s request for allocation of parental responsibilities; 2) the non-parent must have an opportunity to rebut the presumption by showing that the proposed modification is not in the child’s best interest, that the arrangement does not endanger the child, and that the present parenting time arrangement is in the child’s best interest; 3) the non-parent must satisfy their evidentiary burden by a preponderance of the evidence; and 4) the court must make finding relative to the special factors found in § 14-10-124, § 14-10-129 and § 14-10-131. See, In re the Parental Responsibilities Concerning B.R.D., 280 P.3d 78 (Colo. App. 2012).
  - b. Title 19
    - i. A motion, by parent, to terminate the grandparent visitation requires 1) a showing of a material change in circumstances; 2) a rebuttable presumption in favor of parents that the grandparents can overcome by clear and convincing evidence. See, In re A.M., 251 P.3d 1119 (Colo. App. 2010)
    - ii. If grandparent visitation is being denied, file a motion under § 19-1-117.5, C.R.S. (similar, though not identical to a motion under § 14-10-129.5, C.R.S.)
    - iii. A grandparent’s time is not terminated by virtue of a stepparent adoption. In re Marriage of Aragon, 764 P.2d 419 (Colo. App. 1988).



# Post Decree Issues CLE

“Dealing with the Family”

James R. Garts, III

Robinson & Henry, P.C.



# What happens when the “other side” has a new partner?

- Quick answer, not much.
- Typically the Court is not interested in the daily comings and goings of people within the other parent’s household because the law trusts fit parents and there is a presumption that a fit parent is competent to manage the care, custody and control of the children.
- You may ask the other side in a Parenting Plan to agree that they not introduce the children to new significant others to the children for a period of time (for example 6-months) so that the parents can be sure that the children are not introduced to and feel abandoned as a consequence of normal but temporary adult relationships.
- You may ask the other side to provide name and birth date to perform background checks on roommates, significant others.
- You may even ask to meet new significant others at dinner or coffee to reassure yourself that the person is normal and safe.
- Being protective is normal and healthy parenting behavior. Where the protection concern starts and ends is a concept of values, culture and ideals that a Court might not support as vigorously as you might want since there is a Federal Constitutional liberty interest of each parent individually in the care, custody and control of their children. It is a fundamental right that resides in each parent whose primary function and freedom include the preparation of the children for obligations the state can neither supply nor hinder.



# What if the “other side is delegating time or decisions to friends, family, step-parents, girlfriends, boyfriends.

- ▶ The reality is that they can probably do so for day to day parenting and care of the child.
- ▶ Major decisions like choice of school, decisions regarding medical care, extracurricular enrollment and religious observance SHOULD fall only to the parents.
- ▶ However, what one commonly sees in post-decree parenting disputes is that when a new partner becomes involved, values and decisions can change. This is normal and natural result of human interaction and reliance upon family and significant others.
- ▶ Yet, it can be disappointing and frustrating to a co-parent to see that the other parent’s previously agreeable values are no longer agreeable.
- ▶ Anecdotally, there is little one can do but contest the major decisions and accept that the other party might modify their values and goals so that they may happily and peacefully engage in a new relationship, and there is little one can do about it.



# Meyer v. Nebraska, 262 US 390 (1923)

- ▶ Nebraska had a law that children who had not successfully passed the 8<sup>th</sup> grade could only be taught the English language. A teacher taught a child the German language.
- ▶ The teacher's conviction was held unconstitutional.
- ▶ An argument was presented that the law was an unwarranted restriction which arbitrarily interferes with the rights of citizens, without reason, from having their children taught foreign languages in schools. This was not the Court's holding.
- ▶ The Court actually held that the restriction of the parents' rights was not entirely arbitrary or unwarranted, but rather restricted a parent's liberty without the due process of law. (14<sup>th</sup> Amendment Substantive Due Process)
- ▶ This is where we first hear of a parent's "right of control." Specifically, the right of control is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the States, including Nebraska, enforce this obligation by compulsory laws



# Troxel v. Granville, 530 U.S. 57 (2000)

- Nearly 80 years later, the Court expressed the primary holding in *Troxel v. Granville* that there is a fundamental right under the Fourteenth Amendment for a parent to oversee the care, custody and control of a child.
- In this case a parent told the grandparents that they could not have more than one visit per month with their grandchildren.
- The grandparents pursued visitation under a Washington statute.
- The U.S. Supreme Court decided that applying the Washington Statute that allowed the grandparents to pursue visitation with the children as written, violated the natural mother's due process right to make decisions regarding the care, custody and control of her daughters.



In the Interest of E.L.M.C.  
100 P.3d 546 (Colo. App. 2004)

In the Interest of C.T.G.  
179 P.3d 213 (Colo.App. 2007)

- ▶ Colorado considered the concept of a psychological parent in these cases. The question was whether there was a compelling state interest in preventing emotional harm to a child with a parent's fundamental right concerning care, custody and control of their child.
- ▶ A psychological parent is one whom the child recognizes as a parent and thus there is a risk of serious emotional harm by removing a non-parent from the child's life.
- ▶ This is an acceptable intrusion into a parent's fundamental liberty interest in the care custody and control of a child.
- ▶ However, the potential psychological parent must show special circumstances that would justify continued visitation over the objection of a parent. Great weight is to be provided to a parent's fundamental rights and so there must be special circumstances demonstrated to overcome that liberty interest.



# In re the Marriage of DePalma, 176 P.3d 829 (Colo. App. 2008)

- ▶ The concept of delegation of parental rights to a step-parent is a primary concept in this component of the presentation.
- ▶ In DePalma, the Court considered whether a stepmother could be delegated parenting time rights by the natural father while he was deployed in the military overseas.
- ▶ The Court of Appeals decided that a parent may delegate their parenting time rights to the children's stepmother and that the stepmother was not required to petition for the right to provide care.
- ▶ As a practical matter the children's best interests were found in maintaining a relationship with their stepmother and stepbrother.
- ▶ Stepmother was not seeking and was not given parental rights. From a perspective, the Court upheld the natural father's right to care custody and control of the children in delegating his parenting time rights to his new spouse.



# In re the Parental Responsibilities of Reese, 227 P.3d 900 (Colo.App. 2010)

- ▶ Non-parents were assisting mother in the care of her adopted child. The care was substantial in both amount and duration.
- ▶ There is a presumption that a fit parent would act in the best interests of their child. That presumption was expanded to require not only “special weight” be applied to a parent’s decision but also increased the burden of proof to the “clear and convincing” standard.
- ▶ Use of the clear and convincing standard was required to apply the Troxel v. Granville concept that “special weight” be applied to a parent’s decisions to protect their due process right and fundamental liberty interest in the care, custody and control of their child. The expansion of a concept was first introduced by the Colorado Supreme Court in In re Adoption of C.A. 137 P.3d 318 (Colo. 2006) and followed here.



# In re Marriage of Dean, 413 P.3d 246 (Colo.App. 2017)

- ▶ This quite recent case discerned that a Court cannot prescribe discipline for a child who refuses to spend time with the other parent.
- ▶ What does one do if their child won't spend time with the other parent. The Courts cannot force a parent to inflict specific discipline.
- ▶ What can the Courts do?
- ▶ It's not clear?
- ▶ Thoughts? Suggestions?
- ▶ Advice: I typically tell the parent to call the other parent and have both parents at once encourage the parenting time. It both maintains the burden on the parent with the child and shares that burden with the parent who wants time with the child.
- ▶ How else might we advise a party to encourage parenting time using "reasonable and good faith efforts."
- ▶ While the Court must abide by Troxel's fundamental principle that parents, not judges make child rearing decisions, what can a Court do to encourage parents not only not to thwart a Court Order by suggesting or encouraging, directly or indirectly, the children not to spend time with the other parent.

**§ 14-10-129.5, C.R.S., Disputes concerning parenting time**

(1) Within thirty-five days after the filing of a verified motion by either parent or upon the court's own motion alleging that a parent is not complying with a parenting time order or schedule and setting forth the possible sanctions that may be imposed by the court, the court shall determine from the verified motion, and response to the motion, if any, whether there has been or is likely to be substantial or continuing noncompliance with the parenting time order or schedule and either:

- (a) Deny the motion, if there is an inadequate allegation; or
- (b) Set the matter for hearing with notice to the parents of the time and place of the hearing as expeditiously as possible; or
- (c) Require the parties to seek mediation and report back to the court on the results of the mediation within sixty-three days. Mediation services shall be provided in accordance with section 13-22-305, C.R.S. At the end of the mediation period, the court may approve an agreement reached by the parents or shall set the matter for hearing.

(2) After the hearing, if a court finds that a parent has not complied with the parenting time order or schedule and has violated the court order, the court, in the best interests of the child, shall issue an order that may include but not be limited to one or more of the following orders:

- (a) An order imposing additional terms and conditions that are consistent with the court's previous order; except that the court shall separate the issues of child support and parenting time and shall not condition child support upon parenting time;
- (b) An order modifying the previous order to meet the best interests of the child;
- (b.3) An order requiring either parent or both parents to attend a parental education program as described in section 14-10-123.7, at the expense of the noncomplying parent;
- (b.7) An order requiring the parties to participate in family counseling pursuant to section 13-22-313, C.R.S., at the expense of the noncomplying parent;
- (c) An order requiring the violator to post bond or security to insure future compliance;
- (d) An order requiring that makeup parenting time be provided for the aggrieved parent or child under the following conditions:
  - (I) That such parenting time is of the same type and duration of parenting time as that which was denied, including but not limited to parenting time during weekends, on holidays, and on weekdays and during the summer;
  - (II) That such parenting time is made up within six months after the noncompliance occurs, unless the period of time or holiday can not be made up within six months in which case the parenting time shall be made up within one year after the noncompliance occurs;
  - (III) That such parenting time takes place at the time and in the manner chosen by the aggrieved parent if it is in the best interests of the child;

- (e) An order finding the parent who did not comply with the parenting time schedule in contempt of court and imposing a fine or jail sentence;
- (e.5) An order imposing on the noncomplying parent a civil fine not to exceed one hundred dollars per incident of denied parenting time;
- (f) An order scheduling a hearing for modification of the existing order concerning custody or the allocation of parental responsibilities with respect to a motion filed pursuant to section 14-10-131;
- (g) Deleted by Laws 1997, H.B.97-1164, § 1, eff. Aug. 6, 1997.
- (h) Any other order that may promote the best interests of the child or children involved.

(3) Any civil fines collected as a result of an order entered pursuant to paragraph (e.5) of subsection (2) of this section shall be transmitted to the state treasurer, who shall credit the same to the dispute resolution fund created in section 13-22-310, C.R.S.

(4) In addition to any other order entered pursuant to subsection (2) of this section, the court shall order a parent who has failed to provide court-ordered parenting time or to exercise court-ordered parenting time to pay to the aggrieved party, attorney's fees, court costs, and expenses that are associated with an action brought pursuant to this section. In the event the parent responding to an action brought pursuant to this section is found not to be in violation of the parenting time order or schedule, the court may order the petitioning parent to pay the court costs, attorney fees, and expenses incurred by such responding parent. Nothing in this section shall preclude a party's right to a separate and independent legal action in tort.

## **C.R.C.P. 107, Remedial and Punitive Sanctions for Contempt**

### **(a) Definitions.**

(1) **Contempt:** Disorderly or disruptive behavior, a breach of the peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings; behavior that obstructs the administration of justice; disobedience or resistance by any person to or interference with any lawful writ, process, or order of the court; or any other act or omission designated as contempt by the statutes or these rules.

(2) **Direct Contempt:** Contempt that the court has seen or heard and is so extreme that no warning is necessary or that has been repeated despite the court's warning to desist.

(3) **Indirect Contempt:** Contempt that occurs out of the direct sight or hearing of the court.

(4) **Punitive Sanctions for Contempt:** Punishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.

(5) **Remedial Sanctions for Contempt:** Sanctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.

(6) **Court:** For purposes of this rule, "court" means any judge, magistrate, commissioner, referee, or a master while performing official duties.

**(b) Direct Contempt Proceedings.** When a direct contempt is committed, it may be punished summarily. In such case an order shall be made on the record or in writing reciting the facts constituting the contempt, including a description of the person's conduct, a finding that the conduct was so extreme that no warning was necessary or the person's conduct was repeated after the court's warning to desist, and a finding that the conduct is offensive to the authority and dignity of the court. Prior to the imposition of sanctions, the person shall have the right to make a statement in mitigation.

**(c) Indirect Contempt Proceedings.** When it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may ex parte order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished. The citation and a copy of the motion, affidavit and order shall be served directly upon such person at least 21 days before the time designated for the person to appear. If such person fails to appear at the time so designated, and it is evident to the court that the person was properly served with copies of the motion, affidavit, order, and citation, a warrant for the person's arrest may issue to the sheriff. The warrant shall fix the date, time and place for the production of the person in court. The court shall state on the warrant the amount and kind of bond required. The person shall be discharged upon delivery to and approval by the sheriff or clerk of the bond directing the person to appear at the date, time and place designated

in the warrant, and at any time to which the hearing may be continued, or pay the sum specified. If the person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the bond may be forfeited upon proper notice of hearing to the surety, if any, and to the extent of the damages suffered because of the contempt, the bond may be paid to the aggrieved party. If the person fails to make bond, the sheriff shall keep the person in custody subject to the order of the court.

**(d) Trial and Punishment.**

(1) **Punitive Sanctions:** In an indirect contempt proceeding where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt action. If the judge initiates the contempt proceedings, the person shall be advised of the right to have the action heard by another judge. At the first appearance, the person shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel. The maximum jail sentence shall not exceed six months unless the person has been advised of the right to a jury trial. The person shall also be advised of the right to plead either guilty or not guilty to the charges, the presumption of innocence, the right to require proof of the charge beyond a reasonable doubt, the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, the right to have subpoenas issued to compel attendance of witnesses at trial, the right to remain silent, the right to testify at trial, and the right to appeal any adverse decision. The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The person shall have the right to make a statement in mitigation prior to the imposition of sentence.

(2) **Remedial Sanctions:** In a contempt proceeding where remedial sanctions may be imposed, the court shall hear and consider the evidence for and against the person charged and it may find the person in contempt and order sanctions. The court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed shall be described in the motion or citation. Costs and reasonable attorney's fees in connection with the contempt proceeding may be assessed in the discretion of the court. If the contempt consists of the failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be fined or imprisoned until its performance.

**(e) Limitations.** The court shall not suspend any part of a punitive sanction based upon the performance or non-performance of any future acts. The court may reconsider any punitive sanction. Probation shall not be permitted as a condition of any punitive sanction. Remedial and punitive sanctions may be combined by the court, provided appropriate procedures are followed relative to each type of sanction and findings are made to support the adjudication of both types of sanctions.

**(f) Appeal.** For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.