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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.**	▲ COURT USE ONLY ▲ Case Number: **08CA790**
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REPLY BRIEF

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RESPONSE TO FATHER'S STATEMENT OF THE CASE AND FACTS

S. B. (Mother) does not agree with R. B.'s (Father) Statement of Facts. At page 3 of the Answer Brief, Father emphasizes that the Magistrate's September 17, 2005 order advised the parties of their right to seek review of the order and that neither party did so. However, only a final magistrate's order is subject to review, and the September 17, 2005 order was not final. *In re Marriage of Roosa,* 89 P.3d 524, 529 (Colo. App. 2004). To the extent that the order did set some financial issues, such as maintenance, it might have been subject to review, see *In re Marriage of Nussbeck*, 899 P.2d 347 (Colo. App. 1995 (temporary maintenance order); *In re Marriage of Henne,* 620 P.2d 62 (Colo. App. 1980), but the issue of emancipation was not ripe for review.

On page 4, of the Answer Brief, Father states that Mother misrepresented the record, that the Magistrate did not impose an obligation to pay support for C.. But

see Vol. I, p. 70 ("Husband does have the responsibility of supporting both children of the parties, and the Magistrate finds the oldest child has a disability under which she is not capable of supporting herself fully at this time.") Contrary to the statement in the Answer Brief at p. 11-12, the temporary orders do not refer to either child as emancipated or unemancipated. Mother had testified that both parties absolutely wanted to continue to support both girls. (Transcript, p. 42, lines 5-10). Father himself also testified that C. was not financially independent. (Transcript, 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 also testified that he paid C. "significant support." (Transcript, p. 93, line 14). 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 court refers to Father's "expenditures" on behalf of the children, and states that Father is not seeking child support from Mother at this time. Vol. I, p. 70. The Magistrate did not address an amount of child support in that order, only maintenance to be paid to Mother.

Pages 5-7 of the Answer Brief discuss the parties' negotiations before an arbitrator for a separation agreement. Those negotiations include Father's efforts to add a provision about C. that had not been discussed before the arbitrator.

Mother's response to Father's attempt to add an un-negotiated provision to their agreement focused on maintenance, and whether Father's support of C. should be factored into the award of maintenance to Mother. It was Father who argued, in his closing argument, that C. was not emancipated and that he should receive credit for the support he provided to her. Father's counsel stated: "I think frankly the testimony established that she is not emancipated." Vol. 2, p. 440, ¶ 5.

Ultimately, as Mother had urged, the agreement did not include the provision on which they had not agreed.

Throughout this litigation, the evidence established that C. earned only $6,786.75 in 2005 and $1,543.18 in 2006. Vol. 2, p. 436. Obviously, her apartment, car, and living expenses were subsidized by the parties.

And, the emphasis on the quoted provision of the Decree of Dissolution ignores the contrary use of the plural "children" in the same sentence: "All provisions regarding the child are in the best interest of the children …." Vol. 1, p. 197.

This record demonstrates that the parties did not reach an agreement, and the various district court orders are susceptible of more than one interpretation about the status of the children and support for them.

SUMMARY OF ARGUMENT

Mother is not barred by the doctrine of res judicata or claim preclusion from litigating her motion for support for C.. The record from interim orders through permanent orders is unclear as to C.'s status. As a result, Mother appropriately cited alternative statutory provisions in support of her motion. The district court erred in not holding an evidentiary hearing to determine whether C. was emancipated or entitled to support.

As stated in the Opening Brief, Father cites no basis for an award of fees against Mother, and the court failed to state any reason for the award. Father attempts to support the award, but he failed to argue a basis for any award. Moreover, it is the duty of the district court to make findings to support its order. There is no factual or legal basis for an award of attorney fees. Nor did Mother invite any deficiencies in Father's motion or the court's ruling.

ARGUMENT

I. Mother is not barred by res judicata or claim preclusion from seeking support for the parties' daughter, who has severe psychological issues.

Requirements of Res Judicata

Res judicata bars subsequent relitigation of the same issue. For the doctrine to apply, the issue must be identical, and there must have been a final determination of that issue. *Murphy v. No. Colo. Grain,* 30 Colo. App. 21, 488 P.2d 103 (1971). Claim preclusion, or collateral estoppel, has four elements. *Pomeroy v. Waitkus,* 183 Colo. 344, 517 P.2d 396, 400 (1973) ("First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was there a final judgment on the merits? Third, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? And, fourth, did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication.")

Analysis

Here, there has not been a final determination whether C. was emancipated at age nineteen. Following the interim order, C.'s status was addressed only in conjunction with the amount of maintenance that Mother would receive. Even then, the discussion and order addressed expenditures on C.'s behalf rather than

her status as emancipated or supported. It was never disputed that both parties contributed to C.'s expenses, or that C. needed those expenditures.

There has never been a separate evidentiary hearing on the issue of C.'s disability, there are no factual findings on her disability, or her entitlement to support. In this unusual situation, in which C.'s disability and entitlement to support have never been directly addressed, the doctrine of res judicata does not bar Mother's motion for support for C..

The question of emancipation is a question of law. *In re Marriage of Robinson*, 629 P.2d 1069 (Colo. 1981). When, as here, the evidence shows that C. is not capable of providing her own support, and the district court's findings are that Father has a responsibility to support his daughters (Vol. I, p. 70), it was error to deny Mother's motion for support for C..

The two statutory provisions cited by Mother are applicable under these circumstances, in which the district court had implied support for C. when it ordered, after C. was nineteen, that Father has a responsibility to support both daughters.

First, the characterization of Mother's motion as seeking to establish support is misleading. Up until shortly before Mother filed her motion, Father had been supporting C.. It was only when Father changed his position, that Mother sought

court intervention to ensure that C. continued to have the support that she had received throughout the proceedings. In this respect it is noteworthy that the only direct mention of support was the statement in interim orders that Father was not seeking child support from Mother, and that Father had a responsibility to support the children.

Section 14-10-115(13)(a)(II), C.R.S. provides that a child shall not be automatically emancipated at the age of nineteen if the child is mentally or physically disabled. The district court's statement that Father was responsible for support, entered after C. attained the age of nineteen, implies that the district court had found her disabled. As such, there was a foundation for Mother to seek to continue support due to C.'s disability.

Mother also cited §14-10-122 in her motion. Father overstates Mother's position when he characterizes the motion as seeking a modification based on C.'s worsening mental health. Mother's motion did not develop the basis for modification pursuant to §14-10-122. Father's footnote which referenced the probate proceeding is unhelpful in that no one disputes that C. was over the age of nineteen and is not a minor. Whether she is incapacitated and should have a guardian appointed was the subject of the probate action and, while tangentially

related to the issue of emancipation, is not dispositive of whether C. suffered a disability and was entitled to support before or after she turned nineteen.

This case is not about whether C. became disabled after she turned nineteen. It is about whether her disability prevented her from emancipating, and whether she should have received support because she has never been able to support 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.

Analysis

Father's motion for fees failed to cite any basis for an award of fees. See Vol. 2, pp. 446-450. See also proposed order, Vol. 2, p. 47, with no proposed findings to support an award of fees. After Mother responded, guessing that Father would assert that her position had been groundless or frivolous, he belatedly asserted a basis for his claim in his reply. "Attorney fees are generally not recoverable in the absence of "a specific contractual, statutory, or procedural rule providing otherwise." *Lawry v. Palm,* 192 P.3d 550, 569 (Colo. App. 2008) (quoting *Waters v. Dist. Court,* 935 P.2d 981, 990 (Colo.1997).

Only after Mother amended this appeal to include the award of fees did Father ask the district court to enter findings.

It is Father who invited the district court to award fees without asserting any statutory basis for them. See Vol. 2, pp. 446-450. It is Father who invited the district court to award fees without any supported findings. See proposed order, Vol. 2, p. 47. For Father to claim that Mother invited the error because of her objection to Father's C.R.C.P. 59 motion on fees is unpersuasive. Indeed, the district court denied Father's motion because the order had been appealed and for no other reason.

Mother presented verified facts in her motion for support, and made an appropriate argument for support for C. after she was nineteen. See *Foxley v. Foxley*, 939 P.2d 455, 460 (Colo. App. 1997); *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).

Father claims that Mother should contribute to his fees pursuant to § 14-10-119. That provision is intended to equalize the parties' financial status, not punish one. See *In re Franks,* 189 Colo. 499, 542 P.2d 845 (1975). It is based on the parties' relative ability to pay. *In re Gutfreund,* 148 P.3d 136 (Colo. 2006).

Father is a surgeon, whose admitted income at the time of dissolution was nearly $500,000. He pays maintenance of $12,000 per month to Mother, less than 30% of his income. After Father's dissipation of marital assets and transfer of assets to his paramour, the remaining marital estate was divided equitably. Mother is not in a superior financial position such that she should contribute to Father's attorney fees under §14-10-119.

In this situation, a reviewing court must determine, if it can, whether Father'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 district court not only provided no findings in its award of fees, it denied Father's C.R.C.P. 59 motion, Vol. III, pp. 551-552, not on the basis of mother's response but because the order had been appealed.

Mother requests that this court vacate the award of fees because her position has a rational basis, and she presented appropriate arguments 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 to set support for C..

Respectfully submitted:

_____

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Reply Brief** was served by depositing it in the United States mail, first-class postage prepaid, on the 2d day of January 2009 addressed to the following:

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