

Colorado Court of Appeals
2 East 14th Ave.
Denver, CO 80203

Appeal from Arapahoe District Court,
Judge Robert Russell
05DR1286
7325 S. Potomac
Centennial, CO 80012

In re: the Marriage of

Appellee: R. C.W. B.

and

Appellant: S. R. B.

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Case Number:

08CA790

AMENDED OPENING BRIEF

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ISSUES PRESENTED

- I. Whether the district court erred in ruling that the parties' daughter, who has severe psychological issues, was emancipated and not entitled to support from her father.**
- II. Whether the district court erred in awarding attorney fees against Mother who sought support for the parties' daughter, based on her severe psychological issues, when there was no claim for fees under § 14-10-119 and Mother's position was neither groundless nor frivolous.**

STATEMENT OF THE CASE AND FACTS

R.B. (Father) and S. B. (Mother) separated after twenty-six years of marriage, and subsequently divorced. Although Mother had supported her husband during the early years of their marriage from 1978 until 1989, she had been a full time mother since the birth of their second child. Issues included property division, maintenance, and support for their two daughters. This appeal involves the older daughter, C., who was diagnosed at the age of nine as bipolar disorder. C.'s psychological prognosis has been poor for many years. Her medical psychiatric billings have reflected the same diagnosis for many years, since at least early 2003: Severe bipolar disorder, mixed state, with psychotic features.

Interim orders were entered on June 29, 2005, based on argument of counsel but no evidence. The court stated both that C. was emancipated *and* that no inferences should be drawn from the interim orders and that they may be modified at temporary orders. Vol. I, pp. 61-62.

A hearing on temporary orders was held August 15, 2005. Vol. 4. Mother testified that Father was the girls' primary source of financial support. (Vol. 4, p. 27, lines 13-14). She testified that both parties absolutely wanted to continue to support both girls. (Vol. 4, p. 42, lines 5-10). Father himself also testified that C. was not financially independent. (Vol. 4, p. 56, lines 21 – p. 60, line 1). However, Father planned to continue supporting C.. (Transcript p. 67, line 7 – p. 68, line 5). Father testified that he paid C. “significant support.” (Transcript, p. 93, line 14). See also Petitioner's Exhibit 1, filed August 15, 2005, showing support for C.. In closing argument Father's counsel argued that the court needed to consider that C. was not emancipated and the parents had a mutual commitment to support C.. The parties' emphasis at temporary orders was how to consider Father's support of C. in determining an appropriate amount of maintenance for Mother.

Temporary orders were entered August 25, 2005. Vol. I, pp. 68-71. In the temporary orders, the court held that Father had the responsibility to support both daughters, ¶ 9, and that the older daughter “has a disability and is not capable of supporting herself fully.” Vol. I, p. 70. The Court ruled in Paragraph 3 that although C. was over the age of nineteen she had a disability due to her bipolar condition and was not capable of supporting herself. The court made a factual

finding that C. resided in an apartment paid for by her Father. The court did consider the support of the children when it awarded maintenance to Respondent.

When the parties exchanged financial information on 2006, Father's information included significant amounts paid on behalf of C.. See, e.g., Vol. I, pp. 102-124 with details of "Medical:C.; C. Edu; preauthorized C.." Mother's financial affidavit showed no support for C..

The parties mediated their issues with Michael DiManna and, to clarify several issues in the resulting separation agreement, arbitrated it with Mr. DiManna. Vol. I, pp. 163-171. Mr. DiManna declined to put a provision regarding C. into the agreement, concluding that the parties had not reached any agreement about her. The separation agreement did award a dependency exemption for both children to the father. See Paragraph 8.3 of Separation Agreement. The arbitrated separation agreement was made an order of the court August 28, 2006. Vol. I, pp. 172-190. A decree of dissolution was entered on September 26, 2006. Vol. I, p. 196.

After entry of permanent orders, Father cut his support of C. to paying her health insurance and out of pocket medical expenses, forcing Mother to support C. out of her maintenance or let C. become homeless. So, less than a year after the decree of dissolution mother filed a verified motion for modification of support to

address the issues with both girls, seeking to have Father contribute to C.'s support. Vol. I, pp. 199-203. Mother stated that she was paying for C.'s apartment, car, food, and clothing, and that she would seek a guardianship or conservatorship for C.. She verified that she had conferred with C.'s doctor, who saw no progress toward independence for C.. Finally, Mother cited statutory provisions for support of a child with a disability, and sought modification of the existing orders.

Father filed a verified response, citing among other arguments the interim order of June 29, 2005 that C. was emancipated. Vol. I, pp. 213-222. He argued a number of factors, including C.'s age, and the fact that she had moved to her own apartment at the age of 17. He argued that for a child to have support due to a disability, the disability had to exist prior to the age of nineteen.

Mother's reply pointed out certain inaccuracies in Father's response, and argued that she had been awarded contractual maintenance but the amount is modifiable. Vol. I, pp. 223-230. She argued that C.'s condition was long standing, not a deterioration since the dissolution. Because Mother's reply brought up the issue of maintenance, Father filed a reply to it. Vol. I, pp. 234-239. Father erroneously argued that the June 29, 2005 interim order was final and, because Mother had not sought review of it pursuant to C.R.M. 7, it was binding.

The court conducted two telephone status conferences, which were not recorded. It then entered its order on March 27, 2008, that C. was emancipated. Vol. II, p. 489. The order permitted Father to file a motion for attorney fees. Mother filed a timely appeal from that order.¹

Father filed a motion for fees, citing the work performed in response to mother's motions, and argued that mother's position was without merit. He supported the motion with timesheets and counsel's affidavit in support of the requested fees. Vol. 2, pp. 446-478.

Mother's response argued that her motions were neither groundless nor frivolous, as defined in relevant case law. She cited record support for her factual allegations, and case authority for her legal arguments. She further pointed out that Father is financially better positioned than she to pay fees. Vol. 2, pp. 498-501.

The court awarded Father the fees that had not yet been paid, \$7,198.04 but did not state the basis for the award. Vol. 3, p. 541. Mother amended her appeal to include the fees order. After resolution of a question about the finality of the emancipation order, the appeal proceeded.

SUMMARY OF ARGUMENT

¹ Mother actually filed two notices of appeal and moved to dismiss the first because counsel had inadvertently referenced the second child. The second child is not at issue in this matter.

The order being appealed, that C. is emancipated, should be reversed because the court failed to enter any findings on the disputed facts. Mother's motion for support for C. after Father no longer voluntarily supported the disabled child was not barred by the law of the case. The only hearing that addressed whether the parties' disabled daughter was entitled to support past the age of nineteen was the temporary orders hearing on August 15, 2006. At that time, the court found that C. could not support herself and ordered Father to pay support for her. That finding should be applied to award support for C. now.

Father cited no basis for an award of fees against Mother, and the court failed to state any reason for the award. Mother's motion was neither groundless nor frivolous under statutory and case law standards. Moreover, where as here Mother is living on maintenance paid by Father, she should not be forced to pay any portion of Father's fees under § 14-10-119.

ARGUMENT

- I. The trial court erred in ruling that the parties' daughter, who has severe psychological issues, was emancipated and not entitled to support from her father.**

Standard of Review

A reviewing court is not bound by a trial court's conclusions of law. *Tatum v. Basin Resources, Inc.*, 141 P.3d 863, 867 (Colo. App. 2005). An appellate court

defers to a trial court's factual findings on disputed facts but applies a de novo standard of review to application of a legal standard. *Matoush v. Lovingood*, 159 P.3d 741 (Colo. App. 2006).

Preservation in the Record

Mother raised the issue whether C. was emancipated or entitled to support in her verified motion for modification of support, seeking to have Father contribute to C.'s support. Vol. I, pp. 199-203.

Analysis

Section 14-10-115(13)(a)(II) provides "If the child is mentally or physically disabled, the court or the delegate child support enforcement unit may order child support, including payments for medical expenses or insurance or both, to continue beyond the age of nineteen years."

Application of this legal standard to the factual issues should be reviewed de novo. However, the court's only factual finding is that C. is over the age of nineteen. There is no finding as to her disability. Instead, the court appears to have relied exclusively upon C.'s age and the interim order of June 29, 2005. As noted

above, that interim order was based exclusively on argument of counsel with no evidentiary hearing or findings.

The parties filed conflicting verified motions on the issue whether C. was emancipated. The court, in its ruling, merely cited C.'s age, in its sentence that C. is emancipated. It made no findings of fact, and in no way addressed the disputed facts about her disability.

The absence of factual findings makes meaningful review difficult. See *People ex rel. J.L.*, 121 P.3d 315, 318 (Colo. App. 2005) (“Because the trial court did not make any factual findings or otherwise explain the reason for its determination, we have no basis for conducting a meaningful review of the ruling, and we cannot make factual findings of our own.”)

The doctrine of the law of the case, based on the interim June 29, 2005 order, should not bar relief to Mother. Under the doctrine of the law of the case, prior relevant rulings made by the court in the same case are generally to be followed unless unusual circumstances, such as intervening changes in the law or circumstances, justify an exception to the doctrine. *People v. Roybal*, 672 P.2d 1003, 1005 n.5 (Colo.1983):

The doctrine of the law of the case refers not only to the conclusive effect of appellate rulings on remand, but also to the binding force of trial court rulings during later trial court proceedings. Prior relevant rulings made by the trial court in the same case are generally to be

followed. However, the law of the case as established by trial court rulings is not binding if it results in error or is no longer sound due to changed conditions, *People ex rel. Gallagher v. District Court*, 666 P.2d 550, 553 (Colo.1983), i.e., if manifest injustice would result, *Verzuh v. Rouse*, 660 P.2d 1301, 1303 (Colo.App.1982). The court that makes a decision has the power to reconsider it, as long as the case remains within its jurisdiction. 1B *J. Moore, Federal Practice* ¶ 0.404[1] at 118 (2d ed. 1983). The doctrine of the law of the case is more flexible in its application to reconsideration by the court making the decision, because there the only purpose of the doctrine is efficiency of disposition. *Id.* ¶ 0.401 at 4.

Thus, when there has never been a separate evidentiary hearing on the issue of C.'s disability, there are no factual findings on her disability, and her entitlement to support, the law of the case does not bar mother's motion for support for C..

Indeed, the temporary orders entered after the August 15, 2006 hearing, included support for both children even though C. was over nineteen at that time. Vol. I, pp. 68-71. specifically p. 70.

Conclusion

The trial court erred in ruling that C. was not entitled to support where the only record findings are in the temporary orders that she is not capable of supporting herself.

II. The district court erred in awarding attorney fees against Mother who sought support for the parties' daughter, based on her severe

psychological issues, when there was no claim for fees under §14-10-119 and Mother's position was neither groundless nor frivolous.

Standard of Review

Ordinarily, an award of attorney fees is reviewed for an abuse of discretion. See *Kennedy v. King Soopers, Inc.*, 148 P.3d 385, 389 (Colo. App. 2006). However, here the issue whether any fees should have been awarded invokes the legal question of the basis for any award, which should be reviewed de novo. See *Tatum v. Basin Resources, Inc.*, 141 P.3d 863, 867 (Colo. App. 2005) (reviewing court is not bound by trial court's conclusions of law).

Preservation in the Record

Mother preserved her opposition to an award of fees in her Opposition to Motion for Attorney Fees, Vol. II, pp. 498-504.

Analysis

Petitioner's motion for fees failed to cite any basis for an award of fees. See Vol. IV, pp. 446-450. "Attorney fees are generally not recoverable in the absence of "a specific contractual, statutory, or procedural rule providing otherwise." *Lawry v. Palm*, -- P.3d -- (Colo. App. July 24, 2008) (quoting *Waters v. Dist. Court*, 935 P.2d 981, 990 (Colo.1997)).

Mother construed the motion for fees as seeking a sanction for a groundless or frivolous claim. So she opposed the request, arguing how the statutory provision in § 13-17-103 for an award of fees for a groundless or frivolous position was not applicable. See Vol. II, pp. 498-504. In short, a claim is frivolous if *no* rational argument based on the law can be advanced. *Foxley v. Foxley*, 939 P.2d 455, 460 (Colo. App. 1997). A claim is groundless if there is no credible evidence to support the allegations of the complaint. *Elrick v. Merrill*, 10 P.3d 689, 698 (Colo. App. 2000). See *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1066 (Colo. 1984).

Although Petitioner filed a reply which asserted that mother could afford the requested fees under § 14-10-119, and that there had been no reasonable basis for her position, Vol. III, pp. 520-527, the order awarding fees stated no basis for the award. See Vol. III, p. 541.

In this situation, a reviewing court must determine, if it can, whether Petitioner's failure to cite a basis for an award of fees in the original motion or the lack of findings in the order should be fatal to the award. Here, the court not only provided no findings in its award of fees, it denied Petitioner's C.R.C.P. 59 motion, Vol. III, pp. 551-552, which requested amended findings because the order had been appealed.

Mother requests that this court vacate the award of fees because her position has a rational basis, and presented appropriate argument in support of the factual basis. There has been no finding to support an award under § 14-10-119. Further, if this court is persuaded by Mother's argument as to the first issue on appeal, it would prove that her position is not groundless or frivolous.

CONCLUSION

Appellant, S. B., requests this court to reverse the order that C. B. is emancipated, vacate the award of attorney fees and remand for further proceedings if appropriate.

Respectfully submitted:

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Amended Opening Brief** was served by depositing it in the United States mail, first-class postage prepaid, on the 29th day of September, 2008, addressed to the following:

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