

## FAMILY LAW NEWSLETTER



# Legal Protection of Children in Nontraditional Families

by Kimberly R. Willoughby and Sherilyn Rogers

The American family is changing dramatically. At one time, most families fit the nuclear family model, consisting of a stay-at-home mother, a working father, and 2.3 biological children. Today's families come in many variations. Consider the following statistics: 27 percent of households with children under eighteen are maintained by a single parent;<sup>1</sup> almost 25 percent of children live or will live in step-families;<sup>2</sup> from 6 million to 14 million children are being raised by gay or lesbian parents;<sup>3</sup> and 3.9 million children live in households maintained by grandparents.<sup>4</sup>

Technology is poised to change even more radically what "a family" means. Children may be born with only one legal parent in certain artificial insemination situations or may have more than two legal parents in certain assisted reproductive technology circumstances. Current medical technology, for example, can create a situation where there are potentially five legal parents for one child: one genetic mother, one genetic father, one gestational mother, and two parents who rear the resulting child. To address the strain that these latter scenarios are likely to put on current state laws, the Family Law Section of the American Bar Association issued a proposed model act in December 1999 dealing with legal issues presented by assisted reproductive technology.<sup>5</sup>

This article discusses ways to protect nontraditional, intact families and briefly looks at how the different legal protections

work when there is a break-up of the family. The article assumes that these families consist of one parent who is a biological or adoptive parent and one who is a "psychological parent." When talking of both parties, the article calls them "parents." Examples of these families are as follows: families in which there is a step-parent; families where the parents are not married either by choice or because they are in a same-sex relationship;<sup>6</sup> families where a biological parent lives with the child's grandparents; and families that have used some form of alternative reproduction that results in a child who is not genetically linked to one or both parents. When talking about "intact families," the article is discussing families where the psychological parent is living with the biological or adoptive parent of the child at issue.

### Statutory Protections

#### *Children of Biological Or Adoptive Parents*

Colorado and federal statutes create many protections for children with respect to their biological or adoptive parents. The following are some examples:

- a child has the right to inherit from a parent's estate, should the parent die intestate;<sup>7</sup>
- subject to the priority of others, a child has the right to be a guardian or conservator or personal representative for the parent or the parent's estate;<sup>8</sup>
- a child has the right to have a parent make medical decisions on the child's behalf, if needed;<sup>9</sup>
- a child has the right to be covered under a parent's health insurance policy;<sup>10</sup>
- a child has the right to have the family unit protected by the Family and Medical Leave Act ("FMLA");<sup>11</sup>

- a child has the right to sue for wrongful death of a parent;<sup>12</sup>
- a child has the right to receive Social Security benefits in the case of the disability or death of a parent;<sup>13</sup>
- a child has the right to maintain a relationship with a parent unless the parent is unfit and parental rights are terminated or the parent presents an imminent danger to the child;<sup>14</sup> and
- a child has the right to receive financial support from a parent during minority.<sup>15</sup>

These are powerful tools that the state has created to strengthen and support the bond between parent and child and to ensure that a child is protected by his or her parents. For a child to be able to use these protections automatically, a biological or adoptive connection to a parent is necessary.<sup>16</sup>

Nontraditional families, however, are often left unprotected and must spend time and money hiring an attorney to provide their children the basic protections the government acknowledges as necessary to a

---

*This newsletter is prepared by the CBA Family Law Section. This month's article was written by Kimberly R. Willoughby, Denver, Manager of Willoughby Law Firm LLC—(303) 839-1770; and Sherilyn Rogers, Parker, an associate with James T. Anest P.C.—(303) 841-0881. The authors would like to thank the many family law attorneys who gave input on this article. The authors also wish to acknowledge those attorneys who have worked to expand the law to protect children in nontraditional families, and who have shared their successes and experiences with other attorneys.*

---

**Column Editors: Bonnie M. Schriner, a sole practitioner in Denver—(303) 458-5100; Gretchen Aultman, of Burns, Wall, Smith & Mueller, P.C., Denver—(303) 830-7000**

child's well-being. Unfortunately, because the attorney must be creative in using the law to protect these children, the attorney's devices are always subject to changes in statutory or common law, to direct challenges from the state, or to the predilections of the judge to whom a matter is assigned. The law is anything but stable or predictable in this area. This article assumes that children are best served by being able to take advantage of the legal bonds to both of their parents.

## Ways to Protect Children in Nontraditional Families

### Guardianships

Under the guardianship statutes, there are three ways to become a legal guardian: (1) through appointment by the court on petition, even though one or both of the biological parents are alive;<sup>17</sup> (2) by a delegation of powers from a biological parent while she or he is alive, which is essentially a power of attorney;<sup>18</sup> and (3) through appointment by the court on the death of one or both biological parents.<sup>19</sup>

A person named as the legal guardian of a child has the powers and responsibilities of a parent regarding support, care, and education of his or her ward.<sup>20</sup> The legal guardian may apply available money to the child's needs; receive money and property on behalf of the child; maintain physical custody of the child; sue on behalf of the child; and consent to medical treatment, marriage, and adoption of the child.<sup>21</sup> The legal guardian is empowered to make decisions for the child and to manage the child's money. The legal guardian may cover the child under the guardian's health insurance and may claim the child as an exemption for federal income tax purposes.<sup>22</sup> The benefits of the FMLA apply to guardians.<sup>23</sup> In exercising powers over the child, the guardian has a fiduciary duty to the child.<sup>24</sup>

**Disadvantages of Guardianships:** When guardianships are used, the child of a nontraditional relationship is not able to take advantage of many of the protections that flow from a biological or adoptive connection to a parent. Although the child can take advantage of some of the protections afforded to guardians, they are not protected by the intestacy laws<sup>25</sup> or by the right to sue for the wrongful death of a guardian.<sup>26</sup>

There are other concerns to be considered in determining whether a legal guardianship should be used as a tool for protecting the nontraditional family and the

child while the biological or adoptive parent is alive. For instance, if the client opts for a guardianship pursuant to CRS § 15-14-104, the guardianship document must be signed by the biological parent every nine months. Guardianships under this statute, essentially powers of attorney, are best where the psychological parent needs to accomplish a discrete task, such as school enrollment, or otherwise to act in the absence of the biological or adoptive parent. However, these guardianships are not useful tools for long-term protection of a child because, as noted, they must be reaffirmed every nine months to remain valid. Finally, clients often do not like guardianships, viewing them, on an emotional level, as something less than "being a parent."

"At present, Colorado statutes do not fully protect nontraditional families or the best interests of their children."

**Advantages for Nontraditional Families:** Having a psychological parent petition a court for legal guardianship status while the biological or adoptive parent is alive is best for families made up of one biological parent and one psychological parent and where the other biological parent (if living) does not object to the guardianship. This choice serves those families well whose primary concern is securing medical insurance coverage for a child when it is not available through the biological parent, but is available through a psychological parent. This also may be a good option for step-families where an absent biological parent does not object to the extra protections for the child but does not want to terminate parental rights, or where the parent living with the child does not want to forsake child support from the absent biological parent.

A psychological parent also may seek an appointment as the legal guardian for a child after a biological or adoptive parent has died. The psychological parent can accept a testamentary nomination to be a guardian<sup>27</sup> or may apply for a guardianship through a petition alleging that the best interests of the child would be served by being named the guardian.<sup>28</sup> This procedure is best for families where no other

person contests the appointment of the psychological parent as the legal guardian for the child.<sup>29</sup>

### Wills

While it is important for all parents to provide for their minor children in their wills, it is especially important in nontraditional families. In the absence of a will, the child of a biological parent may automatically inherit from the parent. The child of a psychological parent has no such protection.<sup>30</sup> By having a will prepared, a biological or psychological parent can financially protect his or her child by providing for the child's care and well-being after the parent's death.

Through a will, a biological parent can make arrangements for the care and financial security of the child, including a nomination of guardianship.<sup>31</sup> This is especially important when there is no other biological parent or the other biological parent is unfit to care for the child. If another biological parent is available, the probate court usually will be inclined to turn over the care and control of the child to that parent.<sup>32</sup> Therefore, it is important to state in the will why another living biological parent should not be awarded the care and control of the child, and why the nominated person should be given such an award. By providing information about the fitness of the biological parent, the parent gives the judge a stronger basis for following the deceased parent's wishes when determining who should be appointed. When appointing a guardian, a judge must make a determination based on the best interests of the child, which includes the wishes of the parent and child.<sup>33</sup>

A psychological parent can ensure the child inherits from that parent by providing for the child in a will. The parent also can ensure that the child's financial needs are met by creating a trust for the child. A psychological parent may not, by will, appoint a guardian for the child.<sup>34</sup> However, CRS § 15-14-202 does not prevent the parent from nominating a person to be appointed. If there are no living biological parents, and the biological parents did not name a guardian or successor guardian, a court may consider the nominee of the psychological parent. Appointment of the psychological parent's nominee would be subject to determination of the child's best interests, and the nominee would have priority only as an "interested person,"<sup>35</sup> unless the parent is also nominated by the child at issue and the child is fourteen years or older.

**Advantages for Nontraditional Families:** Families that would benefit most from providing for a child in a will are those in which the proper person to have the care and control of the child after the death of a biological or adoptive parent is not the other biological or adoptive parent. This could be a situation where a biological or adoptive parent wishes his or her current spouse or domestic partner to care for the child after that parent's death, rather than the child's other biological or adoptive parent. This type of planning also is good for families in which there are no surviving biological or adoptive parents, or when a psychological parent wishes to provide for a child despite the availability of another biological or adoptive parent.

### **Actions for Allocation of Parental Responsibilities**

CRS § 14-10-123(c) enables a psychological parent to petition the court for an allocation of parental responsibilities with respect to the child, as long as the child has been under the physical care of the psychological parent for at least six months, if such an action is commenced within six months of termination of physical care. This method of protecting the child can be used, in some courts, either during the relationship, while the family is intact, or after a breakup of the parents' relationship. However, other courts will not hear such a petition while the family is intact. Such courts view CRS § 14-10-123 as requiring a case and controversy before a petition may be heard (this issue is discussed in more detail below).

During the relationship, a biological or adoptive parent and a psychological parent can file a non-contested petition for an allocation of mutual responsibilities with respect to the child, along with a parenting plan and other required pleadings. As with other non-contested domestic relations proceedings, if both parties are represented by counsel, the petition can be granted without a hearing. If the parents' relationship has ended, the psychological parent can petition for parenting time and an allocation of decision-making, as long as this is done within the requisite time period.<sup>36</sup>

A mutual allocation of parental responsibilities protects the child in many of the same ways as a legal guardianship appointment. While the parents are in an intact relationship, the psychological parent is able to perform such general parental functions as enrolling the child in school

and extracurricular activities, taking the child to the doctor or mental health professional, making emergency and non-emergency medical decisions for the child, and receiving information regarding the child from third parties.<sup>37</sup>

If the parents have terminated their relationship, an allocation of parental decision-making to both parents and a determination of parenting time for the non-primary caregiver ensures that the child can continue a stable relationship with both parents.

**Disadvantages of Parental Allocation Actions:** While an allocation of parental responsibilities in some respects grants a stronger legal connection between the psychological parent and the child than a legal guardianship, in other ways the legal relationship is weaker. When a psychological parent is granted decision-making authority and parenting time, there may be no legal "responsibilities" to the child involved. Some courts will issue orders that require a psychological parent to pay child support, while others will not. Legal guardians, on the other hand, at least have a fiduciary duty to their charge and cannot

relieve themselves of that duty without first requesting action from the court.<sup>38</sup>

The child of a psychological parent who is granted an allocation of parental responsibilities is left unprotected in a number of ways. The creation of this legal relationship between the child and the psychological parent does not resolve intestacy, right-to-sue, FMLA, or government benefit issues. Another problem is that the applicable jurisdictional statutes are vague, and Colorado lacks case law to flesh out the statutes. For instance, for parents who are in intact relationships, using a joint petition to give the psychological parent parental responsibilities is not an option in some courts.

Such courts interpret CRS § 14-10-123, and Title 14<sup>39</sup> actions in general as requiring a controversy before the court has jurisdiction to hear a case. While the relationship is intact, it is reasoned, parents do not have a case and controversy. Other jurisdictions, however, do not interpret the statute this way. They reason that the court has jurisdiction over a joint petition that requests a mutual allocation of parenting responsibilities in the same way a court

- Advertisement -

## **Free Report Shows Lawyers How to Get More Clients**

**Sta. Margarita, CA—**  
Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to California lawyer David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers," Ward says. "They have simply learned how to market their services."

A successful sole practitioner who at one time struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight."

Ward says that while most lawyers depend on referrals, not one in 100 has a referral system.

"Without a system, referrals are unpredictable. You may get new business this month, you may not," he says. A referral system, however, can bring in a steady stream of new clients, month after month, year after year, he notes.

"It feels great to come to the office every day knowing the phone will ring and new business will

be on the line."

Ward has taught his referral system to more than 2,500 lawyers worldwide, and says that any lawyer can learn how to get more referrals.

He has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which shows lawyers how to use this marketing system to get more clients, increase their income, and develop a successful law practice.

Colorado lawyers can get a FREE copy of this report by calling 1-800-562-4627 (a 24-hr recorded message), or visiting Ward's web site, [www.davidward.com](http://www.davidward.com)

would have jurisdiction to hear a guardianship action, even though there may be no controversy over the appointment of the guardian.

Only a few appellate cases address who may be deemed a psychological parent and, therefore, who may be entitled to petition the court for an allocation of parental responsibilities. Parents who planned to adopt a child,<sup>40</sup> grandparents who have had the child “dropped off on their doorstep,”<sup>41</sup> and some step-parents<sup>42</sup> all have been deemed psychological parents. However, no Colorado appellate case addresses whether a range of different family members could be considered psychological parents.<sup>43</sup>

To compound the difficulties in identifying who can be a psychological parent, nothing in the Colorado statutes limits the number of persons who can have an allocation of parental responsibilities with respect to a child. In theory, there could be more than two people who petition for an allocation of parental responsibilities, as long as each meets the statutory requirements.<sup>43</sup>

Further muddying the waters is the standing requirement of CRS § 14-10-123. A nonbiological parent can petition a court for parenting time and decision-making authority only if he or she has had “physical care” of a child for at least six months within six months of filing.<sup>44</sup> However, the statute does not define “physical care.” *In re the Custody of C.C.R.S. v. T.A.M.* is the seminal case addressing the meaning of “physical custody” in CRS § 14-10-123(c).<sup>45</sup> In that case, the Colorado Supreme Court held that “physical custody” does not mean “legal custody,” and that to determine who has “physical custody” of a child, the courts should look at how much time the child spends with the petitioning party and the quality of the psychological bond between the child and the petitioner.<sup>46</sup> In considering CRS § 14-10-123(c), the Colorado Court of Appeals has held that if a biological parent maintains contact with the minor child while the child is in the home of the psychological parent, such contact does not defeat the psychological parent’s standing to petition for an allocation of parental responsibilities.<sup>47</sup>

Some Colorado district courts are extending the “physical care” requirement much further, finding that, to meet the “physical care” requirement of CRS § 14-10-123(c), a psychological parent need not have the child actually living with him or her for six months. Instead, regular parenting time with the child suffices to give

the psychological parent standing if there is a significant bond with the child.

Using an allocation of parental responsibilities to protect the child of a nontraditional family is complicated. An attorney must be aware of how individual courts have interpreted the statute. The vagueness of the statute allows for the protection of a broad array of nontraditional families, but only if the particular judge hearing the case is amenable to that type of protection—and if that judge is the sole judge to preside over the case.<sup>48</sup> Because this statute does not provide predictability in its application, it does not provide stability for the family.

**Advantages to Nontraditional Families:** CRS § 14-10-123(c) is best used for non-intact families where there is a dispute over what kind of relationship a child will have with a psychological parent after the child has been removed from the home of the psychological parent. Where the biological or adoptive parent has forbidden a relationship between the child and the psychological parent, this statute is the only means of protecting the child’s relationship with the psychological parent.<sup>49</sup>

However, the U.S. Supreme Court recently ruled, in *Troxel et vir v. Granville*,<sup>50</sup> that a parent has a constitutional right to the care, custody, and control of his or her child. Hence, there must be a justification for a court to interfere with a parent’s decision to allow or disallow visitation to a non-parent, and a parent’s decision on the issue must be accorded some special weight. This decision may have an effect on what relief a psychological parent may receive from a court in these types of cases.

### Uniform Parentage Act Actions

Some Colorado courts are issuing orders protecting nontraditional families pursuant to the Uniform Parentage Act (“UPA”). Petitioners make a claim under CRS § 19-4-105, the statute that governs presumption of parentage. Under this statute, there are a number of ways a person can be presumed to be a parent of a child. For instance, a person is presumed to be a natural parent of a child if he or she receives the child into his or her home and openly holds the child out as his or her natural child, acknowledges parentage in a writing filed with the court or the registrar of vital statistics, and the other parent of the child does not object.<sup>51</sup>

The statute specifically states that a determination of parentage does not depend on the marital status of the parents.<sup>52</sup> Fur-

ther, a biological connection between the parent and the child is not required to establish a presumption of parenthood.<sup>53</sup> Finally, the UPA specifically anticipates that there may be more than one presumptive parent of either gender for a child, such as when a child is born during a marriage, but a non-spouse is shown to be the genetic parent.<sup>54</sup>

**Advantages to Nontraditional Families:** Nontraditional families have just started using UPA actions to protect themselves in Colorado. It is unclear how different judges will interpret the statute and respond to the legal arguments. It appears that actions under the UPA are most appropriately used for two types of nontraditional families: those made up of same-sex parents in an intact relationship,<sup>55</sup> and those made up of parents who have children as a result of assisted reproductive technology where one or both rearing parents are not genetic parents of the child.<sup>56</sup> The UPA can be used only where there is just one legal parent of the child at the time of the petition.

Of the various means of protecting nontraditional families noted above, a UPA action provides the best protections, as the child is determined to be the legal child of the psychological parent. The petitioner is placed on the child’s birth certificate. Therefore, the child of the psychological parent can enjoy all the state and federal protections that flow from legal parentage.

At this time, however, a UPA action is legally tenuous. In Colorado, before 1996, psychological parents could be placed on the child’s birth certificate if the psychological parent legally adopted the child pursuant to CRS § 19-5-203. In 1996, the Colorado Supreme Court determined that only married persons were entitled to file a petition under the statute.<sup>57</sup> The Attorney General’s Office recently attempted to legally challenge the placing of a psychological parent’s name on a child’s birth certificate pursuant to a UPA action.<sup>58</sup>

### Conclusion

Colorado has many types of nontraditional families that include children. At present, Colorado statutes do not fully protect these families or the best interests of their children. Current statutes are inadequate to help maintain stability for these children when their families are no longer intact, leaving them without many of the legal protections granted to children who have two biological or adoptive parents. That protection is left to the General Assembly to provide in the future. Until that

time, attorneys must be willing to work creatively to eke out protections within current law for this vulnerable group of Colorado citizens.

## NOTES

1. U.S. Census, Oct. 1998: <http://www.census.gov>.

2. Bartlett, "Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed," 70 *Va. L.Rev.* 879, 909 (1984).

3. Patterson, "Children of Lesbian and Gay Parents," 63 *Child Development*, 1025-42 (1995).

4. Casper and Bryson, "Co-resident Grandparents and Their Grandchildren: Grandparent Maintained Families," Population Division Working Paper No. 26, U.S. Bureau of the Census (March 1998). According to *The Washington Post*, 1.5 million children are raised primarily by their grandparents. Biskupic, "Challenging Legal Notion of Family"; Supreme Court to Hear Grandparents' Visitation Request," *The Washington Post* (Sunday, Jan. 9, 2000) at A01.

5. Assisted Reproductive Technologies Model Act, Assisted Reproduction and Genetic Technologies Committee, Family Law Section, American Bar Association, Dec. 1999.

6. Although Vermont recently passed its Civil Unions bill granting same-sex couples all of the rights and responsibilities heterosexual couples have under the law, same-sex couples cannot solemnize their relationships in Colorado. Governor Owens recently signed into law House Bill 1249, which states that for a marriage to be valid in Colorado, it must consist of one man and one woman.

7. CRS § 15-11-103.

8. CRS §§ 15-14-311 (priority for guardianship); 15-14-410 (priority for conservatorship); and 15-12-203 (priority among persons seeking appointment as personal representative).

9. CRS § 14-10-124.

10. CRS § 14-10-115(13.5).

11. 29 U.S.C.A. §§ 2601 *et seq.*

12. CRS § 13-21-201.

13. 42 U.S.C.A. § 416.

14. *See* CRS §§ 14-10-124, -104.5, and -129.

15. CRS §§ 14-10-115 and 19-4-129.

16. For statutory rights and responsibilities to flow from a caretaker to a child, the caretaker must be a "parent" of the child. Colorado statutes contain the following definitions of "parent":

"Parent" means the natural or adoptive mother and father of the minor who is pregnant, if they are both living; one parent of the minor if only one is living, or if the other parent cannot be served with notice, as hereinafter provided; or the court-appointed guardian of such minor if she has one or any foster parent to whom the care and custody of such minor shall have been assigned by any agency of the state or county making such placement. CRS § 12-37.5-103.

"Parent" includes any person entitled to take, or who would be entitled to take if the

child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent. CRS § 15-10-201.

"Parent" means either a natural parent of a child, as may be established pursuant to article 4 of this title, or a parent by adoption. CRS § 19-1-103(82)(a). As used in this article, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. "Parent and child relationship" includes the mother and child relationship and the father and child relationship. CRS § 19-4-102.

17. CRS § 15-14-204.

18. CRS § 15-14-104.

19. CRS §§ 15-14-202 and -206.

20. CRS § 15-14-209.

21. *Id.*

22. I.R.S. Pub. 929, Tax Rules for Children and Dependents.

23. 29 U.S.C.A. § 2611.

24. CRS § 15-1-103. A number of other rights and responsibilities flow from being the legal guardian of a child. For example, the legal guardian of a victim of a criminal act has the right to be heard and present at all critical stages of a criminal proceeding, Colorado Constitution, Art. II, § 16a, Bill of Rights. The legal guardian also can overrule a physician's "do not resuscitate" order, CRS § 16-9-101; can formulate an individual literacy plan for a school child, CRS § 22-7-504; and can require certain disclosures from an unlicensed psychotherapist, CRS § 12-43-214.

25. CRS §§ 15-11-103; 15-10-201.

26. CRS § 13-21-203; *see Herrera v. Glau*, 772 P.2d 682 (Colo.App. 1989).

27. CRS § 15-14-202.

28. CRS § 15-14-206.

29. While a person nominated by a testamentary writing will receive priority to be appointed as guardian, CRS § 15-14-206, "any interested person" also may petition, and removal of a guardian requires only that a best interests standard be met, CRS § 15-14-212.

30. CRS § 15-11-103.

31. CRS § 15-14-202.

32. When a person petitions to be appointed a guardian for a minor, the petition is to contain a statement that either both parents of the minor child are dead or that a surviving parent has no parental rights. CRS § 15-14-202. *But see Abrams v. Connolly*, 781 P.2d 651 (Colo. 1989) (the death of the custodial parent does not automatically vest the noncustodial parent with custody where it would be in the best interests of the child to remain with a legal guardian appointed by the custodial parent in a will).

33. CRS § 15-14-206.

34. CRS § 15-14-202.

35. CRS § 15-14-206.

36. CRS § 14-10-123(c); *In re the Custody of C.C.R.S. v. T.A.M.*, 892 P.2d 246 (Colo. 1995); *In*

*re the Marriage of Dureno*, 854 P.2d 1352 (Colo. App. 1992).

37. CRS §§ 14-10-123.8 and -124.

38. CRS § 15-14-212.

39. Uniform Dissolution of Marriage Act, CRS §§ 14-10-101 *et seq.*

40. *In re the Custody of C.C.R.S.*, *supra*, note 36.

41. *Coulter v. Coulter*, 347 P.2d 492 (Colo. 1959); *Devlin v. Huffman*, 339 P.2d 1008 (Colo. 1959); *In re Marriage of Truth*, 631 P.2d 1183 (Colo.App. 1981).

42. *Root v. Allen*, 377 P.2d 117 (Colo. 1962); *Marriage of Dureno*, *supra*, note 36; *In re Marriage of Tricamo*, 599 P.2d 273 (Colo.App. 1979).

43. CRS § 14-10-123(c).

44. *Id.*

45. *Supra*, note 36. Before February 1, 1999, CRS § 14-10-123(c) required the petitioning party to have "physical custody" of the child for the requisite amount of time. Now, the statute reads that the petitioning party must have "physical care" of the child.

46. *In re the Custody of C.C.R.S.*, *supra*, note 36 at 253.

47. *In re Custody of A.D.C.*, 969 P.2d 708 (Colo. App. 1998); *In re the Matter of V.R.P.F.*, 939 P.2d 512 (Colo.App. 1997).

48. The authors have found that, with respect to these types of actions, judges will also, *sua sponte*, overturn other judges' orders in the same case if they interpret the laws differently than the first judge.

## Paternity?



When you really need to know.

PROVIDING CHOICES & QUALITY SERVICE

- ✓ Colorado's oldest & most experienced paternity testing laboratory
- ✓ Expert witness services
- ✓ DNA, HLA & red blood cell analysis
- ✓ Buccal swabs or blood samples tested
- ✓ Guaranteed probability of paternity 99% or above in 2 independent confirmations
- ✓ Personal coordinators dedicated to follow your case
- ✓ Competitive pricing with timely service


717 Yosemite Circle  
Denver, CO 80230

(303) 365-9000 or 1-800-321-6088

## HOFGARD & CO., INC.

Meeting the insurance needs of attorneys, their families, and their staffs for over 44 years in Colorado.

**Life - Disability - Health - Dental - Long Term Care - Section 125**

1510 TWENTY-EIGHTH STREET, SUITE 250  
BOULDER, COLORADO 80303  
TELEPHONE: (303) 449-0054, (800) 887-0054  
FACSIMILE: (303) 449-0243  
WWW.HOFGARD.COM

CALL TODAY OR VISIT OUR WEB-SITE  
FOR A FREE, INDIVIDUALIZED QUOTE!

An Approved  
Colorado Bar  
Association  
Member  
Advantage  
Provider



Kurt C. Hofgard, JD, CLU  
and  
William G. Hofgard, CLU, ChFC

49. *But see In re O.R.L. v. Smith*, 996 P.2d 788 (Colo.App. 2000) (a nonparent may be appointed a temporary guardian of a minor over the biological parent's objection, even if there has been no physical abandonment of the child by the biological parent).

50. 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

51. CRS §§ 19-4-105(1)(c), (e) and -125.

52. CRS § 19-4-103.

53. CRS § 19-4-105.

54. *Id.*

55. Where there is a family consisting of two same-sex parents, the statute appears to allow a finding of two "mommies" or two "daddies" as long as there is not a conflict between the parties and there is not another presumptive (biological) parent who makes a claim to the child. CRS § 19-4-105(2)(a). This might be the factual basis for a claim, for instance, in situations where one woman has conceived through artificial insemination or where one parent has effected a single-parent adoption, and both parents agree to the parentage action.

56. *See Johnson v. Calvert*, 5 Cal.App.4th 84, *cert. denied*, 114 S.Ct. 206 (1993) (holding that persons who initiate medical procedures that are intended to and do result in the birth of a child are engaging in "procreative acts," and therefore shall be treated as the lawful parents

of the resulting child, regardless of lack of genetic connection to the child). *See also In re Marriage of Buzzanca*, 61 Cal.App.4th 1410 (1988). Colorado also has ruled that in making determinations as to paternity, it is important to look at the "preconception intent" of parties to an action. *In the Interest of R.C.*, 775 P.2d 27 (Colo. 1989).

57. *In Matter of the Adoption, T.K.J.*, 931 P.2d 488 (Colo.App. 1996).

58. In the case referred to by the authors, the Attorney General's Office attempted to intervene in the matter, but the trial court denied their petition to intervene on the grounds that the Office lacked standing. That decision is now being appealed by the Attorney General's Office. It is interesting to note, however, that if a man wants to be named the father of a child at the time of birth, he can have his name placed on the birth certificate regardless of whether he is married to the mother. He does need to prove that he is biologically related to the child. CRS § 25-2-112. One assumes, therefore, that the general purpose of the UPA, as well as that of the above-referenced statute, is to ensure that all children have two legal parents. The biological connection between legal parent and child appears to be secondary to the protection of children under the UPA. ■

Enter the World of the CBA at [www.cobar.org!](http://www.cobar.org!)

## MADDEN & MADDEN

Attorneys & Counselors at Law

Practice limited to  
Litigation and Dispute Resolution

Accepting referrals and  
requests for co-counsel

JOHN W. MADDEN III  
JOHN W. MADDEN IV

410 17th Street  
Suite 530  
Denver, Colorado  
(303) 436-1111

CLHP



### Colorado Lawyers Health Program

(303) 832-2233 • (800) 432-0977  
Fax: (303) 825-7079

CLHP provides support meetings for all attorneys in Colorado for both mental health/substance abuse issues and career/transition issues. These meetings are confidential and are provided at no charge.

#### MEETINGS

**Peer Support Meeting**  
Every Wednesday night at 6:30 P.M.  
Trinity Methodist Church  
1820 Broadway, Denver

**Lunch Meeting**  
Every last Friday at noon  
Edelweiss Restaurant  
34 East Ramona, Colorado Springs

**Mental Health Support Group**  
Every Tuesday evening at 7:00 P.M.  
Please call (303) 832-2233 for information