



WHO'S YOUR DADDY (OR MOMMY)?
ENSURING THE PROPER ESTABLISHMENT OF PATERNITY
IN DEPENDENCY OR NEGLECT CASES

“At the outset, we note the extraordinary importance of the outcome of a paternity proceeding. Such a proceeding determines who a child's legal father will be, and therefore, who will enjoy the rights and responsibilities of legal fatherhood.”

N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000)

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I.

THE JUVENILE COURT MUST IDENTIFY THE CHILD'S TWO LEGAL PARENTS PRIOR TO ADJUDICATION

- **The Department has statutory authority to include a paternity action in a dependency and neglect case.**
See, § 19-4-107(1), C.R.S.

This is because being a “parent” of the child is one of the facts that must be shown by a preponderance of the evidence before a child may be adjudicated under section 19-3-102(1)(a), (b), or (d), C.R.S.

People In Int. of M.R.M., 2021 COA 22, ¶ 28, 484 P.3d 807, 812 (If a paternity issue arises in a dependency and neglect proceeding, a paternity action may be joined with the dependency and neglect proceeding to resolve the issue).

People In Int. of O.S-H., 2021 COA 130, ¶ 19, 503 P.3d 884, 888 (Once a child has been adjudicated dependent and neglected, all matters related to the child's status, including paternity, must be addressed in the open dependency and neglect case.

- **Paternity must be raised before the trial court, not the appellate court**

Psychological mother did not seek to have herself established as the child's natural parent by commencing a maternity action in this case. Nor did the Department seek to commence a maternity action, apparently because of psychological mother's position throughout this case that she wanted to adopt the child. So she cannot now claim that she is the child's natural parent.

People In Interest of C.D.P., 2023 COA 90, ¶ 27, *cert. denied sub nom. J.L.P. v. People In Interest of C.D.P.*, 23SC771, 2023 WL 8042498 (Colo. Nov. 20, 2023)

There was no error where paternity was never disputed here, nor was the court asked to address competing presumptions of paternity. Thus, even assuming the UPA applies where there aren't competing presumptions of paternity - an issue we don't reach - because father never raised the issue, we conclude that he waived any objection that the juvenile court didn't comply with the UPA.

People in Interest of ANB, 23CA0296 (*unpub*)

- **Paternity proceeding are governed by the UPA (Uniform Parentage Act)**

The UPA is located in Article 4 of Title 19 (§ 19-4-101 to § 19-4-130)

When a paternity issue arises in a nonpaternity proceeding, such as a dependency and neglect case, the court must follow the procedures outlined in the UPA.

- **Failure to follow the UPA results in a void judgment.**

A failure to follow the UPA's requirements deprives the court of jurisdiction to determine paternity.

People In Int. of O.S-H., 2021 COA 130, ¶ 40, 503 P.3d 884, 891.

If all presumed and alleged fathers are not made parties or given legal notice, the court lacks subject matter jurisdiction to decide paternity.

M.R.M., ¶ 28; *J.G.C.*, ¶¶ 11- 14; *E.K.*, ¶¶ 12-14.”

Evidence showing that the child’s parentage has already been legally established (i.e., birth certificate or child support order) is insufficient to establish paternity unless the UPA was followed at the time the prior order was entered.

In re the Parental Responsibilities of C.L.B., 21CA143 (unpublished) - Seven years after an APR order was issued, the COA vacated the prior 2013 paternity/APR order because the juvenile court had failed to add the presumed father to the case and provide him notice.

- **“Natural parent” under the UPA is not synonymous with “biological parent.”**

Unless the context otherwise requires, as used in this title 19, “natural parent” means a nonadoptive parent established pursuant to this article 4, whether or not biologically related to the child.
§ 19-4-102.5, C.R.S.

“Parent” is defined as “either a natural parent of a child, as may be established pursuant to article 4 of this title 19, or a parent by adoption.” § 19-1-103(105)(a), C.R.S.

See O.S-H., ¶ 52 (“[A] person may gain the status of a child’s natural parent by holding the child out as his own.”); *In re Parental Responsibilities Concerning A.D.*, 240 P.3d 488, 490-92 (Colo. App. 2010) (rejecting argument that a presumptive father could not be a presumptive “natural” father under the UPA’s holding out provision because he had admitted that he was not the child’s biological father).

- **The UPA is gender-neutral - “paternity” also means “maternity”**

The UPA statutes were recently amended to be more inclusive.

§ See, 19-4-102.5, C.R.S. (any reference in this title 19 to “father” includes a parent of any gender, any reference to “mother” includes a parent of any gender, and any reference to “paternity” is equally applicable to “parentage”).

“Nothing in the UPA prohibits a child from having two same-sex parents. Rather, the plain language of the UPA is gender-neutral and specifically allows the terms “father” and “mother” to be used interchangeably, where practicable. § 19-4-125. Had the legislature intended to limit parentage to one female and one male, it could have done so.” *In re Parental Resps. of A.R.L.*, 2013 COA 170, ¶ 34, 318 P.3d 581, 586.

- **However, the UPA allows only two legal parents, regardless of gender**

The UPA does not allow a court to recognize more than two legal parents for a child.

People In Interest of C.D.P., 2023 COA 90, ¶ 16; *People In Int. of K.L.W.*, 2021 COA 56, ¶ 36

In *K.L.W.*, the out-of-state bio dad was determined to be the children’s legal parent, thus excluding mother’s same-sex partner from the D&N case. Although the COA upheld the lower court’s ruling, the court seemed to dislike the UPA’s restrictions, stating, “It may well be, as the juvenile court expressed, that the UPA has not kept up with the realities and rich complexity of modern family life and of raising children. This may in turn keep the court from implementing an order that it believes will truly serve the best interests of the children in some of those cases.”

Mother’s same-sex partner petitioned the Supreme Court for cert on this issue. Despite support in the LGBTQ community, the cert petition was denied.

- **The UCCJEA does not limit a court’s jurisdiction to determine paternity or order child support.**

True, a paternity case is one type of child-custody proceeding under the UCCJEA. § 14-13-102(4). The official comment to section 14-13-102, however, clarifies that only the custody and visitation aspects of

paternity cases are child-custody proceedings subject to the UCCJEA. § 14-13-102. As a result, the UCCJEA does not limit a court's jurisdiction to determine paternity or order child support
People In Interest of G.C.M.M., 2020 COA 152, ¶¶ 22-23

- **The court must clearly make its paternity findings and identify the child’s legal father on the record.**
See, *People In Int. of O.S-H.*, 2021 COA 130, ¶ 47, 503 P.3d 884, 892 (The court did not address whether the prior adjudication was effectively a determination that biological father is the child's parent and, if so, whether the determination had been made after following the requirements of the UPA).

In a 2022 unpublished opinion, the COA overturned an adjudication after father alleged on appeal that the juvenile court did not explicitly find that father was a “parent” as defined by the statute and did analyze the evidence in light of the statutory definition.

Specific to Dependency & Neglect Adjudications:

- **The court cannot adjudicate the child dependent or neglected “as to” a parent until the legal parent is established.**

In several unpublished cases, the COA reversed an adjudication, holding that the juvenile court erred because the Department did not conclusively establish paternity pursuant to the UPA *prior* to adjudication. *People in Interest of JDK*, 21CA616 (*unpub*).

“Alleged father contends that the trial court erred in entering an order of adjudication with respect to him prior to establishing parentage under the Uniform Parentage Act (the UPA), sections 19-4-101 to -130, C.R.S. We agree that the trial court erred in entering an order of adjudication with respect to alleged father.” (*2018 unpublished case*).

- **The court cannot enter a “temporary” adjudication as to more than one father.**

(Such as when waiting for the genetic test results on two men)

“We are aware of no legal authority for the proposition that a child can be adjudicated dependent and neglected with respect to two or more possible fathers at the same time, even as a temporary measure.” (*2018 unpublished case*).

II.

PATERNITY CONSIDERATIONS

- **§ 19-4-105 provides procedures to assist the court in resolving a paternity dispute.**

N.A.H. v. S.L.S., 9 P.3d 354, 360 (*Colo. 2000*) (19-4-105 is a mechanism to choose among competing presumptions).

It is evident from the statutory scheme as a whole that presumptions of fatherhood can be the starting point for an adjudication of paternity, not the end of the inquiry.”

N.A.H. at 362

The first question is how many presumed or alleged parents are identified?

- **If there are NO identified fathers, the court may use 19-4-107(3), C.R.S.**

An action to determine the existence of the father and child relationship with respect to a child who has no presumed father pursuant to section 19-4-105 may be brought by the state, the state department of human services, a county department of human or social services, the child, the mother or personal representative of the child, a man alleged or alleging himself to be the father.

“John Doe” may be declared as the child’s legal father when no presumed or alleged fathers are located.

- **If there is only ONE identified father(or second parent):**

If paternity is not disputed, there is no need for a 19-4-105 hearing.

However, the Court must still follow the UPA prior to entering a final adjudication of paternity (*i.e.*, before declaring this person to be the legal parent, the court must establish there are no other presumed or alleged parents).

This may be done by asking the birth mother about any other person who holds a presumption or may claim to hold a presumption. *Note:* in a 2011 unpublished case, the court of appeals indicated that the proper question is whether any other man may claim to be the child’s father. It was insufficient for the court to merely ask mother, “Are you naming anyone else as possible father?”

This does not need to be a separate hearing, but the court must do this on the record.

In a 2022 unpublished case, the COA overturned an adjudication finding the juvenile court erred because it did not analyze the evidence in light of the statutory definition. The juvenile court simply stated, “At this time, [father] is the only named, possible, biological father of the child, and therefore, I must proceed.” The COA found this was not a proper finding that the Department had proved, by a preponderance of the evidence, that father was a parent.

- **If there are TWO OR MORE identified fathers (or second parents) the court *must* hold a paternity hearing to resolve the competing presumptions, as presented next in Section III.**

- **What’s the difference between “presumed” parent and “alleged” parent?**

Presumed Parent

A person who holds one (or more) of the legal presumptions found in § 19-4-105, C.R.S.

Alleged Parent

A person who does not currently hold any *legal* presumption found in 19-4-105, but has asserted that he is the biological father; the person wishes to be declared the legal parent even though he/she is not the biological parent; or he/she has been identified at some point as the child’s parent (biological or otherwise).

- **Presumed and alleged parents are treated the same under the law**

In re Support of E.K., 2013 COA 99, ¶ 12, 410 P.3d 480, 482 (We perceive no reason to treat the required joinder of presumed and alleged natural fathers any differently).

- The Court can order genetic testing of an alleged father.

- An alleged father may become a presumed father upon confirmation of biology.

Notice

- If all presumed and alleged parents are not provided notice of the paternity hearing, it will invalidate the paternity finding. See, *E.K.*, at ¶ 12; § 19-4-110, C.R.S.

- **Personal Service is required**

Upon filing of the petition, the court shall issue a summons. § 19-4-109(2), C.R.S.

- **Service by Publication is allowed (after personal service has been attempted), pursuant to the Rules of Civil Procedure.**

This includes service by publication for a “John Doe” or a “John LNU (last name unknown).”

Advisement of Paternity

- The Court *must* verbally advise the presumed or alleged father of his right to request genetic testing. § 19-4-111(1), C.R.S.

- The Court *must also* advise the presumed or alleged father that if genetic testing is not obtained prior to a final adjudication of paternity, genetic test result may not be allowed into evidence later. § 19-4-111(1), C.R.S.

Genetic Testing



- The court *must* order genetic testing in any action in which parentage of a child is at issue. § 13-25-126(1)(a)(I), C.R.S.

- Even if parentage is not directly at issue, such as in a D&N case, the court *must* order genetic testing *if requested by any party*. § 19-4-112(1), C.R.S.

- However, biology is *unnecessary* when establishing the legal parent-child relationship. *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000).

Thus, the court can still declare a man who refuses genetic testing as the legal father.

§ 13-25-126, C.R.S.

People in Interest of JV, 21CA1776 (unpub) (“The court appropriately considered father’s failure to engage in genetic testing when it adjudicated him as the child’s father.”).

• If later genetic testing reveals the man is *not* the child’s biological father, he can ask the court to set aside the paternity order. *BUT*, this challenge must be made within two years of the order, the court must hold a hearing on the matter, *and* the court must determine that setting aside the paternity order is just and proper under the circumstances and in the best interests of the child.

§ 19-4-107.3, C.R.S.

• The presumed or alleged father may admit paternity *without testing* IF the court finds his waiver of genetic testing is made knowingly and voluntarily, after a full advisement of his rights.

III. PATERNITY HEARING

• **Competing presumptions require a 19-4-105 hearing!**

• **The court cannot dismiss any named party from the D&N petition without first conducting a hearing regarding paternity.**

“By dismissing from the petition one of two men claiming a presumption of paternity instead of determining which of them was the legal father, the district court misapplied the law and abused its discretion.” *2017 unpublished case.*

• **A presumption of paternity must be established by a PREPONDERANCE OF THE EVIDENCE.**

• **Presumed parent must first establish that he/she has a presumption**

Because J.C. did not establish that he was a presumed father under section 19-4-105(1)(d), the burden did not shift to the Division to rebut the presumption. Further, because J.C. failed to establish a presumption, this case did not involve any competing presumptions between J.C. and John Doe. Therefore, the court did not need to decide whether it was in the child’s best interest to adjudicate John Doe the child’s legal father instead of J.C.

People in Interest of LC, 22CA2214 (unpub)

****TRIAL PRACTICE TIP:** The GAL and DHS must ensure that the court holds a proper paternity hearing - including addressing the factors listed in 19-4-105 if there are competing presumptions! Be prepared to present evidence and arguments at that hearing in support of the parent you feel will be best for the child.

• **In all circumstances, the best interest of the child is the guiding principle!**

“The inquiry is fact-intensive, but the court must focus on the best interests of the child and determine paternity with that standard at the forefront.” *J.G.C.*, ¶ 22.

See also; K.L.W., ¶ 41; *N.A.H. v. S.L.S.*, 9 P.3d 354, 364-65 (Colo.2000)

Step 1: Establish who holds a PRESUMPTION OF PATERNITY

• § 19-4-105(1) lists the PRESUMPTIONS of PATERNITY:

A. “Presumption of Legitimacy”

1. The person was MARRIED or in a CIVIL UNION with mother when the child was born; or if the child is born within 300 days of the marriage/civil union;
2. The person and mom TRIED TO MARRY BEFORE THE BIRTH and the child was born during this attempted marriage or within 300 days thereafter, or the child was born within 300 days of when the parents’ cohabitation ended;
3. The person and mom MARRIED OR TRIED TO MARRY AFTER THE BIRTH **AND** one of the following is true:
 - (I) The person acknowledged parentage in a writing filed with the court or vital statistics
 - (II) The person consented to his/her name appearing on the child’s birth certificate
 - (III) The person is obligated to pay support under a written voluntary promise or court order

B. “Holding Out Presumption”

While the child is a minor, this person received child into his home and openly HELD OUT the child as his natural child.

C. “Presumption of Biology”

GENETIC TESTING show the parent is the biological parent by a 97% probability or higher

• For the “Holding Out” presumption, the parent must have had the child in their home after the birth

While girlfriend may have intended to ultimately have the child in her care, the plain language of the statute isn’t satisfied if the person merely prepares to receive the child into her home but never actually does. We see nothing in the statute suggesting that actions taken before a child’s birth, standing alone, can satisfy the statute. Girlfriend doesn’t cite any authority, and we are aware of none, to support such a position.

People in Interest of RJ, 21CA1973 (unpub - announced Nov 2023)

• A person who holds NO “presumption of paternity” may still be named the legal parent!

When there is no presumed father, section 19-4-107(3), C.R.S. allows the Department, among other interested parties, to bring an action to determine the existence of the father and child relationship. The court appropriately considered father’s failure to engage in genetic testing when it adjudicated him as the child’s father. *See* § 13-25-126(1)(a)(I), C.R.S. 2021.

People in Interest of JV, 21CA1776 (unpub)

• None of the UPA presumptions are conclusive, including the presumption based on biology.

N.A.H. v. S.L.S., 9 P.3d 354, 361-62 (Colo. 2000); *J.G.C.*, ¶ 21; *People In Int. of K.L.W.*, 2021 COA 56, ¶ 67, 492 P.3d 392, 402.

Contrary to biological father’s argument, the court was not required to prioritize his position as the child’s biological father over husband’s position as mother’s spouse when the child was born and as the child’s primary caregiver and father figure.

Interest of MFLW, 21CA0473 (unpub)

- **However, the trial court “may” view biology favorably when considering paternity**

The equities arising from disruption of the parent-child relationship weighed in favor of biological father because, if the court adjudicated him the child’s second legal parent, the child was more likely to be able to maintain his connection to his maternal and his paternal families. The court reasoned that if biological father was given the opportunity to develop a psychological relationship with the child, that connection would be the best way to maintain the child’s link to the maternal and paternal sides of the child’s family because biological father had a link to the mixed-sibling group, while wife did not.

People in Interest of ELC, 22CA1636 (unpub)



Step 2: Determine whether any of these presumptions are rebutted by clear and convincing evidence

- If two or more presumptions are established, which have *not* been rebutted by CLEAR & CONVINCING EVIDENCE, the court must move on to Step 3.
- If all other presumptions are rebutted and only one presumed parent remains, the court may declare that person the legal parent without further analysis.

Step 3: Conduct the “POLICY AND LOGIC” balancing test found in 19-4-105(2)

- The controlling presumption is determined by the “the weightier considerations of policy and logic” § 19-4-105(2)(a), C.R.S.
- **Competing presumptions are resolved by a preponderance of the evidence.**
People In Int. of K.L.W., 2021 COA 56, ¶ 70, 492 P.3d 392, 402.
- The court must make specific findings as to the listed 19-4-105 factors when determining which presumption controls.
- **§ 19-4-105(2)(a) lists the factors the court must consider (paraphrased).**
 - I. How long has the presumed parent been on notice that the presumed parent might not be the biological parent? (does not include assisted reproductive procedures)
 - II. How long has the presumed parent assumed the role as the child’s parent?

- III. How did the presumed parent discover that he/she might not be the genetic parent? (does not include assisted reproductive procedures)
- IV. What is the nature of the existing parent-child relationship?
- V. How old is the child?
- VI. What is the child's relationship with any presumed parent or parents?
- VII. Has the passage of time reduced the chance of establishing paternity and child support with another parent?
- VIII. The catch-all consideration – “Any other factors which effect the equities arising from the disruption of the parent-child relationship between the child and the presumed parent or parents or the chance of other harm to the child.”

• Examples of “equities” considerations:

- What is the effect of disrupting of the current relationship between the child and the presumed parent?
- What is the chance of harm to the child?
- What is the potential harm to the child from the disruption of an existing parent-child relationship?
- How the child will be affected by the introduction of a *new* parent-child relationship?
- What is the relationship with the other parent? (*i.e.* Is there domestic violence? Will the presumed parent work cooperatively with the other parent?)
- Is there bad behavior toward the other parent?

“The primary concern in making a paternity determination is the child’s best interests and not the rights, or the fairness, to each of the presumptive parents.”...“We are not persuaded that the court was totally precluded from considering whether a parent had acted fairly to another parent when weighing the competing paternity presumptions. Indeed, section 19-4-105(2)(a) directs the court to consider all pertinent factors.” (2017 unpublished case)

See also, *People In Int. of K.L.W.*, 2021 COA 56, ¶ 51, 492 P.3d 392, 401 (we are not persuaded that the court was totally precluded from considering whether mother and her family had erected barriers to father assuming his role as a parent).

Step 4: Declare the legal parent based on the controlling presumption AND the child’s best interest
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- **The parent who is the subject of the controlling presumption becomes the child’s legal parent.**
People in Interest of C.L.S., 313 P.3d 662, 667 (Colo. App. 2011).

- **Determining paternity is in the trial court’s discretion.**

The court’s paternity determination is reviewed for abuse of discretion. See, *People in Interest of K.L.W.*, 2021 COA 56, ¶ 42; *People in Interest of M.B.*, 2020 COA 13, ¶¶ 39-40.

Meaning, so long as the court correctly holds a proper paternity hearing under the UPA, the juvenile court's decision will likely stand on appeal.

- When weighing competing paternity presumptions, the court must focus on the child's best interests. *People In Int. of O.S.-H.*, 2021 COA 130, ¶ 54, 503 P.3d 884, 892.
See also, *People In Int. of K.L.W.*, 2021 COA 56, ¶ 50.

IV. MISCELLANEOUS

- **Paternity Orders issued by a MAGISTRATE**

A "PETITION FOR MAGISTRATE REVIEW" must be filed in the district court prior to appealing to the court of appeals. *In re J.H.*, 2021 COA 94, ¶ 13 (the requirement that district court review is a prerequisite to a party appealing a magistrate's order in a paternity action to this court).

A party has fourteen days to request review a paternity order.

§ 19-1-108(5.5), C.R.S.

People In Int. of L.B.-H.-P., 2021 COA 5, ¶ 16, 482 P.3d 527, 530.

****APPELLATE PRACTICE TIP:** If a magistrate entered the order and the Notice of Appeal does not show that a petition for magistrate review was filed in the district court, file a motion to dismiss the appeal for lack of jurisdiction.

- **Is a paternity order a "final and appealable" order?**

Some Divisions of the COA have required the appellant to obtain a **Rule 54(b)** order from the juvenile court before the appeal may proceed.

A Rule 54(b) order certifies that the parentage determination is final for purposes of appeal.

* A Rule 54(b) order was required in both *People In Int. of O.S.-H.* and *People In Int. of K.L.W.*, which *significantly* delayed the appeal and the permanency for the child.

** In the *O.S.-H.* case, it was over two years from the time father filed his notice of appeal and the COA's opinion. In the meantime, the paternal family (including the paternal grandmother who wanted custody of the child) was denied participation in the case!

**** TRIAL PRACTICE TIP:** Ask the trial court to direct an entry of a final judgment as to the issue of paternity pursuant to Rule 54(b) at the time the paternity order is entered!

- **Challenges to Paternity**

§ 19-4-105(2)(c), C.R.S. - An acknowledgment of parentage may be challenged in court only on the basis of FRAUD, DURESS, or MISTAKE of MATERIAL FACT, with the burden of proof upon the challenger.

In re: Parental Responsibilities Concerning CLB, 21CA0143 (unpub) (Mother's husband challenged paternity determination entered seven years earlier because he was not provided notice of the original proceeding. The COA vacated the paternity order and remanded the case).

V.
FINAL TAKE-AWAY:

THE GAL HAS A RESPONSIBILITY TO ENSURE THAT PATERNITY IS PROPERLY DETERMINED!

“For the foregoing reasons, although I concur in the disposition, I write separately to highlight that:

(1) the UPA specifically contemplates determining parental relationships other than those formed legally by birth or adoption;

(2) the Department and other “interested parties,” such as a GAL, have a responsibility to bring a UPA claim if they have sufficient notice that a participant in a dependency and neglect action might be a child's natural parent;

(3) by failing to raise a UPA claim when there is sufficient notice, the Department may end up naming three respondent parents in a dependency and neglect petition, contrary to the UPA's requirement that a child only have two parents; and

(4) by dismissing psychological mother from the case without first determining whether she might be the child's natural parent, the juvenile court may have deprived her of all the due process rights she would be entitled to in a dependency and neglect action.”

People In Interest of C.D.P., 2023 COA 90, ¶ 92, *cert. denied sub nom. J.L.P. v. People In Interest of C.D.P.*, 23SC771, 2023 WL 8042498 (Colo. Nov. 20, 2023) (J. Johnson, concurring):

I would add

(5): Failing to properly determine paternity at the outset of the case places the adjudication and/or termination order at risk of being reversed on appeal!

