Survey of Family Law Cases 2004-2013

2011 Family Law Survey

PARENTAGE IN DENVER

The issue of whether a party may file a **Title 19 action when an action has already been filed under Title 14** was addressed in In re the Parental Responsibilities Concerning G.E.R., No. 11CA0032 (Colo. App. 2011). Here, Mother alleged that she and Father were the natural parents of G.E.R., born out of wedlock. In November 2009, Mother petitioned for allocation of parental responsibilities (APR) and child support under the Uniform Dissolution of Marriage Act (UDMA). The magistrate entered a child support order and determined the allocation of parental responsibilities.

In June 2010, Mother moved for modification of child support and also filed a petition for paternity under the Uniform Parentage Act (UPA), seeking birth-related costs, court costs, and attorney fees, yet she contended that paternity was not an issue and that Father was, in fact, the biological parent to G.E.R. At a hearing on the petition for paternity, the magistrate found that there was no question of paternity, and that although the UDMA and UPA provided different remedies, the remedies were mutually exclusive and Mother had to elect between pursuing an action under the UDMA or an action under the UPA. Thus, the magistrate dismissed Mother's petition for paternity.

Mother petitioned for district court review of the magistrate's order under C.R.M. 7(a) alleging that the magistrate could consider a request for birth-related costs under C.R.S. §19-4-116 after it had entered orders under the UDMA. The district court adopted the magistrate's order on the basis that the paternity issue had already been resolved.

The Court of Appeals agreed with Mother's contention that the magistrate erred by concluding that she had to elect between pursuing an action under the UDMA or the UPA and remanded the issue to the district court. The Court found that birth-related costs incurred by Mother could not be awarded as a debt of the marriage under C.R.S. §14-10-113 because the parties were never married. Thus, to recover birth-related costs, Mother was required to file a petition for paternity under the UPA.

C.R.S. §19-4-109(1) provides that an action under the UPA may be joined with an action in another court of competent jurisdiction for child support. Here, Mother had a motion for modification of child support pending when she filed her UPA action. Although the better practice would have been to bring both actions simultaneously, and then to consolidate them pursuant to C.R.S. §19-4-109(1), nevertheless, both actions could have been joined under C.R.S. §19-4-109(1). Because the UPA provides that a parent may bring an action in paternity "at any time", Mother was not precluded from seeking birth-related costs under the UPA despite the fact that the father-child relationship was uncontested.

The issue of what **burden of proof** should be applied to resolve competing presumptions of paternity was addressed in People in the Interest of C.L.S., No. 10CA1980 (Colo. App. 2011). In that case, Mother and Husband were married a short time when son, C.L.S., was conceived. Mother simultaneously had a short, intimate relationship with Boyfriend. Mother filed for dissolution of marriage prior to son's birth. The dissolution decree, issued after son was born, does not refer to any children. The son's birth certificate did not list a father.

Mother and Boyfriend began dating again three months after son was born. Genetic testing was performed excluding Boyfriend as son's biological father. Nonetheless, boyfriend acted as son's father, signed an acknowledgement of paternity, and added his name to the birth certificate.

Upon ending his relationship with Mother, Boyfriend asked a court to grant him parental responsibilities for the son. The court awarded him parenting time and he paid mother child support. Mother applied to child support enforcement (CSE), which sought an order establishing Husband as the son's legal father and requiring him to pay regular child support. Genetic testing established a 99.99% probability that husband was son's biological father. When CSE learned that Boyfriend had signed an acknowledgement that he was the son's father and that his name was on the birth certificate, it filed an action to determine son's legal father.

The first step in establishing a father-child relationship is determining whether a man is presumed to be a child's father. C.R.S. §19-4-105(1). There are six statutory presumptions; two applied to husband:

- § 19-4-105(1)(a) (the man and the child's mother were married and the child was born during the marriage); and
- § 19-4-105(1)(f) (genetic tests establish that the probability of a man's parentage of the child is 97% or higher).

Two of the six presumptions also applied to boyfriend:

- § 19-4-105(1)(d) (the man received the child into his home and openly held the child out as his natural child); and
- § 19-4-105(1)(e) (the man acknowledges his paternity in writing, but, if another man is also presumed to be the father, the other man has given written consent to the acknowledgement).

No statutory presumption of paternity is conclusive. Once a presumption is established, it may be rebutted by clear and convincing evidence. C.R.S. §19-4-105(2)(a). Although Colorado has recognized that evidence must be clear and convincing to rebut any established presumptions of paternity, it has not addressed what burden of proof should be applied to resolve competing presumptions.

Normally, the burden of proof in civil cases is a preponderance of the evidence. C.R.S. §13-25-127(1). The plain meaning of the language used in C.R.S. §19-4-105(2)(a), "the weightier considerations of policy and logic," is consistent with the preponderance standard. By determining which considerations are weightier, a trial court essentially determines which ones are "more probable" to be in the child's best interests, as opposed to those that are "highly probable."

The court here held that trial courts should resolve competing presumptions by using the preponderance standard rather than the clear and convincing standard. The legislature has stated generally that the preponderance standard is the burden of proof in civil cases, C.R.S. §13-25- 127(1), and paternity cases are civil cases. By using the word "weightier," the plain language of section 19-4-105(2)(a) indicates that the preponderance standard applies. Our supreme court and two divisions of this court have stated that the preponderance standard applies to paternity cases. Employing the clear and convincing standard at this point of the decision-making process would make it harder to promote the child's best interests because this elevated standard of proof would (a) put greater weight on the rights of the presumed fathers than those of the child, when it is the child who has the most at stake in a paternity proceeding; (b) change the focus of the analysis to the interests of the presumed fathers, even though in some cases, the child's best interests may not match the best interests of any of the adults involved; and (c) make it more difficult to

determine which presumed father should become the legal one, lessening the prospect of a workable result.

Two women **dispute motherhood** in In re the Interest of S.N.V. and Concerning C.A.T.C., No. 10CA1302 (Colo. App. 2011); one as the biological mother, while the other claims legal motherhood under presumptions set forth in the Colorado Uniform Parentage Act (UPA).

S.N.V. was born in 2007. He was conceived through sexual intercourse between Birth Mother and Husband. Husband and Wife assert that they arranged with Birth Mother to act as a surrogate, paid for all birth-related expenses, and have been S.N.V's sole caregivers since his birth. Birth Mother asserts that S.N.V.'s conception was the result of her intimate relationship with Husband, denies the existence of a surrogacy agreement, and states that she participated in S.N.V.'s care for the first two years of his life.

In 2009, Birth Mother sought allocation of parental responsibilities under C.R.S. §14-10-123. Wife filed an action under the UPA to establish that she is S.N.V.'s legal mother under C.R.S. §19-4-105. Birth mother moved to dismiss Wife's petition, arguing that Wife lacks the capacity to bring an action under the UPA. Alternatively, Birth Mother requested summary judgment in her favor because she undisputedly is S.N.V.'s biological mother.

The magistrate ruled in favor of Birth Mother and concluded that Birth Mother must prevail as a matter of law because she is the biological mother. The district court affirmed the magistrate's decision. The Court of Appeals reversed and held that an action to determine legal maternity may be brought by any woman who is presumed to be the child's mother under C.R.S. §19-4-105.

Here, the question is whether the Supreme Court's interpretation of the UPA as it applies to paternity actions - also applies to maternity actions. The Court of Appeals held that it does.

The UPA governs any dispute about the existence of a parent-child relationship. Although, on its face, section 19-4-105 applies only to paternity determinations, the Court of Appeals held that it is extended to maternity determinations by sections 19-4-122 and 19-4-125. See § 19-4-122 ("Insofar as practicable, the provisions of [the UPA] applicable to the father and child relationship apply."); § 19-4-125 ("In case of a maternity suit against a purported mother, where appropriate in the context, the word 'father' shall mean 'mother.'").

Thus, under section 19-4-105, a woman may gain the status of a child's natural mother even if she has no biological tie to the child. A woman's proof of marriage to the child's father, or her proof of receiving the child into her home and holding the child out as her own, also may establish the mother-child relationship.