

13-1. Grandparents' and Great-Grandparents' Visitation Rights¹

If you have a dispute with your adult children or one of your children gets a divorce, you could be denied contact with your grandchildren. You have a remedy in court if a parent does not let you visit your grandchildren in the following situations:

- ▶ When the grandchild's parents are going through a divorce or legal separation;
- ▶ When the legal custody of the grandchild has been given to a party other than the parent, or the child has been placed outside of and does not reside in the home of the parent (but this does not cover a child who has been placed for adoption or whose adoption has been legally finalized);
- ▶ When the grandchild's parent, who is the child of the grandparent, has died;
- ▶ When the grandchild has lived with the grandparent for 182 days within the last 182 days; or
- ▶ When the grandparent has been appointed the legal guardian of the grandchild.

Grandparents have no recourse if the child and his or her parents are an intact family; they can seek a court order allowing grandparent (or great-grandparent) visitation if, and only if, one of the above situations is present. If this basic criterion is met, the grandparent must file a motion and accompanying affidavit for grandparent visitation with the district court for the district in which there has been or is a child custody case, or if there is no other child custody case, in the county where the child resides or is found. The motion and affidavit must set forth the facts supporting the requested order — that is, facts showing why it is in the child's best interest to spend time with the grandparent. Notice must be given to the party (or parties) who has legal custody of the grandchild. The court may make an order, with or without a hearing, granting (or denying) visitation rights whenever such an order would be in the best interest of the grandchild.

In order to determine that spending time with the child is in the child's best interest, some courts will order you to meet with a trained mediator and the child's parents or custodian to try to reach an agreement before the court listens to your case.

If the court gives you visitation rights, your rights continue even if the parents divorce or legally separate, or if one or both of the parents die. Your rights can end if the parents lose their rights over the child or if your grandchild is adopted. However, if your grandchild is adopted by his or her natural parent's new spouse (that is, a stepparent), you are entitled to seek grandparenting time so long as the child still remains with and in the legal custody of his or her natural parent. Ask a lawyer for advice about seeking visitation.

A motion for grandparent visitation cannot be filed more than once every two years unless there is a showing of good cause.

¹ This section applies to both grandparents and great-grandparents. The word "grandparent" in this section should be understood as also meaning "great-grandparent."

If the grandchild's custodial parent does not comply with court-ordered visitation, the law provides various remedies. Under the grandparent visitation law, you may file a motion asking the court to enforce such visitation. If you prove that the grandchild's custodian has not complied with the visitation order, the court has some tools to remedy the situation and can:

- ▶ Impose additional terms and conditions consistent with the court's previous order;
- ▶ Modify the previous order;
- ▶ Require the violator to post bond or security to ensure future compliance;
- ▶ Require that missed visitations be made up;
- ▶ Hold the violator in contempt of court and impose a jail sentence or bond; or
- ▶ Award the person denied visitation his or her attorney fees.

Grandparents' rights vary by state. All states now have laws enabling grandparents to petition for visitation rights with their grandchildren, but there are great variations from state to state. Therefore, you will need to research grandparents' rights under the law of another state if your grandchildren live in another state and are subject to that state's laws.

13-2. Custody of Grandchildren

Sometimes grandparents may have to care for grandchildren permanently or temporarily. Seniors caring for grandchildren for a brief time should get written permission from at least one parent to authorize emergency medical care for the child. A simple signed and dated note will work. If a grandchild will be with the grandparent for more than a brief time, the grandparent should have authority to protect the child, especially if the parents will be difficult to reach. There is a general provision in Colorado law governing people with disabilities that allows the child's parents to delegate "any power regarding care, custody, or property of" the child. This includes, but is not limited to, the power to make health care decisions and may be effective for up to 12 months. However, the grandparent cannot consent to the marriage or adoption of the grandchild. Legal stationery stores, some legal aid offices, law firms, and some senior centers have forms for this purpose. The Colorado form can be found online. It is generally titled "Delegation of Power by Parent or Guardian."

If you expect to care for your grandchild for an extended time, you may want legal guardianship of the child. A legal guardianship gives you ultimate authority over the child's care and well-being. You may apply to a district court to become your grandchild's guardian. If the parents do not agree to the guardianship, you must show the court why the child needs a guardian. Once you are appointed as a guardian, only the court may terminate the appointment.

With or without a guardianship, you may qualify for Temporary Aid to Needy Families (TANF) and Medicaid coverage for a grandchild in your care. In unusual circumstances, grandparents may seek full legal custody of a grandchild. To win such a case, you must show that it is in the child's best interest to transfer custody to you.

To be able to request custody of your grandchild, your grandchild must no longer be in the custody of either of his or her natural parents, or you must have had physical custody of your grandchild for 182 days continuously. If you had physical custody of your grandchild for 182 days, then you must have filed a petition for custody within 182 days of the termination of such physical custody. Courts may show a preference for grandparents in determining custody for grandchildren as long as the child has been removed from the parents' care, and as long as the grandparents are appropriate, capable, willing, and available. When considering grandparents for custody, courts will take into consideration any credible evidence of past child abuse or neglect. The court also can order the child's parents to pay child support and your legal fees.

13-3. Divorce

Divorce has become more common in recent years. In Colorado, you do not have to prove that a failed marriage is anyone's fault. A "no-fault" divorce will be granted based on your inability to get along with each other. You merely state that the marriage is "irretrievably broken."

A divorce decree restores your status to that of a single person. It also divides marital property and debts and provides for maintenance (also called alimony or spousal support) when appropriate. The court will not order spousal support if neither party needs it, nor will they order spousal support if you can prove you cannot pay it. Spousal support can also be modified or terminated if the supporting spouse can prove a substantial change in circumstance that has affected his or her ability to pay.

For couples with minor children, divorce settles custody (now called allocation of parental responsibility); visitation (also called parenting time); and child support issues. In Colorado, child support ends at age 19. A court may not order a parent to pay college costs. Either spouse may receive temporary or permanent maintenance/spousal support, if he or she cannot support himself or herself through employment or assets. The court will first apply a formula that gives the lower-earning spouse 40 percent of the parties' combined incomes, multiplied by either 80 or 75 percent, for a duration based upon the length of the marriage. The court will then look at various other factors in deciding whether and how much maintenance (spousal support) to award.

You can get a divorce in Colorado if you or your spouse has been living in Colorado for at least 91 days prior to filing for divorce. This is true if you have been living in Colorado for at least 91 days before filing and your spouse has not.

The same laws and requirements apply to an action when filing for a legal separation. A legal separation decides all the issues a divorce decides, except that it does not free you to remarry, and each spouse will retain his or her rights to the other spouse's estate. No less than 182 days after the decree of legal separation, there is an absolute right for either party to convert the legal separation to a divorce, upon filing of a written motion.

If you move to Colorado and leave your spouse behind in another state, a Colorado court may not be able to decide property, child custody, and support issues, even if the

Chapter 14

Grandparent Custody and Visitation Issues

Kara E. Clark, Esq.*
Larimer County Attorney's Office

SYNOPSIS

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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 and great-grandparents have the right, under Colorado law (C.R.S. § 19-1-117), 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 or great-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 and great-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 and great-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.

Additionally, a grandparent or great-grandparent cannot interfere with a parent's wishes regarding religious training. A court cannot order that a grandparent or great-grandparent have visitations in order to take the child to religious services.

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 or great-grandparents — rather than with either one of their birth parents — and grandparents raise these children to adulthood. Over 70,000 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, father, or both temporarily 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 parents and the grandparents. These assignments are temporary, can only last for a maximum of 12 months, and can be revoked by the parent at any time. 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. *See* C.R.S. §§ 15-14-201, *et seq.* 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. If a parent agrees to the guardianship of the child, the parent may revoke consent at any time.

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." *See* C.R.S. § 14-10-123. 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.

If a case has already been filed involving the children and biological parents (for example, a divorce or, in the case of unmarried parents, an allocation of parental responsibilities), the grandparents or great-grandparents should file a motion to intervene in the existing case. After the grandparents or great-grandparents have intervened and are made parties to the existing case, they can file a petition for allocation of parental responsibilities.

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 parental responsibilities 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 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 statewide 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

Social Security Benefits for Grandchildren

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

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.

Catholic Charities — Kinship Caregiver Program

Provides support groups, resource assistance, and training:

<https://ccdenver.org/kinship/>

(720) 799-9254

(720) 799-9253 (en Español)

Catholic Charities — Weld County

Provides monthly kinship support groups:

<https://ccdenver.org/weld-county-services>

(970) 353-6433

Colorado State University Extension — Relatives as Parents Program

Provides statewide support network of resources for grandparents:

<http://grg.colostate.edu/support-groups.php>

(970) 491-1118

Colorado Department of Human Services — Kinship Connection

Provides statewide services:

www.colorado.gov/pacific/cdhs/kinship-connection

(303) 866-4617

Families First

Provides statewide services, including support groups, parenting education classes, community resources, and a free telephone support line:

<https://shilohhouse.org/familiesfirst/>

(303) 695-7996

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Chapter 15

Estate Planning: Wills, Trusts, and Your Property

Clara Brown Shaffer, Esq.
Brown & Brown, P.C.

SYNOPSIS

- 15-1. Overview of Lifetime and Post-Mortem Distributions of Your Assets
 - 15-2. Ownership of Property
 - 15-3. Types of Estate Planning Techniques
 - 15-4. Additional Information
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Estate planning is a process designed to help people ensure their assets are distributed upon their death in accordance with their wishes. In some circumstances, when an individual has a taxable estate, complex planning is used to minimize the amount of estate tax due upon the person's death. Estate planning also allows clients to name people to act on their behalf in financial and medical situations when the client is unable to do so, and allows a client to name a guardian and/or conservator for a minor or disabled child.

Many options are available to you when planning how to pass on your estate. To plan the distribution of your assets, you must decide what to give away, when to give it, who will receive it, and when they will receive it. You also may want to consider some methods that are less expensive and others that will reduce any estate taxes.

This chapter addresses important estate planning issues, such as making a will, distribution of assets when there is no will, the probate process, bank account options, trusts, life insurance, and estate taxes.

Wills, trusts, and documents of ownership that transfer assets can be very complex. This chapter explains the basics of each of these choices, and some of the advantages and disadvantages they present. With this information, you will be able to seek further legal advice about the choices that would benefit you and your family the most. For many people, talking to a lawyer about end-of-life issues can be uncomfortable; however, most people who complete the process are rewarded with a sense of relief and certainty that their wishes will be carried out.

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**Sean C. Bell
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