

## **CBA Civil Appeals Clinic Volunteer Outline for Domestic Cases**

This outline summarizes procedures, standards, and issues common to domestic appeals. It isn't designed to be comprehensive but merely to give you a broad overview of some of the applicable standards and issues you may encounter when advising self-represented litigants in a domestic appeal. (For general issues, please refer to the general issues outline.)

### **Is the order final and appealable?**

- Final, appealable orders generally include:
  - Temporary orders as to spousal maintenance, child support, and attorney fees
  - Permanent orders, once all issues are resolved, including issues of attorney fees (reduced to a sum certain)
  - Post-decree orders on motions to modify allocation of parental responsibilities (APR), spousal maintenance, or child support (note: these orders are final even if the court hasn't resolved any related attorney fee issues)
  - Contempt orders, once the court has made a contempt finding and imposed a sanction (reduced to a sum certain)
  - Permanent protection orders
  - Orders on post-trial motions (see notes on the next page regarding the effect of such motions on the deadline to appeal; also note that orders on CRCP 60 motions are separately appealable from the merits)
- Finality requirements: To be "final," an order must be dated, written, and signed and it must determine all issues. A minute order may constitute a final order if it fulfills these requirements (including being signed).

### **Is the order appealable to the Court of Appeals?**

- Magistrate orders: If the order was entered by a magistrate, the appellant may first need to file a petition for review in the district court before going to the Court of Appeals (CRM 7(a)).
- The test: The appeal path depends on whether consent by the parties was necessary for the magistrate to decide the matter.
  - Consent *is* necessary for a magistrate to preside over contested hearings resulting in permanent orders on property division, spousal maintenance, child support, and allocation of parental responsibilities (CRM 6(b)(2)). For these issues, the magistrate's order is appealable to the Court of Appeals, just like any other final order (CRM 7(b)).

- Consent *is not* necessary for a magistrate to preside over other matters, like motions to modify permanent orders (CRM 6(b)(1)). For these issues, an appeal may not be filed in the Court of Appeals unless a petition for review to the district court has been filed and decided (CRM 7(a)).
- Note on C.R.M. 7 notations: Magistrates are supposed to include a notation in each order indicating which appeal path applies (CRM 7(a), (b)); but that doesn't always happen or a notation could be wrong.
- Note on preservation: With few exceptions (for instance, issues that touch on the court's jurisdiction), generally only the same issues appealed to the district court may be appealed to the Court of Appeals.
- Timing: A petition for review must be filed in the district court within 14 days if the parties were present when the order was entered, or within 21 days after the order was mailed or otherwise transmitted to the parties (CRM 7(a)(5)).

### **Is the appeal timely?**

- Appeal deadline: 49 days after entry of the final order; but if a party filed a CRCP 59 motion within 14 days of the final order, the deadline is 49 days after the court's ruling on that motion.
- Caveats:
  - A CRCP 59 motion is deemed denied after 63 days (CRCP 59(j)).
  - Magistrates don't have authority to rule on CRCP 59 motions, so filing such a motion after a magistrate ruling on an issue that required consent won't toll the appeal deadline. But if the ruling was on an issue that didn't require consent, the district court might choose to treat a CRCP 59 motion as a petition for review. (See the section above titled "Is the order appealable to the Court of Appeals?" for information about matters requiring or not requiring consent.)
  - A CRCP 60 motion doesn't toll the appeal deadline.
  - An appeal may be timely as to a post-trial motion but still not timely as to the underlying order, depending on any tolling and the dates of the orders.

### **Does the appellant need to seek a stay of the judgment?**

- Automatic stay: A judgment is stayed automatically for 14 days (CRCP 62(a)) and then may be executed.
- How to seek a stay: A party generally must first seek a stay in the district court and then, if unsuccessful, in the Court of Appeals. The process and requirements are outlined in CRCP 62 and CAR 8.

- Note: Stays are discretionary, and if seeking a stay of a money judgment the movant will probably have to post a bond.
- Factors a court will consider in ruling on a stay request: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party will be irreparably injured absent a stay; and (3) whether other interested parties will be harmed by the stay (*In re Marriage of Finn*, 2016 COA 193, ¶¶ 13, 17, 24).

### **What review standards apply?**

- De novo: Interpretation of a statute; constitutional issues; interpretation of a marital or separation agreement
- Clear error: Factual findings
- Abuse of discretion: Application of legal standards to the facts, such as in determining the division of property, spousal maintenance, child support, and allocation of parental responsibilities.
- Harmful error: An appellant must show prejudice, *i.e.*, that an error affects their substantial rights. An error in a property division affecting a small percentage of the overall marital estate may be considered harmless.

### **What record is needed for review?**

- Transcripts: Under C.A.R. 10(d), the appellant must include transcripts of all proceedings necessary for considering and deciding the issues on appeal. So, for instance, if challenging a court's factual findings on an issue, the appellant needs to include transcripts where the facts were presented.

### **Do any special provisions apply?**

- Other states: If a party is dealing with out-of-state orders, or if the family has moved outside of Colorado, you may need to consider the provisions of the Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA). See C.R.S. §§ 14-13-101 – 14-13-403.
- Paternity: If a matter involves a contest about paternity, you may need to consider the provisions of the Uniform Parentage Act (UPA). See C.R.S. §§ 19-4-101 – 19-4-130.

**What common issues should you look for?**

**Division of marital property and debt** (CRS § 14-10-113)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>The court determines what property is separate and what property is marital. Generally, marital property includes all property acquired by a spouse during the marriage except by gift or inheritance — and property acquired by either spouse during the marriage is presumed to be marital, regardless of how (or in whose name) it is titled. But an increase in the value of separate property during the marriage is considered marital property. Also, if separate property is commingled with marital property it may become marital property.</p> <p>The court then sets apart for each spouse their separate property and divides marital property as it deems just after considering the relevant factors: the contributions of each spouse; the value of property set apart to each spouse; the economic circumstances of each spouse; and any increases or decreases in the value of a spouse’s separate property during the marriage or depletion of separate property for marital purposes.</p> <p>The court may also consider one party’s improper dissipation of marital property. However, the court cannot consider marital misconduct.</p> <p>The court has broad discretion in determining the value of the parties’ property. Marital property is valued as of the date of the dissolution decree or the hearing, whichever is earlier.</p> <p>The court has discretion to determine an allocation that is fair and equitable, and it needn’t be equal.</p>	<p>Did the court apply the correct standards?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings and valuations, such as on whether property is separate or marital, on the value of the property, or on dissipation of marital property?</p>

**Income** (CRS §§ 14-10-114(8)(c) & 14-10-115(3)(c), (5), (6))

<u>General standards</u>	<u>Potential appeal issues</u>
<p>The court will calculate each spouse’s income as part of its consideration of spousal maintenance and child support.</p> <p>Generally, “income” under the two statutes includes a party’s actual gross income, including all wages, tips, and income from any other source unless it is specifically excluded by the statutes. For instance, the statutes generally exclude income from public assistance and from a second job (so long as the first job is considered to be full time employment).</p> <p>A court may also consider a party’s potential income if the court finds they are voluntarily unemployed or underemployed. And it may use an average of a party’s income over several years if income varies.</p> <p>Courts will often use worksheets (and often the parties will present their own worksheets) to calculate income and make adjustments to income for purposes of calculating spousal maintenance and child support obligations.</p>	<p>Did the court apply the correct standards?</p> <p>Did the court correctly include or exclude certain forms of income?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings relating to both parties’ incomes?</p>

**Spousal Maintenance** (CRS § 14-10-114)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>If a party requests spousal maintenance, the court first must make findings on the amount of each party’s income, the marital property apportioned to each party, the financial resources of each party, reasonable financial need as established during the marriage, and whether maintenance would be deductible by the payor and taxable as income to the recipient for federal income tax purposes.</p> <p>Then the court must determine the amount and term of maintenance, if any, that is fair and equitable after considering (1) the guideline amounts set forth in the statute and (2) the statutory factors, which include the financial resources of both parties, the lifestyle during the</p>	<p>Did the court apply the correct standards, make the required findings, and consider the relevant factors?</p> <p>Did the court make the necessary findings under the statute?</p> <p>Did the court sufficiently explain,</p>

<p>marriage, the distribution of marital property, both parties' income and employability, whether one party historically earned more income in the past than currently, the duration of the marriage, the amount and length of temporary maintenance, the parties' age and health, the parties' significant economic or noneconomic contributions to the marriage, whether a nominal amount of maintenance is warranted to preserve a claim of maintenance in the future, the taxation or deductibility of maintenance for federal tax purposes, and any other relevant factor.</p> <p>The guidelines are not presumptive but are merely a starting point, and the court has discretion to determine an award of maintenance that is fair and equitable. It must make specific findings to support an award of maintenance but doesn't have to make explicit findings as to each and every factor.</p> <p>Finally, the court must consider whether and find that the party seeking maintenance lacks sufficient property to provide for their reasonable needs and is unable to support themselves through appropriate employment. A party can receive maintenance only if this need is satisfied.</p> <p>Also, parties may waive maintenance; but an unrepresented party can't waive it unless they have indicated they are aware of the maintenance guidelines in the statute.</p>	<p>and is there support in the record for, its findings on maintenance?</p>
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**Child support** (CRS § 14-10-115)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>To determine child support, the court first finds the basic child support obligation using the schedule in the statute.</p> <p>The court then allocates that amount between the parties using Worksheet A if only one parent has the child/children more than 92 overnights per year or Worksheet B if both parents have more than 92 overnights per year. (The worksheets are available</p>	<p>Did the court apply the correct standards and consider the relevant factors?</p> <p>Did the court correctly apply the guidelines and adequately explain</p>

<p>at <a href="http://www.courts.state.co.us/Forms">www.courts.state.co.us/Forms</a> in the “Family Matters” section.)</p> <p>The court may deviate from the guideline amount if that amount would be inequitable, unjust, or inappropriate, but it must first find the guideline amount and then explain any deviation.</p>	<p>any deviation from the guidelines?</p>
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**Allocation of parental responsibilities** (CRS § 14-10-124)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>A court will determine the allocation of parental responsibilities (APR), including parenting time and decision-making responsibilities, based on the best interests of the child/children.</p> <p>A court may consider several factors in determining the child’s best interests for these purposes: the parents’ wishes; the child’s wishes; the child’s relationships with the parents; the child’s adjustment to their home, school, and community; the mental and physical health of all persons involved; the parties’ ability to encourage the sharing of love, affection, and contact between the child and the other party; each party’s pattern of involvement with the child; the physical proximity of the parties to each other; and each party’s ability to place the child’s needs ahead of their own. A court must indicate that it considered the factors that are pertinent but needn’t make specific findings as to each and every factor.</p> <p>A court must also consider any domestic violence or child abuse or neglect.</p> <p>If a parent intends to relocate before entry of the initial APR, the court must allocate parenting time based on the parent’s intended location.</p> <p>A court may not restrict parenting time unless it finds that parenting time by a party would endanger the child’s physical health or significantly impair the child’s emotional</p>	<p>Did the court apply the correct standards and consider the relevant factors?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings on APR?</p> <p>If the court restricted a party’s parenting time, did it adequately explain its reasons for doing so?</p> <p>If the court disagreed with the recommendations of a child and family investigator (CFI), did the court explain its reasoning for doing so?</p>

<p>development; and the court must make specific findings in doing so.</p> <p>Pursuant to CRS § 14-10-116.5, the court may appoint a child and family investigator (CFI) to help in investigating, assessing, and making recommendations on APR issues. (Other professionals may also be appointed pursuant to other statutes, but CFIs are the most common.)</p>	
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**Modification of the property division** (CRS § 14-10-122)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>A court can modify a property division only if the circumstances justify the reopening of a judgment under CRCP 60(b) or CRCP 16.2(e)(10). The latter rule allows the parties to a domestic case to move for reallocation of assets or liabilities within five years after the final decree or judgment if a party's mandatory disclosures contain misstatements or omissions that materially affected the division of assets or liabilities.</p>	<p>Did the court apply the correct standards?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings on modification?</p>

**Modification of spousal maintenance & child support** (CRS § 14-10-122)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>CRCP 16.2(e)(10), referenced above relating to modification of a property division, doesn't apply to — and thus won't justify any modifications to — spousal maintenance or child support.</p> <p>Rather, a court can modify maintenance only upon a showing of changed circumstances that are so substantial and continuing as to make the terms unfair. There is generally a high burden on the party seeking modification.</p> <p>And a court can modify child support only upon a showing of changed circumstances that are substantial and continuing or if the prior order</p>	<p>Did the court apply the correct standards?</p> <p>Did the court ensure that the change was sufficiently significant and continuing to justify modification?</p>



<p>doesn't cover medical support. For such orders, a change may be substantial and continuing only if it would result in at least a 10% change in the amount of child support due per month.</p> <p>A court can modify spousal maintenance or child support obligations even if an appeal is pending.</p> <p>Modifications generally are effective on the date of filing of the motion. In limited circumstances outlined in the statute, they may be retroactive to before that date. For example, when there has been a change in the child's care arrangement, a child support modification order will generally be applied retroactively to the date of the change.</p>	<p>Did the court sufficiently explain, and is there support in the record for, its findings on modification?</p>
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**Modification of parenting time and decision-making** (CRS §§ 14-10-129 & 14-10-131)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>A court can modify parenting time whenever doing so would be in the best interests of the child/children. This includes when an appeal is pending.</p> <p>A court can substantially modify parenting time (changing the party with whom the child resides most of the time) and can modify decision-making responsibility only if it finds, based on facts that either arose since or weren't known to the court at the time of the prior order, that the circumstances have changed and a modification is necessary to serve the best interests of the child/children. Still, the court must retain the parenting time schedule and allocation of decision-making responsibility unless the parties agree to the modification, the child has been integrated into one party's family with the consent of the other party, the party with whom the child resides the majority of the time is intending to relocate with the child, a modification of parenting time warrants modification of decision-making responsibilities, one party has consistently consented to the other party making decisions, or the child's present environment or situation</p>	<p>Did the court apply the correct standards and consider the relevant factors?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings on modification?</p> <p>Did the court sufficiently explain, and is there support in the record for, its findings concerning a parent's relocation with the child/children?</p>

<p>endangers their physical health or significantly impairs their emotional development.</p> <p>If a party moves to substantially modify parenting time (changing the party with whom the child resides most of the time) or to modify decision-making authority, no party can file another such motion within two years after the disposition of that motion unless the court finds the prior order may endanger the child’s physical health or significantly impair the child’s emotional development or the party the child resides with a majority of the time is planning to relocate.</p> <p>If the party with whom the child/children resides a majority of the time seeks to relocate with the child/children to a residence that substantially changes the geographical ties between the child and the other party, the court must consider whether the modification of parenting time is in the best interests of the child/children, considering several factors, including (1) any domestic violence by any party, (2) the same factors applicable to an initial determination of parenting time (listed above), and (3) the relocation factors. The relocation factors are: the reasons the party wishes to relocate with the child; the reasons the other party objects; the history and quality of each party’s relationship with the child since any prior parenting time order; the educational opportunities for the child at the existing and the new location; the presence or absence of extended family at the existing and the new location; any advantages of the child remaining with the primary caregiver; the anticipated impact of the move on the child; whether the court will be able to fashion a reasonable parenting time schedule; and any other relevant factors.</p> <p>A court can’t restrict (or continue to restrict) a parent’s parenting time unless the court makes specific factual findings that parenting time would endanger the child’s physical health or significantly impair the child’s emotional development.</p>	<p>If the court restricted a party’s parenting time, did it adequately explain its reasons for doing so?</p>
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**Contempt** (CRCP 107)

<u>General standards</u>	<u>Potential appeal issues</u>
<p>Procedural requirements are generally set forth in CRCP 107. But sanctions for failure to comply with a parenting time order may be sought under CRS § 14-10-129.5. And violation of a protection order is a criminal offense under CRS § 18-6-803.5.</p> <p>There are two types of contempt (direct and indirect) and two types of sanctions a court can impose when it finds someone in contempt (remedial and punitive).</p> <p>For direct contempt — contempt the court has seen or heard that is so extreme that no warning is necessary or that has been repeated despite prior warnings — the court may impose sanctions summarily after giving the contemnor the right to make a statement in mitigation.</p> <p>For indirect contempt — contempt occurring outside the direct sight or hearing of the court — if a motion supported by affidavit suggests contempt has been committed, the court may issue a citation for the person to appear at a date at least 21 days after service of the citation and show cause why they shouldn't be held in contempt. If they fail to appear after notice, an arrest warrant may issue.</p> <p>Punitive sanctions are imposed to punish through an unconditional fine and/or a fixed sentence of imprisonment for conduct found to be offensive to the authority and dignity of the court. Such sanctions must be supported by findings of fact establishing beyond a reasonable doubt that (1) a lawful order existed, (2) the contemnor knew about the order, (3) the contemnor had the ability to comply with the order, and (4) the contemnor willfully refused to comply with the order. If a jail sentence is contemplated in an indirect contempt proceeding, the person must be advised of their rights — including the right to appointed counsel if the person is indigent.</p>	<p>Did the court follow the procedures set forth in CRCP 107?</p> <p>Did the court make the necessary findings for contempt and for the sanction?</p> <p>Was the party held in contempt entitled to an attorney in the proceedings?</p>

<p>Remedial sanctions are those that are 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. Such sanctions must be supported by findings of fact that (1) a lawful order existed, (2) the contemnor knew about the order, (3) the contemnor failed to comply with the order, and (4) the contemnor has the present ability to comply with the order. An order of remedial sanctions must describe the means by which the contemnor may “purge” the contempt and the sanctions that will be in effect until the contempt is purged. The ability to purge the contempt must lie with the contemnor at the time of the hearing; it can’t be based on a past ability to comply or on a future transaction. Because a one-time violation can’t be purged, remedial sanctions don’t apply to a one-time violation of a court order. In a contempt proceeding initiated by a governmental entity (such as child support services) where a jail sentence is an available remedial sanction, an alleged contemnor who is indigent has the right to court-appointed counsel.</p> <p>A court may award attorney fees as a part of a remedial sanction but not as a punitive sanction.</p> <p>A finding of contempt is within the district court’s discretion.</p>	
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**Attorney fees** (CRS §§ 13-17-102, 14-10-119 & 14-10-129.5(4))

<u>General standards</u>	<u>Potential appeal issues</u>
<p>A court may order a party to pay a portion of the other party’s attorney fees for maintaining or defending any domestic proceeding, based on consideration of both parties’ financial resources. In doing so, the court must make findings about the parties’ relative incomes, assets, and liabilities; must apportion fees based on the equitable purpose of the statute; and must explain how and why it arrived at the specific amount of the award.</p> <p>A court must award attorney fees against a party or attorney who brought or defended a civil action</p>	<p>Did the court apply the correct standards?</p> <p>Did the court sufficiently explain, and is there support in the record for, its decision on attorney fees?</p>

(including a domestic action), in whole or in part, that the court finds lacked substantial justification, meaning that it is substantially frivolous, groundless, or vexatious. But a court can award fees against a self-represented litigant only if the court finds that they clearly knew or reasonably should've known that the action or defense was substantially frivolous, groundless, or vexatious.

A court must order attorney fees and costs against a parent who is found to have failed to provide or to exercise court-ordered parenting time, for fees and costs related to that issue. A court may (but is not required to) award attorney fees and costs to a parent who is found not to have failed to provide or to exercise court-ordered parenting time, for fees and costs related to that issue.

The district court must hold a hearing on the reasonableness of fees, if one is requested.

Attorney fee issues are generally left to the discretion of the district court, although the court must adequately explain its decision. The amount of an attorney fee award is generally based on the lodestar approach, under which a court first calculates the lodestar amount, representing the number of hours reasonably expended on the case multiplied by a reasonable hourly rate, and then has the discretion to adjust the amount upward or downward after considering the relevant factors in Colo. RPC 1.5(a).