Colorado Court of Appeals Court Address: 101 West Colfax Avenue Suite 800 Denver, CO 80202 Appeal from: Pueblo District Court Judge David Crockenberg 320 West 10th Street Pueblo CO 81003	**COURT USE ONLY**
In re: the Marriage of **Petitioner/Appellee: Mr. C** **and** **Respondent/Appellant: Ms. W**	
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Opening Brief

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CERTIFICATE OF COMPLIANCE

The brief complies with C.A.R. 28(g) because it contains 9,497 words. The brief complies with C.A.R. 28(k) because it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._, p.__), not to an entire document, where the issue was raised and ruled on.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

ISSUES PRESENTED FOR REVIEW 1

1. Did the trial court commit reversible error by relying on an investigative report by a child's legal representative ("CLR") and adopting her recommended parenting plan, in violation of C.R.S. § 14-10-116, and without any opportunity for confrontation and cross-examination, in violation of Mother's constitutional right to due process?

2. Did the trial court commit reversible error by granting Father's unverified motion to modify the permanent custody order and removing the child from her Mother, the majority-time residential parent, without finding endangerment, in violation of C.R.S. §§ 14-10-129 and 132?

3. Did the trial court commit reversible error in assessing the mandatory best interest factors under C.R.S. §§ 14-10-129 and 124 when it refused to admit and/or consider evidence of Father's domestic violence and alcohol problems, and failed to consider evidence of the five-year-old child's existing family and community bonds?

STATEMENT OF THE CASE 1

A. Statement of Facts 2

1. History of Spousal Abuse 2

2. History of Alcohol Abuse 3

3. Mr C's Maltreatment and Abandonment of His Older Daughters 5

a. K1 5

b. K2 6

B. Procedural History 8

1. Court's Permanent Decree Makes Ms. W the Majority Parent 8

2. Mr C's Repeated Efforts to Modify the Decree 8

TABLE OF CONTENTS
(continued)

Page

3. Appointment of Evaluator and CLR 9

4. "Temporary Modifications" of Permanent Decree 10

5. C1's Schooling 13

6. Ms. W's Challenges to the CLR's Role 13

7. Final Hearing and 2009 Order Granting Mr. C's 2006 Motion.....15

SUMMARY OF ARGUMENT 17

ARGUMENT 18

I. THE COURT VIOLATED COLORADO LAW AND DUE PROCESS BY RELYING ON THE CLR'S REPORT AND RECOMMENDATIONS 18

A. The Court Violated Colorado Law by Allowing the CLR to Simultaneously Act as a CFI Who Investigates, Evaluates and Provides Recommendations.....19

B. The Court's Reliance on the CLR's Reports Without Opportunity for Cross-Examination Violated Ms. W 's Due Process Rights 22

II. THE COURT'S POST-DECREE MODIFICATION IGNORED THE REQUISITE ENDANGERMENT STANDARD UNDER SECTION 14-10-129 26

A. Colorado's Statutes Required Preservation of C1's Stability and the Permanent Order Absent an Endangerment Finding.....27

B. The Record Cannot Support an Endangerment Finding 31

C. Parental Alienation Is an Invalid and Inadmissible Theory When Applied to Abuse Allegations 32

TABLE OF CONTENTS
(continued)

Page

III. IN REMOVING C1 FROM HER MOTHER, THE COURT FAILED TO CONSIDER STATUTORILY REQUIRED BEST INTEREST FACTORS....36

A. The Court Improperly Refused to Consider Mr. C's Familial Abuse and Past Failed Parenting....37

B. The Court Failed to Consider Mr. C's Substance Abuse....40

C. The Court Disregarded Allison's Stable Bonds with Her Mother, Siblings, Friends, Doctors, and Community in Lamar....42

CONCLUSION....44

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Goldberg v. Kelly,
397 U.S. 254 (1970).....24

STATE CASES

Anderson v. Anderson,
445 P.2d 397 (Colo. 1968).....22

Burlington N.R. Co. v. Hood,
802 P.2d 458 (Colo. 1990).....42

Christian v. Randall,
516 P.2d 132 (Colo. App. 1973)..... 27, 28, 30, 36

Conrad v. City & County of Denver,
656 P.2d 662 (Colo. 1982).....42

Hernandez v. District Ct.,
814 P.2d 379 (Colo. 1991).....9

In re J.E.B.,
854 P.2d 1372 (Colo. App. 1993).....19, 22

In re the Marriage of DeZalia,
151 P.3d 647 (Colo. App. 2006).....43

In re Marriage of Francis,
919 P.2d 776 (Colo. 1996).....27

In re Marriage of Harris,
670 P.2d 446 (Colo. 1983).....30

In re Marriage of Lampton,
704 P.2d 847 (Colo. 1985).....37

In re Marriage of Larington,
561 P.2d 17 (Colo. App. 1976).....28, 30

TABLE OF AUTHORITIES
(continued)

Page

In re Marriage of Lester,
791 P.2d 1244 (Colo. App. 1990).....36

In re Marriage of Martin,
42 P.3d 75 (Colo. App. 2002).....37, 42

In re Marriage of McCaulley-Elfert,
70 P.3d 590 (Colo. App. 2003).....37

In re Marriage of Pilcher,
628 P.2d 126 (Colo. App. 1980).....32

In re Michie,
844 P.2d 1325 (Colo. App. 1992).....8

Leiting v. Mutha,
58 P.3d 1049 (Colo. App. 2002).....25

Pacheco v. Pacheco,
554 P.2d 720 (Colo. App. 1976).....23

People Ex Rel M.H.,
10 P.3d 713 (Colo. App. 2000).....40

People v. Crespi,
155 P.3d 570 (Colo. App. 2006).....42

Saucerman v. Saucerman,
461 P.2d 18 (Colo. 1969).....19, 22

Sidman v. Sidman,
--- P.3d ----, 2009 WL 3465724 (Colo. App. 2009)..... 18, 26, 36

Spahmer v. Gullette,
113 P.3d 158 (Colo. 2005).....27

Thomas v. Rahmani-Azar,
217 P.3d 945 (Colo. App. 2009)..... 18, 26, 36

TABLE OF AUTHORITIES
(continued)

Page

OTHER STATE CASES

Betz v. Betz,
575 N.W.2d 406 (Neb. 1998) 25

Coble v. Coble,
470 A.2d 1002 (Pa. Super. Ct. 1984).....23

Hastings v. Rigsbee,
875 So. 2d 772 (Fla. App. 2004) 25

In re Custody of Carter,
137 484 N.E.2d 1175 (Ill. App. 1985).....30

In re Dolly D,
41 Cal. App. 4th 440 (1995) 23

Joyce S. v. Frank S.,
571 N.W.2d 801 (Neb. 1997) 25

Kelley v. Kelley,
175 P.3d 400 (Okla. 2007).....23

Koehler v. Farmers Alliance Mut. Ins. Co.,
566 N.W.2d 750 (Neb. 1997) 25

Malone v. Malone,
591 P.2d 296 (Okla. 1979).....24

Matter of Swan,
567 P.2d 898 (Mont. 1977).....24

NK v. MK,
851 N.Y.S.2d 71 (N.Y. Sup. Ct. 2007).....34

People v. Fortin,
706 N.Y.S.2d 611 (N.Y. Co. Ct. 2000) 34

TABLE OF AUTHORITIES
(continued)

Page

Snyder v. Cedar,
No. NNHCV 010454296, 2006 WL 539130 (Conn. Super. Ct., Feb. 16, 2006) 34

STATE STATUTES

C.R.S. § 14-10-116 ..... passim

C.R.S. § 14-10-116.5 .....19, 21

C.R.S. § 14-10-124 ..... passim

C.R.S. § 14-10-127 23

C.R.S. § 14-10-128.1 21

C.R.S. § 14-10-129 ..... passim

C.R.S. § 14-10-131 ..... 28, 29, 32

C.R.S. § 14-10-132 .....1, 8

RULES

Colorado Rule of Professional Conduct 3.4 .....19, 20

Colorado Rule of Professional Conduct 3.7 .....19, 20

Chief Justice Directive, 04-06 20

Chief Justice Directive, 04-08 ..... 20, 21, 26

COLO. R. EVID. 801 42

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 23

COLO. CONST. art. II § 25 23

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, Rule III.B (Aug. 2003) 20

APA, VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 100 (1996) 34

Lundy Bancroft, *The Batterer as a Parent*, Synergy, Winter 2002 (Newsletter of the National Council of Juvenile and Family Court Judges) 38

COLORADO BAR ASSOCIATION CLE, THE ROLE OF THE CHILD AND FAMILY INVESTIGATOR AND THE CHILD'S LEGAL REPRESENTATIVE IN COLORADO (Robert M. Smith ed., 2005) 20

Clare Dalton et al., Nat'l Council of Juvenile & Fam. Ct. Judges & State Justice Inst., *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (2006) 34

Robert E. Emery et. al, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System* PSYCHOL. SCI. IN THE PUB. INTEREST, July 2005 33

H.B. 10-1135, 67th Leg, 2d Reg. Sess. (Colo. 2010) 38

ISSUES PRESENTED FOR REVIEW

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STATEMENT OF THE CASE

Since her birth, C1 has always lived in the primary residential care of her mother, Ms. W, her majority time parent under the March 7, 2005 permanent order ("Decree") governing the parties' divorce. More than four years after its Decree, the trial court granted a three-year-old, unverified modification motion by C1's father, Mr. C , and reversed custody for the next seven years, at which point she will be returned to her mother. In removing C1 from her mother and majority-time parent, the court did not find C1 was endangered or emotionally impaired, as required by C.R.S. § 14-10-129. Instead, after permitting the court-appointed child legal representative ("CLR") to act in

conflicting roles as a Child and Family Investigator (CFI) and lawyer for the children, which is expressly prohibited by Colorado statutes and due process, the Court simply adopted the CLR's unlawful recommendations. Moreover, the Court's misapplication of the "best interests" standard ignored the statutory emphasis on stability for children and entirely failed to consider key factors, including Mr. C's history of domestic violence, alcohol abuse, and failed parenting, and C1's existing stable connections to her home, school, siblings, extended family, doctors, and friends in Lamar.

Each of these errors requires reversal and the return home of now six-year-old C1 to her Mother and siblings.

A. Statement of Facts

On October 31, 2000, Ms. W married Mr. C. Vol. III, *3/4/05 Transcript,* 53:24-54:3.

1. History of Spousal Abuse

Ms. W testified that she left the marriage in 2004 because of Mr. C's alcohol abuse and domestic violence, including a particularly severe incident in 2004 while she was *nine months pregnant* with C1, after he had had a night of drinking. *Id.*, 39:6-40:14. Ms. W testified that Mr. C attacked her, shoving her down on their bed, and straddled and choked her, making her afraid for her baby's life and her own. *Id.*; Env. II, T Report, pp.7-8.

C1 was born shortly thereafter, on April 20, 2004. Vol. III, *3/4/05 Transcript*, 30:7-17. Ms. W testified that about a month later police were called to the marital home to protect her as she fled with the children to her parents in Lamar. *Id.* 43:8-19. *See also id.* 3:25-4:12 (Mr. C's counsel's description of same May 25, 2004 incident). Upon arrival in Lamar, Ms. W filed for and received a Protective Order against Mr. C on May 26, 2004. *See* Vol. I, p.51, ¶7; CD, Bookmark 43, pp.146-147 (5/26/04 TPO).

On August 5, 2004, Mr. C filed for dissolution. Vol. I, pp.1-4. However, he continued to harass Ms. W with threats and stalking, including phone calls "at all hours day and night," to such an extent that she sought and received another restraining order. *See* CD, Bookmark 56, p.276 and Bookmark 43, p.138; Vol. I, pp.144-147 (6/01/06 TPO). Ms. W testified she feared allowing Mr. C to visit the girls alone, because he threatened to take them away from her. Vol. III*, 3/4/05 Transcript*, 21:2-16. *See also* Vol. I, p.62.

2. History of Alcohol Abuse

Kody, Ms. W's oldest child, informed the court-appointed custody evaluator that Mr. C is an "excessive drinker" who becomes "angry-aggressive" and "yell[s] a lot" when intoxicated. Env. II, T Report, p.9. Mr. C himself testified he was arrested around 1996 for drunk driving (CD,

7/31/09 Transcript, 90:10-91:6; *see also* CD, Bookmark 53, p.238 (DUI charge)), and admitted to Dr. T "that he would have family get-togethers on Sunday" with "some drinking." Env. II, T Report, p.6. Kody indicated what "some drinking" meant to Mr. C: "Every Sunday he'd have his family [over] and there would be a bag full of beer cans." *Id.* p.9.

Mr. C's own mother begged him to think about the hurt he caused Angela and the children when he drank. CD, Bookmark 56, p.283 (Ex. 3). Even Mr. C acknowledged his drinking problem in writing in 2004. CD, Bookmark 56, p.282 (Ex. 2, Letter memorializing his "commitment not to drink" on Sundays and to "avoid[] beer for at least one week" in order to focus on his "marriage, [his] family, bonding again with K1, and the child on the way [C1].").

Tammy Nelson ("Nelson"), Mr. C's first wife and mother of their daughter K1, testified that she divorced him because of his drinking problems, CD, *7/31/09 Transcript*, 111:12-17, and submitted an affidavit describing the abuse his "obsessive drinking" caused, including "pushing and yelling," "emotional abuse while I was pregnant," and an extra-marital affair. CD, Bookmark 60, p.298 (signed affidavit).

3. Mr. C's Maltreatment and Abandonment of His Older Daughters

Mr. C has two older daughters: K1, a biological daughter with Nelson, and K2, Ms. W's daughter whom he adopted just prior to their separation. CD, Bookmark 60, p.298; Vol. III, *3/4/05 Transcript*, 10:17-18.

a. K1

Nelson testified that after she left Mr. C, he began emotionally and verbally abusing K1. K1 informed her mother that Mr. C "would lock her in the closet and tell her that monsters were going to come and get her [and] hold pillows over her face demanding that she call him dad or she [would] not breath[e] again." CD, Bookmark 60, p.299. Nelson testified that Mr. C would call seven-year-old K1, intoxicated, and verbally abuse her as "stupid and dumb" while on speakerphone, CD, *7/31/09 Transcript*, 115:11-116:20, and that K1 developed phobias, including becoming scared to sleep in her own room, after Mr. C told her "there were monsters in her room at mommy's house." *Id.* 116:21-117:2.

Nelson further testified that when K1 developed ulcers, and required counseling and medication, Mr. C overdosed her on the medication, causing hospitalization, *id*. 117:3-13; that K1's counselor recommended ending Mr. C's visitations, *id.* 117:12-118:5 (sustaining unexplained

objection); that Mr. C refused a court order to attend parenting and anger management classes, CD, Bookmark 60, p.299; that subsequently, his parenting time with K1 was terminated by the court, *id., see also* CD, *7/31/09 Transcript*, 117:14-118:5; and that when K1 was around nine, Mr. C relinquished his parental rights to her on the condition that he not have to pay substantial back child support and interest he owed. *Id.* 117:22-119:20.

Although the trial court "discount[ed]" the information provided by Tammy Nelson as not "helpful," it did not suggest the information was *untrue*. CD, *7/31/09 Transcript*, 129:19-23.

b. K2

Mr. C testified that he adopted C1's half sister, K2, a month before Ms. W left him. Vol. III, *2/20/07 Transcript*, 173:25-174:2. He immediately changed his mind. *See* CD Bookmark 53, p.2 (Ms. W's statement that Mr. C "requested many times to reverse the adoption… [but] it was too late"). He admitted on cross-examination that he financially pressured Ms. W to try to force her to reverse the adoption. Vol. III, *2/20/07 Transcript*, 170:25-174:14 (quoting Mr. C's statements that "…reversing [K2's adoption] is the only way your name will come off the truck [loan]" and "I will not risk getting stuck with child support and the truck payment…"). In May 2006, Mr. C reported to the court that he was "willing to relinquish his par[enting] rights w[ith re]spect

to [K2]." Vol. I, p.240; CD, *7/31/09 Transcript*, 87:7-88:21. Medical records corroborated K2's statements that Mr. C treated her abusively. For example, during C1's second hospitalization for failure to thrive under his care,[1] hospital security witnessed Mr. C "drag[K2] out of [the] hospital" after he verbally attacked Ms. W in C1's hospital room. CD, Bookmark 56, p.287. K2 reported that "[h]e was grabbing my wrist [so hard that] it made a little bruise." Env. II, T Report, p.18.

Like K1, K2 required mental health treatment "for anxiety and fear of [Mr. C]." Env. II, 3/07/06 Letter from René Larrabee M.S., L.P.C. K2 reported that she feared Mr. C "will hurt [me,] 'grab me and break my arm'." *Id.* She had nightmares Mr. C would "break into their house[,] kill her mother and baby brother[,] and then kidnap [her] and [C1]." *Id.* She also described his neglectful behavior in real life, such as abandoning her for 20 minutes alone in Wal-Mart when she was only nine. *Id*. K2's therapist found it against her best interests to see Mr. C. *Id*.

[1] *See* CD, Bookmark 43, pp.141 and 170 (Ex. 4) and Bookmark 56, pp.274 and 285-287 (Ex. 5).

B. Procedural History

1. Court's Permanent Decree Makes Ms. W the Majority Parent

The court's March 2005 Decree awarded primary residential custody and majority parenting time of C1 and K2 to Ms. W. Vol. I., pp.69-79. The Decree allowed Mr. C three daytime visitations per week, and later, two overnights every other weekend. *Id.* pp.71-72.

2. Mr. C's Repeated Efforts to Modify the Decree

Less than two weeks later, Mr. C began submitting repeated modification motions. *See* Vol. I, pp.83-90 (3/21/05 motion, denied as premature); pp.110-11 (9/30/05 unverified motion), and pp.169-73 (6/27/06 unverified motion). Despite the clear prohibition in Colorado, *In re Michie*, 844 P.2d 1325 (Colo. App. 1992) (under C.R.S. 14-10-132, court shall deny modification motion unless affidavits establish adequate cause; unverified motion fails to do so), the court modified the Decree on March 1, 2006 to give Mr. C three overnights each week. Vol. I, pp.116-117.

On May 26, 2006, Ms. W notified all parties she wanted to return to Lamar to pursue better housing for the children, and educational and employment opportunities. Vol. I, p.240. According to medical records, two days later Mr. C threatened and verbally attacked her when she picked C1 up.

"[H]e apparently was upset that the toddler was saying the mother's last name as HER last name and this 'set him off' so the police were called and a restraining order was issued and he was incarcerated over the weekend." CD, Bookmark 56, p.285 (6/14/06 CFCC medical chart for C1). The police arrested and charged Mr. C with domestic harassment. CD, Bookmark 53, p.238 ("Domestic Violence" arrest). The courts issued civil and criminal protective orders. *See* Vol. I, p.144-147; Vol. III, *6/30/06 Transcript*, 62:12-63:5. Ms. W later voluntarily dismissed the order. *See id.*, 62:7-24.

Shortly after his arrest, Mr. C filed a third motion, again unverified, to modify the permanent Decree. Vol. I, pp.169-73. This is the motion at issue in the present appeal.

3. Appointment of Evaluator and CLR

At Mr. C's request (Vol. I., pp.166-68) and over Ms. W's objection, the court appointed Dr. T as custody evaluator, and rejected Ms. W's request for another evaluator unless she paid for it up front, *contra Hernandez v. District Ct.*, 814 P.2d 379 (Colo. 1991). Vol. III, *6/30/06 Transcript*, 71:7-19, 59:14-16. The appointment order did not request evaluation of endangerment or emotional impairment to C1, but only "the ability of each parent to serve the best interest of the children." Vol. I, pp.175-176.

At the same hearing, the court appointed a new law graduate, Danita Alderton, as Child's Legal Representative for K2 and C1, to represent their "best interests" under C.R.S. 14-10-116(2)(a). Vol. III, *6/30/06 Transcript*, 64:20-65:7; Vol. I., pp.177-80.

4. "Temporary Modifications" of Permanent Decree

In August 2006 and again in February 2007, the Court, following the CLR's recommendations, issued orders increasing Mr. C's custodial time with C1 . On August 15, 2006, the CLR recommended that C1's parenting time be "split" equally while Dr. T completed his investigation and written report. Vol. III, *8/15/06 Transcript*, 73:7-13 ("Ms. Alderton is here in her capacity as legal representative of the children"); 73:23-74:9 ("what I did [as CLR] was try to work out a parenting time schedule that would . . . split the time evenly"). She presented no evidence or legal authority for this recommended modification, which Ms. W objected would unlawfully alter the Decree by removing her as majority parent without a showing of endangerment. *Id.* 78:1-15. Without hearing evidence or testimony, the court issued a temporary order that adopted the CLR's allocations virtually verbatim, but nominally retained Ms. W's primary parent status by giving her four nights a week with C1. Compare *id*. 73:17-75:16 with 81:16-82:12.

Dr. T's evaluation suggested that Mr. C was alienated from his adopted daughter K2, and attributed this to Ms. W without investigating any other causes, such as Mr. C's behavior toward K2 or his efforts to undo the adoption. Nonetheless, and notably, Dr. T found no evidence that C1 was alienated from Mr. C. Rather, he specifically noted that Mr. C "appears to have a very strongly attached relationship with C1." Env. II, 11/16/06 T Report, p.13. He also found no emotional impairment or endangerment to C1 under her mother's care; to the contrary, he found she was normal, "happy and well-adjusted," *id.* p.18, and that Ms. W "appear[s] to be an asset to [her] children." *Id.* p.19. Nevertheless, he recommended Ms. W see a therapist because he "would be" concerned that someday in the future Ms. W "will engage in [parental alienation of] Allison." *Id.* p.16.

The CLR filed her first report to the court on February 15, 2007; it recommended that the parents temporarily split two-year-old C1's time "50/50." Vol. I, pp.200-201. To Ms. W's concern that this would impair "the close relationship that C1 has with her [three live-in] siblings and family in Lamar," the CLR simply responded that C1 had an adult half-sister (K1) and an "extended family" in Pueblo. *Id.* The Report included factual assertions from the CLR's "investigation," comprising two home visits with Mr. C, one with Ms. W, office visits, phone calls, and questionnaires she

required the parents to complete. *Id.* pp.194. At the hearing, the court stated that "without having heard any evidence, I have reviewed Dr. T's report and I have reviewed the report from Ms. Alderton, and it would appear to me that it would be in C1's best interest on the basis of what I've read to adopt a 50-50 sharing arrangement." Vol. III, *2/20/2007 Transcript*, 98:24-99:4. Ms. W again objected to her displacement as C1's majority parent with no endangerment finding. *Id.* 91:22-92:22 and 99:22-100:9. The court stated it could avoid making one, and still adopt the CLR's recommendation to modify the final decree, so long as it gave Ms. W *one more day* — *i.e.*, 183 days of custody to Mr. C's 182. *Id.* 101:14-16 ("I'm certainly willing to do that so that we can say that Ms. W is still the majority parent and we're not getting into those issues").

The court entered a "temporary" order from the bench adopting the CLR's written recommendations and decreasing Ms. W's time with C1 to every other week. *See id.* 192:11-195:4; 195:18; 198:15; 201:12-14 ("as long as Ms. Alderton is comfortable with it I don't have a problem"). The court also adopted Dr. T's recommendation that Ms. W complete therapy to address K2 's "alienation." *Id.* 195:19-196:5. The April 2, 2007 written order directed the CLR to "remain on this case to oversee the Court's orders and assist the parties in facilitating said orders." Vol. I, p.210. Apparently acting

on that basis, the CLR appeared in court *ex parte* on April 21, 2008 to "report" that Ms. W had successfully completed the recommended therapy. Vol. I, *4/21/08 Transcript*, 205:11-15.

5. C1's Schooling

Over the next two years, contrary to his testimony that he "would like to enroll C1 in [pre-]school [in Pueblo]. . ." because "[C1]'s eager to go," Vol. III, *2/20/07 Transcript*, 166:3-21, Mr. C actually kept C1 out of school. CD, Bookmark 16, p.43. Ms. W did enroll C1 in preschool in Lamar; therefore she could be pre-enrolled in kindergarten with her pre-school friends at a high-quality school attended by her siblings, two blocks from her mother's home. CD, Bookmark 16, pp.44-46; Bookmark 43, p.177. In November 2008, Ms. W requested modification of the 2007 temporary order so C1 could attend kindergarten full-time in Lamar. CD, Bookmark 16, p.33. Mr. C responded that C1 should be removed from her mother, siblings and schoolmates, should live with him, and attend a school *five miles* from his house. *See* CD, *7/31/09 Transcript*, 58:14-18.

6. Ms. W's Challenges to the CLR's Role

On December 3, 2008, Ms. W filed a pro se motion to recuse the CLR and forestall her improper practice of submitting reports to the court, citing violations of 14-10-116 and the Colorado Rules of Professional Conduct

("CRPC"). CD, Bookmark 17, pp.47-51. Ms. W objected to the court's acceptance of those reports in violation of § 14-10-116 and Ms. W's right to due process. *Id.* 48. The court denied her motion on December 29, 2008. Vol. I, p.252.

The CLR then, in her own words, "conducted [another] investigation" of the parties, received documents outside the trial record, conducted a "Settlement Conference at CLR's office . . . with both sides presenting their positions," and again filed a report. Env. V, Guardian Ad Litem Reports [*sic*] dated *3/20/09*, p.1. This time the CLR recommended that since "Father's work schedule is not conducive to weekend parenting time," five-year-old C1 should be removed from her home to live in Pueblo for the next seven years, and then be returned to Lamar. *Id.* p.11-12. She recommended that C1 see her mother the first three weekends of the month and for eight summer weeks.

On March 24 Ms. W filed objections that, among other things, the report and recommendations (1) overlooked pertinent best interest factors, (2) failed to consider how the proposed "schedule would adversely affect the "close bond that C1 has with her 3 other siblings [and] with the Mother," (3) were negligent in "ignoring and minimizing the harmful behavior of father," and (4) relied on false hearsay accusations and speculation about non-existent alienation of C1. CD, Bookmark 43, pp.138, 140 and Bookmark 51.

At the hearing, the court stated that because Ms. W's objections to the CLR's report made ethical challenges, she had only "two choices, either you withdraw it permanently as an issue, or . . . I need to reset [the hearing]." Vol. III, *3/26/09 Transcript*, 8:23-9:24. When Ms. W maintained her objections, the CLR immediately formally requested withdrawal from the case. *Id.* 9:25-10:12; 11:6-10; Vol. I., p.253. With C1 due to start kindergarten in August, the Court continued the hearing to July 31. Vol. II, *3/26/09 Transcript*, 11:19-12:9.

7. Final Hearing and 2009 Order Granting Mr. C's 2006 Motion

At the final hearing, the CLR ─ who had withdrawn ─ did not participate. CD, *7/31/09 Transcript*; *see* CD, Bookmark 44.

Only four witnesses testified: Mr. C, Ms. W, K1 Nelson and Tammy Nelson. *Id.* The Nelsons testified concerning Mr. C's abusive treatment and relinquishment of rights to K1. *Id.* 40:5-49:25; 109:21-124:12. Issuing its order from the bench, the court refused to consider their testimony, stating only that "they have such a strong bias at this point . . . I don't really think their testimony is particularly helpful to the Court" ─ without explaining the source of the bias or why it so far exceeded that of either party as to render their testimony worthless. *Id.* 129:19-23. The court excluded two

proffered letters from Mr. C and his mother acknowledging his drinking problem. *Id.* 91:13-92:17. The court accepted the record evidence that "Allison's got siblings and friends and a good school in Lamar," but gave it no weight, simply stating "I'm sure she will develop friends [in Pueblo]." *Id.* 130:12-15.

Despite finding that Ms. W was an "excellent parent[]," the court adopted the CLR's allocation recommendations nearly verbatim. *Id.* 130:5-131:8 (because of Mr. C's work schedule "I'm going to adopt the recommendation") ("Ms. Alderton put a lot of time and thought into this. And I'm going to agree with her recommendations.").

The court's written Order stated that it "agrees with Ms. Alderton[']s recommendations filed with the Court dated March 20, 2009, and hereby adopts those specific recommendations set forth in the Court[']s order below." CD, Bookmark 103, p.427 (*8/24/09 Order Granting Permanent Orders* ("8/24/09 Order")). The Order makes no mention of Mr. C's relinquishment of rights to his two older daughters, his past domestic abuse, or his alcoholism. *Id.* It references the "best interests of the child" standard but makes no mention of endangerment or emotional impairment. *Id.*

Ms. W timely appealed.

SUMMARY OF ARGUMENT

The court's August 24, 2009 order is unprecedented and replete with legal errors. Before that order, five-year-old C1 had always lived with her mother under the Permanent Decree establishing Ms. W as the primary, majority time parent. Four years after the Decree, the court ripped C1 from her mother's custody *for the next seven years*, when she would be returned. This highly unusual custody order suffers from three fatal legal errors.

First, the court based its order on a report and recommendations made by the CLR in clear violation of Colorado law and due process.
C.R.S. § 14-10-116 expressly prohibits a person from serving a dual role as both a CLR — an attorney for the child — and an investigator for the court, charged with making recommendations to the court. And due process forbids a court from relying on such a report where the parties have no opportunity to cross-examine the author.

Second, in removing her mother as majority parent, the court did not find C1 was endangered or emotionally impaired, as required on modification by C.R.S. § 14-10-129, and the record precludes any such finding.

Third, even if the "best interests" standard properly applied on modification, the court erred as a matter of law by failing to consider mandatory best interests factors, including Mr. C's history of domestic

violence, alcohol abuse, and failed parenting, and C1's existing stable connections to her mother, siblings, extended family, school, doctors, and friends at home in Lamar.

Each of these errors requires reversal and return of C1 to her Mother.

ARGUMENT

I. The Court Violated Colorado Law and Due Process by Relying on the CLR's Report and Recommendations

Standard of Review

This Court reviews legal errors, including errors in interpreting or applying statutes and constitutional guarantees, *de novo*. *See Sidman v. Sidman*, --- P.3d ----, 2009 WL 3465724 *2 (Colo. App. 2009); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 947 (Colo. App. 2009).

Preservation in the Record

This issue was preserved for appeal at CD, Bookmark 51, pp.203-205 (objecting to CLR filing recommendations in violation of § 14-10-116); Bookmark 17, p.48 (objecting on due process grounds to the CLR "assuming the role of the CFI" or "making any recommendations"); Bookmark 47, p.187 (objections to use of the Report "by the court in formulating any judgments in this matter, without the proper introduction of evidence for statements, hearsay, and/or opinions contained within it"). *See also* Vol. II, *3/26/2009 Transcript,*

2:11-11:3; CD, *7/31/2009 Transcript*, 58:8-13, 68:1-13, 69:11-15 and 84:14-85:19 (recognizing Mother's continuing objection to the Report).

A. The Court Violated Colorado Law by Allowing the CLR to Simultaneously Act as a CFI Who Investigates, Evaluates and Provides Recommendations

Prior to adoption of Colorado's current statute, court-appointed guardians ad litem ("GALs") in Colorado were allowed to present investigative and evaluative reports to the court on the condition that they be subject to cross-examination. *See, e.g.*, *In re J.E.B.***,** 854 P.2d 1372, 1375 (Colo. App. 1993); *Saucerman v. Saucerman*, 461 P.2d 18, 20 (Colo. 1969). However, this practice was ethically and legally problematic insofar as it permitted GALs to act simultaneously as attorneys and witnesses, both making recommendations and providing testimony, in violation of CRPC Rules 3.4 and 3.7.

The legislature therefore eliminated the GAL position in 1997 and divided its former functions into two separate appointed roles: 1) the "Child's Legal Representative" ("CLR"), and 2) the "Child and Family Investigator" ("CFI") (formerly termed "special advocate"). C.R.S. §§ 14-10-116 and 116.5. The new statute expressly prohibits conflation of the two roles: "In no instance may the same person serve as both the [CLR] pursuant to this section and as the [CFI] for the court pursuant to section 14-10-116.5." C.R.S. § 14-10-116(1) (emphasis added). This careful boundary reflects the

Legislature's and Colorado Supreme Court's determination that "[t]he role requirements of the [CFI] and the [CLR] are in conflict with each other." Chief Justice Directive (C.J.D.) 04-08, Standard 4, Commentary.

As an attorney representing the child's best interests, the CLR is limited by statute and ethical rules to submitting legal arguments based on evidence in the record, rather than providing her own out-of-court report. *See* C.R.S. § 14-10-116(2) (requiring compliance with ethical rules); C.J.D. 04-06 (same); CRPC Rules 3.4 (barring lawyers from stating personal opinions, mentioning matters unsupported by admissible evidence, and asserting personal knowledge of facts or credibility of witnesses), and 3.7 (prohibiting lawyers from "act[ing] as an advocate at a trial in which the lawyer is likely to be a necessary witness"); *see also* COLORADO BAR ASSOCIATION CLE, THE ROLE OF THE CHILD AND FAMILY INVESTIGATOR AND THE CHILD'S LEGAL REPRESENTATIVE IN COLORADO § B1.2.1 (Robert M. Smith ed., 2005) ("Why the CLR Should Not Issue A Report"); ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, Rule III.B (Aug. 2003) ("A lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and <u>should not testify, file a report, or make recommendations</u>.") (emphasis added). The CLR is explicitly barred from being a witness. *See* C.R.S. § 14-10-116(2). Nor may she act as an

investigator or other arm of the court, such as a parenting coordinator. *See, e.g.*, C.R.S. §§ 14-10-116; 14-10-128.1(4)(a).

Conversely, a CFI must have "*an independent perspective acceptable to the court*" and "shall investigate, report, and make recommendations . . . in the form of a written report filed with the court. . ." C.R.S. § 14-10-116.5(2) (emphasis added). CFIs are barred from "provid[ing] legal advice to any party or otherwise act[ing] as an attorney in the case," and from "later accept[ing] an appointment as a [CLR]." C.J.D. 04-08, Standard 4. The CFI must also be trained in common psychological and social issues in custody proceedings. *Id.*, Standard 6, Commentary.

Here, the trial court and the CLR completely conflated these roles. Acting as an attorney, the CLR filed motions and conducted cross-examinations, yet she also submitted reports to the court that included her own factual findings and "recommended" parenting time allocations based on her untrained out-of-court "investigation." *See supra*, pp. 10-11, 14.[2] When

[2] *See, e.g.*, statements by the CLR found at CD, Bookmark 15, p.27 ("If the parties cannot reach a mutual agreement, then and only then does CLR become involved with investigation and recommendations accordingly."); *id.* 27-28 ("CLR's recommendations are. . . to the Court. The parents can accept the recommendations, modify the recommendations, or refuse the recommendations and take the matter to Court"); Vol. II, *3/29/09 Transcript*, 6:2-4 ("I have conducted my investigation in accord[ance] with the statute.").

Appellant pointed out that the CLR's reports and overall role blatantly violated § 14-10-116 and ethical rules, the CLR withdrew from the case. However, the court nonetheless expressly adopted her *ultra vires* report's detailed parenting schedule as its own orders, thereby allowing this profound procedural violation to dictate Ms. W's rights. *See, e.g.,* CD, *7/31/09 Transcript*, 69:11-15 ("It was submitted as the recommendation to the Court. I am going to consider it."); CD, Bookmark 103, p.427 (court "hereby adopts those specific recommendations"). *See also* Vol. III, *2/20/07 Transcript*, 192-195; 198; 201; *compare 8/15/06 Transcript*, 81:16-82:12 (court order) and 73:17-75:16 (CLR's recommendations).

B. The Court's Reliance on the CLR's Reports Without Opportunity for Cross-Examination Violated Ms. W's Due Process Rights

Even before the custody statute was amended, this state's appellate courts consistently held that due process prevents trial courts from accepting independent investigatory reports and recommendations without providing litigants the opportunity to cross-examine their authors. *See In re J.E.B.*, 854 P.2d at 1375 (requiring cross-examination where GAL "present[s] his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence."); *accord Saucerman v. Saucerman*, 461 P.2d 18, 20-21 (Colo. 1969); *Anderson v.*

Anderson, 445 P.2d 397, 399 (Colo. 1968); *Pacheco v. Pacheco*, 554 P.2d 720, 723 (Colo. App. 1976).[3] *See* U.S. CONST. amend. XIV, § 1; COLO. CONST. art. II, § 25.

In this respect, Colorado is in keeping with other states treating unsworn custody reports as prohibited hearsay and protecting parents' rights to cross-examine investigators. *See Kelley v. Kelley*, 175 P.3d 400, 403-06 (Okla. 2007) (parties have the right to cross-examine the GAL and seek discovery concerning the basis for a custody recommendation) (family court's reliance on evidence/reports untested by cross-examination would be "fundamentally unfair" and "amount to private investigations by the court . . . out of the sight and hearing of the parties, who are deprived of the opportunity to defend, rebut or explain."); *In re Dolly D*, 41 Cal. App. 4th 440, 446-47 (1995) (holding trial court deprived father of due process when it prohibited cross-examination of the author of a "highly conclusory" report regarding custody); *Coble v. Coble,* 470 A.2d 1002, 1003-04 (Pa. Super. Ct. 1984) (reversible error where court

[3] Under C.R.S. § 14-10-127(3), any party may call the evaluator and "any person with whom the evaluator has consulted" for cross-examination. Dr. T stated in his report that "[t]he children's legal representative (CLR) Danita Alderton was consulted regarding her observations and impressions." Env. II, T Report, p.2. Therefore, even had the CLR not submitted an improper report, due process required her to be available for cross-examination.

considered appointed agency's investigative report in contested custody decision, without affording opportunity to cross-examine its author); *Malone v. Malone,* 591 P.2d 296, 298 (Okla. 1979) (investigator in child custody case must be available for cross-examination, as due process "requires an opportunity, in almost every situation, to confront and cross-examine adverse witnesses") (*citing Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). *See also Matter of Swan***,** 567 P.2d 898, 900-01 (Mont. 1977) ("Any relaxing of these procedural rules could create a custody procedure ripe for abuse," holding that admission of unsworn state agency reports without cross-examination was reversible error).

The CLR's recommendations repeatedly related double hearsay statements as facts; asserted her own personal opinions, including regarding the justness of each parent's case; described facts not in the record; and judged the credibility of the parties' statements. *See, e.g.,* CD, Bookmark 15, p.2 ("CLR believes Father was merely trying to convey to Mother that…"); Vol, I., p.197 (in recorded calls, "admittedly, some of the conversations sound as if Scott is slurring his words" but "Scott. . .denied that he was still drinking. . ."); p.198 (expressing personal feeling that Ms. W's reasons for moving to Lamar ─ better jobs, housing ─ do not "ring true"); p.200 (relating as fact Mr. C's claim that he "only wants the best for K2"). The CLR's report also

offers hearsay or double-hearsay statements to support the alienation claim: for example, "Scott states [that] Angela will make comments to C1," etc. *Id.* p.198. At no time during any hearing did the CLR offer any written evidence or call any witnesses. Vol. III, *2/20/07 Transcript*, 191:10-12.

Even a properly conducted report or evaluation may not be a vehicle for admitting inadmissible hearsay. *See Leiting v. Mutha*, 58 P.3d 1049, 1054-55 (Colo. App. 2002) (excluding hearsay statements in expert report, because expert reports are not "a vehicle for undermining other rules of evidence") (quoting 29 C. Wright & V. Gold, Federal Practice & Procedure § 6273, at 315 (1997))*; see also Hastings v. Rigsbee*, 875 So. 2d 772, 778 (Fla. App. 2004) (reliance upon parenting coordinator's report which was "almost entirely hearsay" was error); *Koehler v. Farmers Alliance Mut. Ins. Co*., 566 N.W.2d 750, 754 (Neb. 1997) (testifying expert may not be made a conduit for hearsay); *Joyce S. v. Frank S*., 571 N.W.2d 801, 808 (Neb. 1997) (excluding hearsay in GAL report from review on appeal), *disapproved by Betz v. Betz*, 575 N.W.2d 406, 410 (Neb. 1998) to the extent it sanctioned GALs acting as attorneys, because under ethical codes, "[o]ne person may not serve in both capacities."

In reforming Colorado's GAL practices, the statute purposely adopts the constitutional mandate concerning the right to examine investigative reports.

The CFI, who "is appointed to serve as the investigative arm of the court," "shall be subject to direct and cross examination by both parties if called as a witness." C.J.D. 04-08, Standard 3. The CLR *may not* be called as a witness. C.R.S. § 14-10-116(2). Of course this bar is constitutionally permissible only if the CLR does not trespass into the role of court investigator.

Here, the CLR presented hearsay reports revealing and interpreting her own investigations and conversations with third parties, and impermissibly functioned as a witness. The court expressly adopted her recommendations as its orders without permitting cross-examination, violating not only the statute, but Ms. W's rights under the Due Process Clauses of the federal and Colorado Constitutions.

II. The Court's Post-Decree Modification Ignored the Requisite Endangerment Standard Under Section 14-10-129

Standard of Review

Application of the correct legal standard is a question of law, reviewed *de novo*. *See Sidman v. Sidman*, --- P.3d ----, 2009 WL 3465724 *2 (Colo. App. 2009); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 947 (Colo. App. 2009).

Preservation in the Record

This issue was preserved for appeal at Vol. III, *2/20/07 Transcript*, 99:22-102:7 (arguing endangerment standard applied to alterations of the 2005

Decree's parenting allocations)and *8/15/06 Transcript*, 78:1-15; 79:19-80:34; 85:19-86:6; 86:15-21 (same); Vol. I, pp.184-185 (ruling on standard to be applied).

A. Colorado's Statutes Required Preservation of C1's Stability and the Permanent Order Absent an Endangerment Finding

Colorado law reflects a clear and wise commitment to stability for children, including the recognition "that a modification of custody is likely to result in some harm to the child involved." *Christian v. Randall*, 516 P.2d 132, 134 (Colo. App. 1973). Regarding modifications, our Supreme Court has stressed the importance of preserving "the interdependence and relationship between the majority time parent and the child," and that "the goal of a modification proceeding is to maintain th[e] stability" created by the dissolution proceeding. *Spahmer v. Gullette*, 113 P.3d 158, 163 (Colo. 2005) (citing § 14-10-129 and *In re Marriage of Francis*, 919 P.2d 776, 780-81 (Colo. 1996). *See also Francis*, 919 P.2d at 780-781 ("The intent of the legislature in enacting section 14-10-131 of the UDMA was clearly to emphasize the importance of stability in a child's custodial arrangements" and in order to do so, to "mak[e] it difficult to modify.").

Thus, once a final decree has been entered, other than a few exceptions inapplicable in this case[4], § 14-10-129 specifically prohibits modifications that change the majority parent unless the court finds

> [t]he child's present environment endangers the child's physical health or significantly impairs the child's emotional development . . . [and that] the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

C.R.S. § 14-10-129(2)(d). *See also* C.R.S. § 14-10-131(2)(c) (related to changes in parental decision making). This endangerment requirement is substantively unchanged from the prior version of the statute. *See In re Marriage of Larington*, 561 P.2d 17, 19 (Colo. App. 1976) ("For the sake of continuity and stability [the similarly worded prior version] dictates that 'the court shall retain the custodian established by the prior decree' absent the [endangerment] showing required by § 14-10-131(2)(c)."); *Christian*, 516 P.2d at 135 (reversing custody modification under prior modification statute where there was "no evidence that the environment of [mother]'s home in Colorado endangered the children's physical health or impaired their emotional

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[4] There was no other possible statutory basis to depart from the rule that the court must retain the allocation of parental rights in the permanent order, or to modify or revoke its designation of Ms. W as C1's majority time and primary residential parent. *See* C.R.S. §§ 14-10-129 and 14-10-131. The trial court expressly found that none of the other statutory exceptions applied. *See* Vol. I., p.184 (Findings 4 and 5).

development.").

Unfortunately, the 2009 Order disregarded the modification standard, and perpetrated precisely the harm the statute aims to avoid. C1 lost the stability of home, community and school granted by the 2005 final decree, and virtually lost her mother and siblings, whom she now sees only a few days each month.

There is no dispute that at the time of Mr. C's 2006 Motion to Modify, Ms. W was the majority time residential parent. *See* Vol. III, *8/15/2006 Transcript*, 85:11-13; *see also* Vol. I., p.184 (8/22/06 *Temporary Order*) (recognizing that Mr. C is "requesting a change in parenting time pursuant to § 14-10-129 which could result in a change of the parent with whom the children reside a majority of the time"). Accordingly, the court acknowledged the applicability of the endangerment standard to Mr. C's Motion, *see id.* (invoking § 14-10-131's and § 14-10-129's "endangerment" finding for changes in decision making authority and majority parenting time, respectively); indeed, in its "temporary" modification orders the court expressly sought to avoid an endangerment inquiry by preserving, albeit only nominally, Ms. W's majority-time status. *See supra*, pp.10-13. Yet the court's final 2009 Order removed Ms. W as C1's primary parent and greatly restricted the child's access to her mother for *seven years*, based solely on a

purported application of a "best interests" standard *without any analysis of endangerment or emotional impairment*. *See* CD, Bookmark 103 (finding only that "the [CLR's] recommendations adopted by the Court are made taking into account the best interest of the child as set out in C.R.S. 14-10-124").

This Court has firmly held that "if the trial court's findings show no indication of [endangerment or impairment], an order changing custody cannot stand." *In re Marriage of Harris*, 670 P.2d 446, 447 (Colo. 1983) (reversing grant of modification motion and remanding with orders to deny the motion); *see also Christian v. Randall*, 516 P.2d at 135 (reversing and remanding with directions to deny the petition for modification); *Larington*, 561 P.2d at 19 (reversing grant of modification motion alleging alienation and remanding with instructions to reinstate the initial decree). Other UDMA states agree. *See In re Custody of Carter*, 137 484 N.E.2d 1175, 1178 (Ill. App. 1985) ("the court's failure to expressly make the required [endangerment] findings renders its judgment void and requires [reversal]"). Here the court failed to find any endangerment to C1 from Ms. W, who it expressly found more than fit. This error alone requires reversal, reinstatement of the original decree, and return of C1 to her mother.

B. The Record Cannot Support an Endangerment Finding

Nor can an endangerment finding be inferred from this record. The trial court expressly found Ms. W is an "excellent parent[],"CD, *7/31/09 Transcript*, 130:19, and that C1 had "siblings and friends and a good school in Lamar." *Id.* 129:24-131:19. Dr. T testified that there was "no evidence of impairment of emotional development in Allison" while in her mother's care. Vol. III, *2/20/07 Transcript*, 146:6-8.

The court identified no concerns regarding Ms. W's parenting of C1. Although the CLR and Dr. T speculated, based on Mr. C's poor relationship with K2, that Ms. W *might* act to alienate Mr. C from C1 someday (Env. II, T Report, p.16; Vol. I, pp.199, 200; Env. V, 2009 Report, p.14), the trial court *explicitly rejected* parental alienation as one of "the real issues in [C1's] case." CD, *7/31/09 Transcript*, 87:7-88:21 (denying Ms. W opportunity to present rebuttal evidence of Mr. C's letters "personally asking to relinquish his rights to K2," on the grounds that alienation was not relevant to C1's situation).

Nor could alienation be found on this record. *See* Vol. III, *2/20/07 Transcript*, 143:25-144:6 (Dr. T's testimony that "Allison has a strongly attached relationship with [Mr. C]"); 143:19-24 (Dr. T testifying that C1 "didn't demonstrate any kind of symptomology"). The CLR's *ultra vires* 2009

Report likewise noted that "C1 is very bonded with Father." Env. 5, 3/20/09 "GAL Report," p.13. Moreover, while Mr. C claimed Ms. W had "alienated" him from K2, Vol. III, *2/20/07 Transcript*, 163:8-13 and 164:13-15, the record clearly indicates that K2's feelings are the natural consequence of his familial and alcohol abuse, and his open efforts to undo the adoption. *See supra,* pp.2-7*, and infra,* Section III.

Finally, any alleged parenting problems with respect to *K2* could not, as a matter of law, justify removing Ms. W as *C1's* primary residential custodian. *See In re Marriage of Pilcher,* 628 P.2d 126, 127 (Colo. App. 1980) (holding, under substantively similar prior version of § 14-10-131(2), that evidence of parent's poor relationship with older siblings "was irrelevant to the questions which must be determined under the statute prior to entry of an order modifying the custody of the youngest child"). In short, there is no possible basis for an endangerment finding here.

C. Parental Alienation Is an Invalid and Inadmissible Theory When Applied to Abuse Allegations

Dr. T characterized K2 as "dramatic" in reporting Mr. C's mistreatment, Vol. III, *2/20/07 Transcript*, 132:11-21, and apparently on that basis concluded that her report was concocted by Ms. W, *id.* 132:11-14 ("I don't think [her statements] are based in reality") — a conclusion that was

repeated without additional support by the CLR. *See* Vol. I., p.199 (2007 Report); Env. V, p.14 (2009 "GAL" Report).

Notwithstanding the trial court's statement that alienation of C1 was *not* at issue, the CLR's opinion – upon which the court's decision was based - and the orders below were thoroughly infected by Mr. C's unverified claims of parental alienation, in which he blamed Ms. W for K2's hostility and intimated that C1 might someday turn against him. *See* Vol. III, *2/20/07 Transcript*, 163:11-13; 164:13-16; 166:22-167:2 (perjuring himself, *see id.* 170:25-173:16); 168:9-19. Dr. T testified that "parental alienation" is an "expan[sion]" of "a thing called parental alienation syndrome. . . a phenomena where one parent engages in behavior aimed at eliminating and interfering with the relationship between the child or children and the other parent," and that he thought Ms. W was at fault for K2's alienation from Mr. C. Vol. III, *2/20/07 Transcript*, 109:14-22.

Whether termed "parental alienation syndrome" ("PAS") or just "parental alienation" ("PA"), the idea that reported abuse and its impact can be dismissed as evidence of "alienation" has been overwhelmingly rejected by the scientific and legal community. *See* Robert E. Emery et. al, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. IN THE PUB. INTEREST, July 2005 at 1, 10 ("[T]he

scientific status of PAS is, to be blunt, nil."). The few published cases directly ruling on the admissibility of PAS have rejected it as lacking any scientific validity. *See Snyder v. Cedar*, No. NNHCV 010454296, 2006 WL 539130 *9 (Conn. Super. Ct., Feb. 16, 2006); *NK v. MK,* 851 N.Y.S.2d 71, 74-75 (N.Y. Sup. Ct. 2007); *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000).

The American Psychological Association's ("APA") expert Task Force has recognized that, like PAS, PA is an "inappropriate pathological label" that is often used in custody cases to discredit family members alleging abuse, warning that "[t]erms such as 'parental alienation' may be used to blame the women for the children's reasonable fear or anger toward their violent father." APA, VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 100 (1996); *see also* Clare Dalton et al., Nat'l Council of Juvenile & Fam. Ct. Judges & State Justice Inst., *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, at 24 (2006) (warning that "[t]he discredited 'diagnosis' of 'PAS' (or allegation of 'parental alienation') . . . inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be 'alienated' have no grounding in reality" and "diverts attention away from the behaviors of the abusive parent").

PA was misused here in exactly those ways. The court, evaluator, and CLR treated K2's hostility toward Mr. C as evidence of Ms. W's "alienation," and ignored *five family members'* (Angela, Kody, K2, Tammy and K1) descriptions of Mr. C's abuse – even including his drunken assault and choking of Ms. W when she was nine months pregnant with C1. *See, e.g.*, Vol. III, *2/20/07 Transcript*, 111:22-112:3 (Dr. T's characterization of the choking as a "minor incident"). Both appointees treated K2 's anger and fear and reports of Mr. C's actions as evidence of alienation, rather than Mr. C's abuse. The court ignored Kody's report of excessive drinking and yelling, Mr. C's arrest for drunk driving, and his admission in writing to an alcohol problem that had seriously affected his family. Similarly, it totally dismissed the Nelsons' reports that he suffocated seven-year-old K1 until she agreed to call him "dad," called her drunk to berate her as "stupid" and "dumb," and overdosed her on medication. *See supra*, pp.5-6. It was alienation theory – which presumes a disfavored father bears little or no responsibility for a child's hostility toward him – that fueled these minimizations and dismissals of Mr. C's behaviors.

This Court should rule as a matter of law that the pseudo-scientific alienation theory ─ whether termed PA or PAS ─ is inadmissible when used to

rebut abuse and its impact on children and their mother, and that such an alienation claim cannot satisfy the endangerment standard under § 14-10-129.

III. In Removing C1 from Her Mother, the Court Failed to Consider Statutorily Required Best Interest Factors

Standard of Review

Application of the correct legal standard is a question of law, reviewed *de novo*. *See Sidman v. Sidman*, --- P.3d ----, 2009 WL 3465724 *2 (Colo. App. 2009); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 947 (Colo. App. 2009). In applying § 14-10-129, the trial court must make findings sufficient for the appellate court to "determine the grounds for the trial court's decision and whether the decision was supported by competent evidence." *In re Marriage of Lester*, 791 P.2d 1244, 1246 (Colo. App. 1990). Its findings "*must* consider all relevant factors" under § 14-10-124. *Id.* Moreover, "when there is no evidence to support a finding or conclusion and such finding or conclusion is manifestly against the weight of the evidence, it cannot be permitted to stand." *Christian v. Randall*, 516 P.2d 132, 135 (Colo. App. 1973).

Preservation in the Record

This issue was preserved for appeal at CD, *7/31/09 Transcript*, 99:19-103:18; CD, Bookmark 43, p.142-43.

Even were application of solely a best interests test legally sufficient for a modification order ─ which as discussed above, it is not ─ the court's determination of C1's best interests was inadequate as a matter of law because it failed to consider all the "pertinent" factors, including the factors mandated by statute. *See In re Marriage of Martin*, 42 P.3d 75, 77 (Colo. App. 2002) (concluding that the trial court abused its discretion, and vacating modification order). Reversal is required. *Ibid*; *In re Marriage of Lampton*, 704 P.2d 847, 850 (Colo. 1985) (reversing and remanding where court misapplied best interest factors).

A. The Court Improperly Refused to Consider Mr. C's Familial Abuse and Past Failed Parenting.

In determining a child's best interests regarding custody, Colorado court must give "paramount consideration" to evidence concerning "[w]hether one of the parties has been a perpetrator of child abuse or neglect" or "spouse abuse." *In re Marriage of McCaulley-Elfert*, 70 P.3d 590, 592 (Colo. App. 2003) (upholding custody determination adverse to boy's father, who abused his wife and stepdaughter, since "[e]vidence of abuse or neglect, even when the victim is unrelated to the perpetrator, is probative of the overall home environment and the interaction of the parties with their children, issues that lie at the core of any parental responsibility or parenting time proceeding.");

C.R.S. § 14-10-124(1.5)(a)(IX), (X).[5] The record here contains substantial evidence — some of which is undisputed — that Mr. C perpetrated both child and spouse abuse against both of his families. The court was required to, at the least, address these core factors.[6]

It was undisputed that Mr. C attacked Ms. W when she was nine months pregnant with C1, pushing her down and choking her, and that she received two protection orders. *See supra*, pp.2-3, 8-9. Ms. W's testimony that he "threat[ened to] tak[e] the[children]" was also never disputed. Vol. III, *3/4/05 Transcript,* 21:8-10. Threatening to take children away from a wife is a common batterer behavior. Lundy Bancroft, *The Batterer as a Parent*, Synergy, Winter 2002, at 6-8 (Newsletter of the National Council of Juvenile and Family Court Judges). The court said nothing about this evidence, despite Colorado's clear policy of treating domestic abuse as vital to § 14-10-124's "statutory directive of assessing all relevant factors when making the best interests determination."

[5] This statute was amended by the legislature in 2010 to substitute "domestic violence" in place of "spouse abuse," effective July 1, 2010. *See* H.B. 10-1135, 67th Leg, 2d Reg. Sess. (Colo. 2010).

[6] Had Ms. W not been repeatedly accused of "alienation" when she and K2 reported Mr. C's abuse, she might have felt more free to discuss the abuse in detail, describing, for example, precisely why she called the police the night she fled to Lamar.

And the court's inexplicable finding that Mr. C was an "excellent parent[]," CD, *7/31/09 Transcript*, 130:19, is even less comprehensible in light of the largely undisputed evidence that Mr. C mistreated K2 and K1, and ultimately abandoned both daughters. *See supra,* pp.3-7. Moreover, Mr. C admitted on cross-examination that he sought to drop his parenting rights to K2 to avoid monetary obligations, hardly the actions of an excellent parent. Vol. III, *2/20/07 Transcript*, 171:25-174:15.

Furthermore, the court heard testimony from Mr. C's former wife and first daughter concerning his domestic abuse. *See supra,* pp.2-4. The court "discounted" it, suggesting they had a "strong bias." CD, Bookmark 103, p.1; CD, *7/31/09 Transcript*, 129:19-23. The court offers no explanation of why it perceives these individuals ─ neither of whom had anything to lose or gain from the litigation ─ as biased, let alone more biased than either party. It cannot be that merely testifying about abuse *per se* renders a witness's testimony "biased" – otherwise, abuse could literally never be proven in court. In fact, the judge did not find their testimony incredible or untruthful – but only not "particularly helpful." *Id.* 129:19-23. When a trial judge dismisses third party witnesses' testimony so flatly, the decision indicates less a credibility

judgment or objective weighing of evidence than a resistance to considering evidence unfavorable to a preferred party.[7]

In any event, as a matter of law, the trial court had to weigh the evidence of abuse and abandonment – it could not simply ignore it. Yet, astonishingly, the court *made no finding whatsoever on domestic violence.* In failing entirely to address the abuse question, the trial court committed legal error.

B. The Court Failed to Consider Mr. C's Substance Abuse

Under Colorado law, the trial court was required to consider "[t]he mental and physical health of all individuals involved." C.R.S. § 14-10-124(1.5)(a)(V). Alcohol abuse is intrinsically relevant to parental fitness. *See People Ex Rel M.H.*, 10 P.3d 713, 715 (Colo. App. 2000) (finding mother unfit based on alcohol and substance abuse).

The record contained the following undisputed evidence of Mr. C's serious alcohol abuse. Mr. C was drinking when he choked Ms. W while nine months pregnant with C1. Vol. III, *3/4/05 Transcript*, 39:6-40:14. Mr. C would become intoxicated and call seven-year-old K1 to verbally abuse

[7] The court's unfriendliness toward appellant, a nonlawyer who was representing herself, and solicitude toward appellee, who was represented by counsel, is palpable. *See, e.g.*, Vol. III, *2/20/07 Transcript*, 135:11-6. *Compare 3/4/05 Transcript*, 8:9-13 and 8:19-23; *id* 43:24-44:10 and 49:9-50:15; CD, *7/31/09 Transcript*, 91:13-92:17, 50:5-25, 44:16-23, 68:1-13, 95:20-96:9, 40:17-41:8 and 42:16-43:6.

her as "stupid and dumb." *See, e.g.* CD, *7/31/09 Transcript*, 115:11-118:20. Mr. C admitted he was arrested and charged with drunk driving around 1996. CD, *7/31/09 Transcript*, 90:10-91:6. *See* CD, Bookmark 53, p.238 (DUI charge). He admitted to family "get-togethers" on Sundays, Env. II, T Report, p.6, after which "there would be a bag full of beer cans." *Id.*, p.9. Kody said Mr. C got "angry-aggressive" when drinking and would drink to excess. *Id*. Nelson divorced him because he refused to stop drinking. CD, *7/31/09 Transcript*, 111:12-17. Indeed, the CLR's Report recognized Mr. C might *still* be drinking. Vol. I, p.197 (it "sounds as if Scott is slurring his words.").

Additional and even more damning evidence was actually deliberately excluded by the court. Although their authenticity was uncontested, the court refused to allow Ms. W to introduce letters from Mr. C (vowing to cut back on his drinking) and his mother (expressing concern about the effect of Mr. C's drinking on the family) (CD, Bookmark 56, Exs. 2 and 3, pp.282-283). . CD, *7/31/09 Transcript*, 91:7-92:17; Vol. I, *3/4/05 Transcript*, 39:6-42:3, 43:23-44:2 (excluding letters as "hearsay"). As evidence of specific admissions by Mr. C of his substance abuse problem, and his mother's statements that she wanted him to consider its effects (not the truth of her statements), they were not

hearsay.[8] Their exclusion was error. *See Burlington N.R. Co. v. Hood*, 802 P.2d 458, 466 (Colo. 1990); *Conrad v. City & County of Denver*, 656 P.2d 662, 677 (Colo. 1982).

The court's final order made no mention of Mr. C's alcohol abuse. Yet it was often related to the reported domestic abuse and was directly pertinent to Mr. C 's parental fitness. The complete failure to address this significant health problem was an abuse of discretion. *See In re Marriage of Martin*, 42 P.3d 75, 78-79 (Colo. App. 2002) (reversing where, in limiting parenting time, "the court did not first consider various factors listed in § 14-10-124(1.5)(a)").

C. The Court Disregarded Allison's Stable Bonds with Her Mother, Siblings, Friends, Doctors, and Community in Lamar

Finally, courts must consider "[t]he interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests" and "[t]he child's adjustment to his or her home, school, and community." C.R.S. § 14-10-124(1.5)(a)(III), (IV). *See also Martin*, 42 P.3d at 78 (Colorado courts recognize that "children benefit psychologically, socially, and educationally from stable and predictable parental relationships" and "when family integrity is broken or weakened by

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[8] *See* COLO. R. EVID. 801(c), 801(d); *People v. Crespi*, 155 P.3d 570, 575-576 (Colo. App. 2006).

state intrusion, a child's needs are often thwarted and … her development detrimentally impacted."). This factor reinforces the statute's overarching emphasis on maintaining stability for children, particularly after final decrees. *See In re the Marriage of DeZalia*, 151 P.3d 647, 648 (Colo. App. 2006) ("[M]odification of a prior order concerning parenting time in a manner that substantially changes the parenting time as well as changes the party with whom the child resides a majority of the time is generally discouraged under § 14-10-129(2)").

There was simply no defensible reason to remove Allison from her positive home environment. Young C1 was part of a loving family, including her sister and two brothers, with whom she had a close relationship. CD, *7/31/09 Transcript*, 100:10-11. She wished to remain with them. *Id.* 100:17-20. Dr. T found that Ms. W was a good mother to C1. Env. II, T Report, p. 15, 19; Vol. III, *2/20/07 Transcript*, 143: 9-24, 146:6-8 (opining that C1 appeared "happy and well adjusted"); *see also* CD, Bookmark 56, pp. 3-6 (discussing C1's positive living environment). She had close friends, her best friend lived next door to her, and she had been attending the same preschool for two years. CD, *7/31/09 Transcript*, 100:9-12; *see also id.* 125:14-126:16. She had a close bond with her maternal grandparents. *Id.* 100:23-24. She had seen the same doctor for three years. *Id.* 100:14-15. Had the trial judge

objectively compared Allison's stable living situation with her mother, under which she was thriving, to the necessary disruption caused by uprooting her from Lamar, he could not have reasonably determined that doing so was in her best interests — *even ignoring her father's history of alcohol abuse and mistreatment of his two older daughters*. Moreover, despite a pronounced obsession with the significance of K2's purported "alienation," neither the court, evaluator, or CLR ever confronted Mr. C's undisputed abandonment of K2 and K1. *See* CD, Bookmark 103, 426-431; Env. II, T Report; Vol. I, pp.193-205; Env. V, 3/20/09 Report.

In unjustifiably removing C1 from her mother, the trial court unwittingly fulfilled Mr. C's abusive threats to take the children from Ms. W. Vol. III, *3/4/05 Transcript*, 21:6-12. When weighed against Mr. C's undisputed history of alcohol abuse, spouse abuse, rejection of his other children, and the troubling evidence of abuse of K1 and K2, the court's readiness to roll the dice for C1 is a disturbing abuse of discretion.

CONCLUSION

Both the record and the legal violations in this case are so clear that this Court should find as a matter of law that the trial court's order stripping 5-year old C1 from her mother was error and requires reversal. This Court should reverse the modification and reinstate the original Decree, and remand with

instructions that C1 be returned to finish school in her mother's primary residential custody in Lamar. Appellant asks that this Court rule in sufficient time for the new school year.

Respectfully submitted,

Original signatures on file in accordance with CRCP 121, § 1-26

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CERTIFICATE OF SERVICE

The above and foregoing document was duly served by Lexis/Nexis on this 1st day of June 2010, to the following:

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