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## Memorandum

**DATE:** February 14, 2020  
**TO:** Zero Abuse Project  
**FROM:** Brownstein Hyatt Farber Schreck LLP  
**RE:** Constitutional Analysis of Proposed Bill Rehabilitating Termed Civil Claims Involving Abuse of a Minor

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This memorandum addresses certain retroactivity issues under the Colorado Constitution with legislation that would rehabilitate civil claims alleging abuse of a minor that are presently time barred. In short, while current Colorado Supreme Court case law prohibits the general assembly from reviving civil claims, the Court has recognized a limited public-policy exception that may, with the proper legislative record, permit legislation reviving claims for long-past abuse to survive constitutional scrutiny.

### **Factual and Legal Background**

We understand you are considering supporting legislation intended to strengthen civil claims for abuse of a minor in Colorado by providing claimants greater access to the courts to redress the wrongs against them. The proposed bill would accomplish this objective by (i) abolishing the statute of limitations for such claims, and (ii) providing for a narrow window (one to two years) that would allow claimants to bring claims otherwise barred by Colorado's statute of limitations. This memorandum focuses on the latter class of claims.

Like many states, Colorado's Constitution prohibits the general assembly from enacting any law that is "retrospective in its operation." Colo. Const. art. II, § 11 (2020). A law that applies *retroactively* is unconstitutionally *retrospective* if it takes away or impairs a vested right. *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006). There is no bright-line test for what constitutes a vested right, but the Colorado Supreme Court has looked to three factors to determine which rights are vested.<sup>1</sup> See *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002). These factors are a

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<sup>1</sup> The three factors are (1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law.

synthetization of the Court's prior understanding of what constitutes a vested right in Colorado.

Specific to the issue here, the Colorado Supreme Court has plainly concluded: "Where a statute of limitations has run and the bar attached, 'the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation.'" *Jefferson Cty. Dep't of Soc. Servs. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980) (quoting *Willoughby v. George*, 5 Colo. 80, 82 (1879)).<sup>2</sup> That is, "[w]hen the bar of the statute of limitations has one attached, the legislature cannot revive the action." *Id.*<sup>3</sup>

Nonetheless, the Colorado Supreme Court has recognized a limited exception to the constitution's prohibition on impairing vested rights. Even vested rights "may be balanced against public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations." *DeWitt*, 54 P.3d at 855. The new law "must bear a rational relationship to [the] legitimate governmental interest" asserted. *Ficarra v. Dep't of Reg. Agencies, Div. of Ins.*, 849 P.2d 6, 22 (Colo. 1993).

### **Colorado Supreme Court's Anticipated Review**

A law reviving civil claims for abuse of a minor is certain to be challenged as unconstitutionally retrospective. Challengers will point to the Colorado Supreme Court's *Jefferson County* decision and argue the new law impairs their vested rights by rehabilitating stale claims. Although that position is nearly certain to prevail, it does not answer the separate question—which must also be addressed—of whether public health and safety concerns and the state's police powers to regulate certain practices outweigh the vested right. Such a showing would save the proposed law's constitutionality.

We believe the constitutionality of a law reviving termed civil claims for abuse of a minor will ultimately be decided by the Colorado Supreme Court. We believe that the best strategy for defending such a law's constitutionality is to invoke Colorado's public-policy exception to the impairment of vested rights. To defend the law on such a ground, proponents should build a legislative record highlighting the importance of the state's police power in protecting minors and the strong public

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<sup>2</sup> See also *In re Estate of Becker*, 32 P.3d 557, 562 (Colo. App. 2000), *aff'd sub nom. DeWitt*, 54 P.3d at 849; *Cont'l Title Co. v. Dist. Ct. In & For City & Cty. of Denver*, 645 P.2d 1310, 1314-15 (Colo. 1982); *People in Interest of Cty. of Sonoma on Behalf of J.S. v. Holleron*, 797 P.2d 806, 808 (Colo. App. 1990).

<sup>3</sup> We note that this case addressed a statute intended to benefit children. It held that a law which would have revived a mother's (and the state's) claims for child support by absentee or deadbeat fathers was unconstitutionally retrospective. 607 P.2d at 1006.

health and safety concerns the law addresses. This legislative record should focus in particular on the unique nature of abuse against children and the difficulty victims of such abuse have in reporting and coming to terms with such abuse—especially in past decades such that the passage of the statute of limitations here is uniquely unjust. Some proposed topics include:

- The prevalence of abuse in Colorado and the United States—20-25% of children are abused—and the need for the state to protect children.
- Research and literature emphasizing that minors often do not understand or recognize the damage which they have sustained until a number of years after they attain majority.
- The need to afford claimants sufficient time to recall and come to terms with traumatic childhood events before they must take action against the abuser. There are known cases in which victims take decades (40 to 50 years) to reveal their abuse.
- That lawsuits filed under other states' window legislation have led to the public identification of previously unknown child predators, reducing the odds that minors will be abused in the future.
- The many adverse childhood experiences as a result of abuse: generational embodiment; social conditions; adverse childhood experiences; disrupted neurodevelopment; social, emotional, and cognitive impairment; adoption of health-risk behaviors; disease, disability, and social problems; and early death.
- The long-term adaptation that often accompanies abuse: sexual problems; dysfunctions or compulsions; confusion and struggles over gender and sexual identity; homophobia and confusion about sexual orientation; problems with intimacy; shame, guilt, and self-blame; low self-esteem; negative self-images; increased anger; and conflicts with authority figures.
- The overwhelming public health costs to the state and society at-large related to abuse. The Centers for Disease Control and Prevention has reported the total estimated per-victim cost of nonfatal abuse is \$830,928, resulting in estimated annual U.S. population economic burden of \$428 billion.
- The comorbidities of abuse and high-school dropout rates, teen pregnancy, substance abuse, increased contacts with law enforcement, and greater utilization of government services.

