OPINION

Emerging Trends in Family Law

BY JENNIE WRAY AND ANGELA ARKIN
THE HARRIS LAW FIRM

Colorado law related to families is constantly changing, both in the area of finances and in relation to the best interests of children. But recent decisions from the Colorado Court of Appeals related to financial and property matters are likely to have a substantial impact on the practice of family law going forward. Specifically, there are two significant decisions that all attorneys should know about.


ANGELA ARKIN


JENNIE WRAY

COLLECTION OF ATTORNEY'S FEES FROM MAINTENANCE AWARDS

Currently, according to the State Court Administrator's Office, approximately 70 percent of domestic relations cases in Colorado are filed by a party without an attorney. Many parties obtain traditional or unbundled representation during the pendency of the case, but it is estimated that at least 50 percent of the cases are resolved with at least one party who is self-represented. Many parties have expressed that the high cost of legal representation has been a significant deterrent to their hiring a traditional, full-service attorney for their divorce or allocation of parental responsibility case.

Dependent spouses who are in a more traditional marriage, have a lower paying job or are employed only part-time might not be able to afford the same attorney representation as the higher-earning spouse without access to funds from the higher earner (through temporary support), or access to credit or marital assets. Courts can award prospective attorney's fees, but self-represented parties are not always aware that they can ask for money to hire an attorney. Also, the amounts awarded by the court to the downside spouse might not cover the total costs of the representation.

In 2015, the Colorado Court of Appeals ruled — as an issue of first impression in this state — that attorneys could not collect their accrued but unpaid fees from a maintenance award, even when the attorney obtained said award for their client in the dissolution of marriage case. The court held that an attorney's attempt to collect a fee judgment by writ from a maintenance award would be expressly disallowed by Colorado law, therefore any action to collect an attorney's lien from maintenance obligations and payments would be void as against public policy, even though not specifically prohibited by statute.

The court reasoned that the purpose of maintenance is to assist a needy spouse in recovering from a dissolution of marriage and moving toward financial stability. Therefore, the collection of attorney's fees from same could deprive the recipient spouse of the ability to become financially stable. The court acknowledged, however, that the fees were voluntarily incurred by the recipient spouse, were a valid debt and were rightfully earned and collectable by the attorney. The court did not address the fact that, for wealthier families, maintenance is not solely a source of subsistence, but also a payment to allow the recipient spouse to maintain an affluent lifestyle similar to that of the payor spouse.

The attorney petitioned for certiorari, and the same was granted in 2016. The Colorado Supreme Court will determine: "Whether a statutory attorney's lien attaches to the client's receipt of an award for spousal maintenance; and whether public policy prohibits an attorney from foreclosing… on maintenance payments." The Supreme Court has invited stakeholders to file amicus briefs.

If the Supreme Court affirms the decision of the Court of Appeals, the ability of the "downside spouse" to retain competent counsel could be markedly diminished. Certainly, as a matter of public policy, the collection of unpaid attorney's fees from maintenance, the primary source of support for a needy ex-spouse, is highly problematic. But unless courts are more willing to equalize the cost of legal fees between spouses during the pendency of the case, the ability of the downside spouse to fairly participate in the litigation could be diminished.

THE STATUS OF STUDENT LOANS AS MARITAL DEBT, AND NOT INCOME

In 2016, the Colorado Court of Appeals considered whether student loans obtained during the marriage should be considered marital or separate debt in the dissolution of marriage action; and whether student loan proceeds should be considered as a financial resource to the student spouse when determining maintenance.

These issues are now very common for divorcing spouses when one or both sought a college education or advanced degree during their marriage.

CONTINUED ON PAGE 20...

CONTINUED...

MENTAL HEALTH
CONTINUED FROM PAGE 4...

and there is "a whole body of case law" delineating the difference between comfort animals and service animals, von Grabow said. Accommodating a comfort animal can be especially complicated for restaurants, for example, as health codes can apply.

"It's one of those areas that frankly, when it comes up, I have to revisit the rules on it because each situation could be unique," von Grabow said.

Another challenging area for employers when it comes to mental health discrimination is testing an employee's fitness for duty. When an employee exhibits angry or aggressive behavior possibly arising from a mental health condition, "often there's a concern about whether the person is going to cause harm to themselves or others as a result of their conduct at work," von Grabow said.

But in order to take an adverse employment action against the worker, the employer must show objective evidence that the worker poses a safety risk or is unable to do the job, even when provided an accommodation. In asking the employee to undergo a fitness for duty assessment, the employer shouldn't proceed on the assumption that the employee actually has a mental condition, von Grabow said. The employer has to respect the worker's antidiscrimination rights while promoting a safe and productive workplace.

"I think that's where the delicate balance comes into play here," she added. •

— Doug Chartier, DChartier@circuitmedia.com

PUBLIC TRUST
CONTINUED FROM PAGE 5...

"manageable" jurisdiction size and its range of populations to address that includes a significant number of refugees as well as rural white communities.

"We're not the only place (doing this), but we're the exception," he said.

As he was beginning his interim leadership, Troyer told Law Week in September that he was interested in getting an official presidential appointment.

But the outcome of the November election may have cast doubts on his prospects for appointment. A Republican administration under Trump, along with a new U.S. Attorney General, is expected to shift priorities in the Justice Department. But considering the time it takes for the president to select a new U.S. Attorney and have him or her vetted and confirmed, the time Troyer has left to carry out his interim role is by no means short.

But Troyer expects the outreach policy to outlast him regardless of who ends up being his successor. His office's law enforcement and community partners, he said, will keep requesting the Justice Department's presence in activities, and the public safety benefit of that presence will speak for itself.

"Anyone who comes in here is going to find out that that is important work that has paid dividends," Troyer said. "I'm going to continue making this a priority as long as I'm here. And when I go, there are going to be 69 people who are still here who believe in that as community safety work." •

— Doug Chartier, DChartier@circuitmedia.com

ETHICS
CONTINUED FROM PAGE 8...

"Despite the harshness of the way the court applied the rule, it has done so correctly. But that's the first step," Luce said. "If that's how the rule is being applied, should the rule be revised?" Luce cited two prior cases with two separate outcomes to highlight the possibilities for the CHEEZO unit and future situations where attorneys use investigators to collect information. He compared the CHEEZO unit to common law enforcement practices that involve posing as someone else to catch someone or attorneys' use of private investigators.

In one Colorado case, People v. Pautler, the court used the rule to suspend a deputy district attorney after he posed as a public defender in order to convince a murder suspect to surrender to authorities attempting to arrest him. In Pautler, the court said that there are no exceptions to the rule, even in extreme circumstances.

An Oregon case where a private attorney posed as a chiropractor to aid a fraud investigation, however, led to a rule change in the state. The Oregon Supreme Court said, similarly to Colorado's, that there are no exceptions to the state's rule. The court did, however, revise its rule shortly after to allow attorneys to advise or supervise a covert investigation.

While Oregon has adapted its rule to allow for attorneys, and prosecutors specifically, to use investigators to gather information in a way that law enforcement agencies might, Colorado's rule keeps attorneys from involving themselves at all. And according to Luce, the Colorado Supreme Court now has two test cases that show the direct effects of the rule.

The latest, he said, "makes the Internet safe for child molesters," and that should be enough to inspire a discussion about whether to adopt a rule similar to Oregon's.

Colorado's rule matches the American Bar Association's model rule 8.4(c). A handful of other jurisdictions joined Oregon in adding carve-outs for government attorneys working in law enforcement purposes shortly after it amended its rule, though, including Washington, D.C., Utah and Virginia.

"Now we have the opportunity to do something and ought to do so," Luce said. "When the rules of ethics are at cross-purposes with justice, it's time to revise them. •

— Tony Flesor, TFlesor@circuitmedia.com

SECRETARY OF LABOR
CONTINUED FROM PAGE 19...

- In 2016, through a provision in the budget bill, fines were increased by almost 78 percent with the ability to increase each year due to inflation. This penalty change has more than doubled the average penalty for a serious violation. These penalty increases are likely to be reviewed.
- OSHA's recent recordkeeping and reporting rule went into effect in December 2016. The anti-retaliation provisions of the rule have created concern due to its unknown effect on employer's incentive programs and drug testing programs. The new administration could roll back or weaken the enforcement of these provisions.
- Finally, the commission that has appellate review over judicial rulings for OSHA enforcement actions currently has a vacancy that will be filled by the new Administration to have a full three-member panel.

MSHA

Similarly, it is anticipated that the new administration will implement measures to alleviate the regulatory burdens that have been imposed on the nation's mines by MSHA. Many eagerly hope for a return to a more collaborative environment between government and industry. Potential changes that could occur include:

- The Federal Mine Safety and Health Review Commission is the adjudicative agency that provides appellate review of disputes under the Mine Act. A full commission consists of five members. Currently, the commission has one vacancy with two additional member terms expiring in August 2018. The new administration will be able to appoint a majority of the members on the commission setting the tone for adjudicative review of agency actions.
- During Obama's administration, MSHA used policy guidance to change long-standing interpretations of regulations. We expect revisions to policy guidance and a return to the formal rule making process.
- Many anticipate a return to a meaningful conferencing process, which reduces the amount of litigation before the agency, and for MSHA to establish formal timelines for special investigations, which currently can take up to two years before investigations are finalized.

There are many more possible changes to OSHA, MSHA or other divisions within the DOL.

While these highlighted changes may only be the beginning, most employers expect and hope for a more collaborative environment as opposed to an enforcement one.

It remains to be seen which approach leads to safer workplaces, the goal of both workers and employers. •

— Kristin White is a member of Jackson Kelly and manages the firm's Denver office.

AS WE LOOK TOWARD 2017, WE AS PRACTITIONERS MUST BE COGNIZANT OF IMPORTANT CHANGES IN COLORADO FAMILY LAW...

FAMILY LAW
CONTINUED FROM PAGE 18...

With regard to the characterization of the student loan incurred during the marriage, the court found that "a party's student loan obtained during marriage constitutes marital debt." Under Colorado law, this finding allows the debt to be divided between the parties in the equitable division of property and debt.

However, the court opined that the trial court may consider the equitable circumstances in allocating the entirety of the debt to the student spouse, if that party would be the only person who will ultimately benefit from the education that was the basis for the accumulation of the debt.

Arguably, if some portion of the student loan supported the family while the student spouse attended school or the student spouse was thereafter earning significant income that benefitted both spouses, the trial court also has the discretion to consider apportioning some debt to the non-student spouse.

The Court of Appeals also found that student loan proceeds should not be considered as a financial resource to the recipient spouse in calculating maintenance.

The court reasoned that consideration of loan proceeds as an asset or financial resource ignores a fundamental characteristic of a loan: it has to be paid back, ordinarily with interest.

This decision will be helpful to parties in negotiating the equities of a dissolution where the division of the student loan obligation constitutes a primary issue in the division of the marital estate, and a maintenance claim requires consideration regarding payment of said loans.

Lastly, one must be aware that there are significant upcoming changes to statutory law with regard to child support. As we look toward 2017, we as practitioners must be cognizant of important changes in Colorado family law, not only from the courts and the legislature, but in the form of Chief Justice Directives and attorney ethics as well. As always, for those attorneys who focus their practice in the area of family law, there is never a dull moment. •

— Jennie Wray is managing partner of the Evergreen office of the Harris Law Firm, and Ret. Judge Angela Arkin is an attorney in the Denver office of the Harris Law Firm.