

Chapter 14

Grandparent Custody and Visitation Issues

Kara E. Clark, Esq.*
Shufflebarger, Lamborne & Clark, LLC

SYNOPSIS

- 14-1. Grandparent Visitation Issues
 - 14-2. Motion to Intervene
 - 14-3. Custody of Grandchildren
 - 14-4. Resources
-

This chapter discusses issues that may arise involving grandparents and their grandchildren, specifically the rights to visit with grandchildren after family changes have occurred and the considerations involved when grandparents actually care for and raise their grandchildren, either temporarily or permanently.

14-1. Grandparent Visitation Issues

Courts traditionally do not interfere with relationships between parents and children — or between grandparents and grandchildren — when the family of origin is intact and where the children’s safety or welfare is not in danger. However, when adult children divorce or where litigation takes place between parents who have never married, grandparents have the right, under Colorado law, to obtain court orders protecting their rights to visit with their grandchildren. The grandparent visitation statute allows courts to issue these orders in child custody cases that already have been filed with the courts. These cases involve:

- 1) Decrees of invalidity (annulment) of the parents’ marriage, or decrees of dissolution of marriage (divorce) or legal separation, and cases where courts have entered orders allocating parental responsibility between parents who have never married;

- 2) Cases where parental responsibilities for children have been given to someone other than the child's parents or the child has been placed outside of the home of a parent (except when a child has been placed for adoption or the adoption is final);
- 3) Cases where a parent, who is the child of the grandparent, has died; and
- 4) Cases where children have been removed from the care of their parents by the state due to abuse or neglect.

Where issues concerning a child's welfare have never been brought before a court — where families are intact and no court has been involved in the parent-child relationship — Colorado law does not permit grandparents to sue those parents for visitation. This is because in an intact family — where courts are not involved in children's issues — the decisions of parents for and about their children are private matters; the rights of parents to raise their children in intact families and to make decisions in what they believe to be their children's best interests are constitutionally protected.

14-2. Motion to Intervene

In cases where a court has become involved in a child's life, however, grandparents may intervene — or may file independent legal actions — seeking court orders requiring parents to permit visitation and contact with their grandchildren. In order to obtain such an order in cases where this is legally possible, the grandparent must first file a motion to intervene and become a party to the case. He or she may then file a motion for grandparent visitation. This written request must be supported with a sworn affidavit reciting the facts supporting the grandparent's claim and must specifically state why this visitation is in the best interests of the grandchild. Each birth parent or other custodian of the child must receive a copy of both documents. Any parent or custodian can file a response and opposing affidavits. If no one asks for a hearing, then the court reviews the affidavits and the motions and can order visitation only if it determines that such is in the best interests of the child. If either side asks for a hearing, the court must hold one. The court then decides what visitation, if any, is in the best interests of the child and enters the appropriate order.

The court, in these cases, is required to make its decisions in the best interests of the child. The Colorado Supreme Court has said that the trial courts are required to give the parent's decisions concerning grandparent visitation special weight and significance. The trial court cannot simply substitute its own opinion for the decisions of the parent; the parent's determination is given preference and is presumed to have been made in the child's best interests. The grandparent's proof must overcome this presumption; the grandparent must establish by clear and convincing evidence that the visitation he or she seeks is in the best interests of the child. A grandparent can prove this by establishing, for example, that the parent denying visitation is unfit to make that decision. He or she might prove that the parent's decision is affirmatively wrong and that it is, in fact, psychologically harmful to the child. The grandparent can prove that visitation with the child — contrary to the parent's belief — is affirmatively in the child's best interests, but this has to be shown by clear and convincing evidence.

There is an important limitation on the court's power, even if it decides to order grandparent visitation: it cannot order a parent not to move outside of Colorado in order to preserve a previously adopted visitation schedule. The previous order concerning grandparent visitation would have to be modified, in the child's best interests, to accommodate the move.

Sometimes after a divorce one parent remarries and the new stepparent adopts the grandchild. This type of an adoption does not take away the biological grandparents' right to visitation with their grandchildren. However, if parental rights are terminated in a dependency and neglect proceeding and if the grandchildren are adopted by an entirely new family, the grandparents' rights to visitation with the adopted child will be severed.

If the grandparent visitation order is violated by the custodian of the child, the grandparent can ask the court to enforce the order. The grandparent seeking enforcement of the order must file a verified motion describing when and how the custodian violated the order. The court has to determine if the violation really occurred, and it must also decide whether there is likely to be substantial and continuing noncompliance with the order. The court can then (1) deny the motion, if the allegations in the motion are not adequate; (2) schedule a hearing and give notice of the date and time of the hearing to both sides; or (3) order the parties to attend mediation — and if it fails, the court can schedule a hearing. If the court decides the custodian or the parent violated the order, it can impose additional terms and conditions, modify the order to meet the child's best interests, require the custodian or the parent to post a bond or security to ensure future compliance with the court's order, or require makeup visitation. In addition, the court could hold the violator in contempt of court and impose a fine or jail sentence. The court also has the power to make the violator of the order repay the grandparent for his or her costs and attorney fees.

A motion for grandparent visitation may only be filed once every two years, unless the court finds good cause. If a grandparent files a motion and there is not good cause, he or she may have to pay the parent's attorney fees and costs.

14-3. Custody of Grandchildren

More and more frequently, it seems, grandchildren actually live with their grandparents — rather than with either one of their birth parents — and grandparents raise these children to adulthood. Over 35,000 Colorado grandparents are responsible for the care of their grandchildren, who live with them. This creates a special set of concerns.

Power of Attorney

If the parent(s) and the grandparents agree to such an arrangement on a temporary basis, the parent needs to make sure that the grandparents have the power to make medical decisions for the children, take them in or out of school, or make any other decisions in their best interests that birth parents ordinarily make. This can be accomplished through a power of attorney where the mother or father or both actually assign their parental rights and responsibilities to the grandparents. A power of attorney is a formal legal document and should be prepared by a lawyer and verified (signed in front of a notary public) by the par-

ents and the grandparents. These assignments are only temporary and they generally only last for 12 months. The assignment through a power of attorney does not impact the rights of the parent. Such a power of attorney can be used, for example, if a child needs medical treatment and the grandparent needs to prove that he or she has the authority to consent to the treatment or assume financial responsibility for it. The grandparent cannot use this power to consent to the adoption or marriage of the grandchild.

Guardianship

If more permanent arrangements for custody are contemplated, a grandparent may want to seek legal guardianship of a grandchild. This could also be important if a child has income or the right to money (such as a personal injury settlement) that, for one reason or another, cannot or should not be controlled by the parent. A grandparent can file a request with the district court to be appointed a legal guardian or conservator for a grandchild. A parent must be notified of this request; if the parent objects, the grandparent must be prepared to convince a judge, at a hearing, that this request is appropriate. Children over the age of 12 must also be given notice of a grandparent's request for guardianship. Children 12 and older have the right to consent, or refuse to consent, to the appointment of a guardian. A court can appoint the grandparent guardian over the objection of the parent and/or child if the court finds that appointing a guardian is in the best interest of the child.

Allocation of Parental Responsibilities

It may become necessary for a grandparent to seek legal decision-making and parental responsibilities for a grandchild. This used to be called "custody"; it is now called the "allocation of parental responsibilities." In Colorado, this is possible — even over the birth parent's objections — under certain circumstances. To have such a request considered by the court, a grandparent must be able to prove that the child is not presently in the physical care of one of his or her parents or that the grandparent had the physical care of the child for a period of 182 days or more and that no more than 182 days has passed since the child left the grandparent's physical care.

Whether a grandparent or other non-parent has had a child in his or her "physical care" depends upon the nature, duration, and frequency of the contact between the grandparent and the grandchild as well as the parent(s) and child. The grandparent's physical care need not be uninterrupted or exclusive of the parent's care. The court should consider the amount of time a child has spent in the actual physical possession of the grandparent and the psychological bonds grandparents or other non-parents develop with children who have been in their physical care and control for a significant period of time.

The case must be filed in the county where the child permanently lives or where the child is located. Notice of the petition for allocation of parental responsibilities must be provided to the birth parents, to any legal guardians, and to any custodian or other person who has been allocated parental responsibilities previously. These individuals must be given an opportunity to respond, in writing, or appear in court and be heard.

The court is required to make the decision as to allocation of parental responsibilities in the best interests of the child. The factors that the court is required to consider include:

- 1) The wishes of the parents;
- 2) The wishes of the child if he or she is mature enough to express a reasoned preference;
- 3) The relationship of the child, parents, grandparents, family members, and any other people who affect the child's best interests;
- 4) The child's adjustment to home, school, and community;
- 5) The mental and physical health of all parties involved;
- 6) The adults' respective abilities to encourage the sharing of love and contact between the child and the other parties;
- 7) The past pattern of the parents' and grandparents' involvement with the child;
- 8) Credible evidence of a history of child abuse or neglect on the part of the parents or grandparents; and
- 9) The abilities of the adults to put the child's needs and best interests ahead of their own.

It may be possible to have a child and family investigator or evaluator appointed by the court to make an investigation into these issues and make a report recommending an outcome that would be in the child's best interests. The court has the power to order the adults involved to cooperate with the evaluation. The evaluator has access to medical, mental health, educational, and other reports concerning the child, although the child's consent has to be obtained before these records are released to the evaluator if the child is more than 15 years old.

In the end, it is the court's responsibility — and the child's right — to have decisions concerning the permanent allocation of parental responsibility be made in the child's best interests. These decisions can be modified by the court upon a finding that a modification would serve the best interests of the child.

Child support, Social Security benefits, and public assistance may be available to grandparents with the allocation of parental responsibilities (APR) orders. Child support may be ordered for the benefit of a grandparent with APR. The amount of support ordered will be according to Colorado statutory guidelines based on the parent's (or parents') income. Assistance in establishing and collecting support is available for a small application fee through the state agency for each county, known as the Child Support Enforcement Unit (CSEU).

The Social Security Administration may pay benefits to grandchildren if benefits are not payable on the work record of a parent. If a child is not receiving benefits from a parent when the grandparent retires, becomes disabled, or dies, the grandchild may then be able to qualify for benefits if certain conditions are met. Generally, the biological parents of the child must be deceased or disabled, or the grandchild must be legally adopted by the grandparent. In addition, the grandchild must have begun living with the grandparent before age 18 and received at least one-half of his or her support from the grandparent for the year before the month the grandparent became entitled to retirement or disability insurance benefits, or died. Also, the natural parent(s) of the child must not be making regular contributions to the child's support.

Means-tested public assistance programs, such as Medicaid and food stamps, may be accessed through the county departments of human services. Grandparents should contact their county for information and assistance.

14-4. Resources

Colorado Legal Services

Provides legal advice and assistance for qualifying grandparents who are raising grandchildren:
www.coloradolegalservices.org

The Foundation for Grandparenting

Has innovative ideas for grandparents as parents and a large selection of books. Also involved in education, research, programming, and networking around grandparenting:
www.grandmagazine.com

Grandparents Raising Grandchildren

Helps individuals network with other grandparents: www.grandparentsasparents.org
State information and website: www.ext.colostate.edu/grg/index.html

Grandparents Resource Center

Works with grandparents and family members to facilitate harmony and foster intergenerational relationships, providing broader security for children in the family: <http://grc4usa.org>

The Grandparent Rights Organization

A grandparenting rights advocacy group: www.grandparentsrights.org

Social Security Benefits for Grandchildren

Provides advice on Social Security benefits: www.ssa.gov/kids/

Colorado State Judicial Branch

Forms available for court proceedings involving grandparent custody and visitation issues:
www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=85

Many judicial districts have self-help centers where grandparents can receive assistance in filling out court forms. Employees of the self-help center cannot give legal advice, but may have additional information on resources specific to your community.

* The author would like to thank Magistrate Betty Strobel, Weld County Combined Courts, for her work on the chapter in 2008, and also Paul J. Kyed, Esq., for his review of the chapter for the 2009 Edition.