APPELLATE REVIEW

CHANGING THE LEGAL LANDSCAPE

Local attorneys highlight the year's most noteworthy family law appellate cases

BY **SARAH GREEN**
LAW WEEK COLORADO

What happens when a dissolution of marriage ends with a question of embryotic property? Or when a court decides laches could be used in the collection of the principal in unpaid child support?

Several family law cases have gone through Colorado's appellate court system over the past year, but three cases in particular may have changed the legal landscape — both locally and nationally.

> *"What I think is sort of interesting is that it goes forward and resets forth what the Colorado legislature has said about human embryos, that they are not children and embryos (are) marital property."*
>
> —Justin Summers, family law attorney

IN RE MARRIAGE OF JOHNSON

The Colorado Supreme Court concluded in 2016 that In Re Marriage of Johnson, where the respondent waited 18 years to file a claim, the petitioner could use laches of unreasonable delay as an acceptable defense in an action to collect interest on unpaid child support.

William Johnson and Carolyn Hodgson dissolved their marriage in 1983. As a result, Johnson was ordered to pay $400 in monthly child support for their two children until they reached the age of emancipation.

Harris Law Firm associate and family law attorney Katherine Ellis said the Johnson case is significant to family law because it demonstrates that legal principles that apply in other areas of the law.

"We often tend to think of family law as being a fairly insular area of law, but it is important to remember that contract principles, equitable doctrines and other common law concepts can and do apply in family law cases as well," she said.

Ellis added that the case "stands for the proposition that common law principles that penalize people for standing on their rights and that favor a swift and determinate legal system also apply in family law cases," she said.

"The effect of the ruling in Colorado should be to see fewer people waiting significant lengths of time before pursuing arrearages, which will hopefully also allow those cases to close more quickly."

In trial court, Hodgson brought an action against Johnson, claiming he owed her over $800,000 in back payments plus interest for years of unpaid child support. Johnson argued that he should not be responsible for paying interest because his ex-wife waited 18 years to initiate her claim. However, since the age of majority changed in 1991 from 21 years of age to 19, Johnson agreed that he was responsible for $4,800

for the one year of child support that he did not pay after their youngest child turned 18. The trial magistrate granted entry of the judgement over Johnson's objection for a defense of laches.

Tom Cossitt, principal of The Cossitt Law Firm in Fort Collins, represented Johnson during the initial trial. He said the case is a positive development in family law cases because allowing the defense of laches as to the interest on unpaid child support should "encourage the prompt enforcement of unpaid child support thereby providing the children with the support they deserve while also allowing a much-needed safety valve in circumstances where the delay in enforcing was unreasonable and prejudicial."

"At the highest statutory rate, the interest on unpaid child support is 12 percent a year compounded monthly and the importance of children having the financial support from each of their parents warrants such a high rate to ensure the support is paid," he said, noting that if a parent is unaware of the interest rate then there is no encouragement from this high rate to pay their obligation.

Given the 20-year statute of limitations on unpaid child support payments, parents could wait to enforce unpaid child support until the child turns 20 years old and still receive the interest, he added.

Gutterman Griffiths associate and family law attorney Justin Summers said this case opens many doors for future family law cases that deal with child support.

"I think a lot of attorneys are going to run into (cases) like this. Unpaid child support is not uncommon and I think that is going to immediately have an impact on the way post decree litigation is done in Colorado," he said.

IN RE MARRIAGE OF GROMICKO

In 2015, Lisa Gromicko filed for a dissolution of marriage where she petitioned for an equitable division of the marital assets and debts as well as spousal maintenance from her husband Nick Gromicko, who founded Boulder-based International Association of Certified Home Inspectors, and refused to make his company's records available to his wife, contending that he was "merely an employee of the company and had no authority to provide the records."

Although the company's general counsel filed a brief on behalf of the company, the trial court did not make a ruling, so Lisa Gromicko served a subpoena and InterNACHI moved to quash it, arguing that many of the documents were "privileged, confidential and irrelevant to the dissolution proceedings." The trial court denied the home inspection company's motion and ordered it to produce the records.

The Colorado Supreme Court reversed the trial court's order, stating that the lower court did not take an active role in managing Lisa Gromicko's discovery request and remanded it to make findings about the appropriate scope of discovery.

"This is an interesting case in that it deals with discovery in a family law case, specifically with respect to cases where one party makes a claim to pierce the corporate veil and that there's a corporate entity that is acting as the alter ego of one of the parties in the case," Summers said.

"Our rules applying to discovery generally suggest that anything that is relevant or is reasonably believed to lead to relevant information is discoverable, however in this case the court specifically held that the court abused its discretion in not limiting it only to what was reasonably necessary to prove their claim as opposed to allowing (Lisa Gromicko) to get all of the information at once that she had been entitled to."

IN RE MARRIAGE OF ROOKS

One issue of first impression in Colorado came before the Colorado Court of Appeals Oct. 20, 2016: How to determine who gets a couple's un-implanted, cryopreserved embryos after the dissolution of their marriage.

Mandy and Drake Rooks had three children through in vitro fertilization, but divorced in 2014. However, once the couple separated, the question of what would happen to the remaining cryopreserved embryos became an issue for the courts. The couple had signed a contract with the fertility clinic that stated "the embryos shall be discarded if a dissolution of marriage were to occur, unless the couple could agree on an alternative arrangement" — which they couldn't. Mandy Rooks sought to keep the cryopreserved embryos while Drake Rooks sought to enforce the contract and have them discarded.

"This is a unique circumstance that few attorneys have to deal with (and it is) not nearly as common of an issue as child support," Summers said. "However I think setting down law about how these types of disputes should be handled is going to apply a lot in the future, especially in the rise of non-traditional families. What I think is sort of interesting is that it goes forward and resets forth what the Colorado legislature has said about human embryos, that they are not children and embryos (are) marital property."

Since the couple originally agreed to discard the embryos on dissolution of their marriage the Colorado Court of Appeals affirmed the lower court's decision to award rights of the embryos to Drake Rooks based on a contract approach. Additionally, the court based its decision on the balancing of interest approach because Drake Rooks' disinterest in having more children with Mandy Rooks outweighed her interest in having a fourth child after they divorced.

"The court considered the emotional and psychological impact of the father knowing that he would have another child, and although he wouldn't have any legal responsibility, this other child would technically be his biological child."

The nature of such noteworthy family law cases not only impact the legal landscape of Colorado, but make an impact on other states as well, Summers said, adding that "these cases follow trends" and will impact the future of family law. •

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One issue of first impression in Colorado came before the Colorado Court of Appeals Oct. 20: How to determine who gets a couple's un-implanted, cryogenically frozen embryos after the dissolution of their marriage. The Colorado Court of Appeals affirmed the lower court's decision to award rights of the embryos to Drake Rooks based on a contract and the balancing approach because Drake Rooks' disinterest in having more children with Mandy Rooks outweighed her interest in having a fourth child after they divorced.

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