00PR880(10/3/02)

PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 00PR880

IN THE MATTER OF

The Estate of DENNIS WAYNE MINDENHALL

Deceased.

ORDER

THIS MATTER comes before the Court on the Petition in Paternity filed on behalf of the Mindenhall Children (Sean, Eli, Telena and Tequila Mindenhall) by their court-appointed attorney, Tracy James. The children challenge the assertion by their mother, Kristy Mindenhall, that they are all natural children of Dennis Wayne Mindenhall, and that therefore Kristy Mindenhall is entitled to 100% of decedent's intestate estate pursuant to C.R.S. § 15-11-102 (b). They request a determination of the nonexistence of the father and child relationship with respect to one or more of the children pursuant to C.R.S. § 19-4-107. As part of that determination, they request a court order directing Kristy Mindenhall to admit that decedent is not the natural father of one or more of the children, and/or an order requiring her to submit to genetic testing pursuant to C.R.S. § 13-25-126. Kristy argues that all of her children are children of the decedent as a matter of law, and that the instant paternity challenges are time-barred by C.R.S. § 19-4-107 (1) (b). This order disposes of the paternity issue, as well as the ongoing attorney fee dispute and Kristy's Motion to Strike the children's Supplement to Argument Regarding Children's Attorney's Fees and Expenses.

BACKGROUND AND FINDINGS OF FACT

Dennis Wayne Mindenhall died intestate on October 7, 1999, leaving an annuity he had received as the result of a personal injury claim. His mother, Gwendolyn Mindenhall, filed a Petition for Adjudication of Intestacy, Determination of Heirs, and Formal Appointment of Personal Representative on June 13, 2000, nominating herself as Personal Representative. Upon receiving notice of the Petition, decedent's estranged wife Kristy Mindenhall wrote to the Probate Court objecting to the Petition, and requesting that the adjudication be postponed until after her release from prison. However, Kristy failed to set the matter for hearing as required by C.R.P.P. 8.8 (4), and her objection was not ruled upon.

When decedent passed away in Denver, Kristy was incarcerated in Arizona and the children were wards of the Arizona Department of Economic Security (ADES). According to Arizona court records, Kristy's children were removed from her custody in October 1999 when, in connection with Child Protective proceedings, she tested positive for cocaine and marijuana. Prior to the children's removal, a complaint had been filed with Child Protective Services, alleging that Kristy's boyfriend had sexually abused Eli and Telena. ADES provided Kristy's family with counseling, psychological evaluations, parent aide, and family preservation services, but according to her case manager, Kristy did not take advantage of the services. On the contrary, Kristy's family situation worsened; she failed to provide food for the children, did not obtain food stamps, did not seek or obtain employment, did not clean the home, and failed to comply with drug testing requirements. Kristy testified that these lapses resulted from her being "too wrapped up in the drugs." Kristy M. v. Arizona Dept. of Economic Security, 2 CA-JV 01-0044, (Az. App. Nov. 29, 2001). Ultimately, Kristy was convicted of child abuse for failing to protect her children from her boyfriend. Kristy's parental rights were terminated with respect to Telena and Tequila, and all four children remained wards of ADES. Kristy was sentenced to prison for one year, was released early, and was later returned to prison for violating the terms of her release. She appealed the termination of her parental rights, but the Arizona Court of Appeals affirmed the trial court, noting that the State had proved by clear and convincing evidence that it was not in the children's best interest to remain with Kristy.

On February 21, 2001, Kristy filed her own Petition for Adjudication of Intestacy, in which she nominated herself as Personal Representative. Gwendolyn objected on February 23, 2001, asserting that because of Kristy's substance abuse problem and her residence in Arizona, Gwendolyn was a more suitable Personal Representative, despite Kristy's statutory priority pursuant to C.R.S. § 15-12-203.

On June 12, 2001, the Court appointed Tracy James as attorney for decedent's minor children. Subsequently, Kristy requested a partial distribution from the annuity in the amount of $47,000, and the children filed an Objection. They argued that a distribution would be premature for two reasons: Medicaid had a potential lien against the estate, and the paternity of some of the children was in question. The children urged the Court to determine what percentage of the estate Kristy was entitled to before making any distributions.

On July 18, 2001, the Court ordered American General Annuity Insurance Corp. to pay $72,250, the amount then owing on the annuity, as well as all future payments ($3750/month, payable until 2009) into the Probate Court Registry. Subsequently, the Court ordered payment of a $49,268.82 Medicaid lien, and, over the children's objection, a $20,000 partial premature distribution to Kristy. On January 14, 2002, Kristy filed another Motion for Distribution of Funds from Court Registry, stating that she needed additional funds to pay her ongoing attorney fees. The children filed a responsive motion, asking, among other things, that Kristy's second distribution request be denied pending resolution of the paternity issue. However, again over the children's objection, the Court ordered the release of another $20,000 to Kristy on July 16, 2002.

Between the first and second $20,000 distributions, a dispute arose between the parties over discovery requests. The children's attorney obtained information suggesting that Eli, Telena and Tequila may not be children of the decedent, contrary to what their birth certificates reflect. Decedent's aunt, Beverly Rauch, signed an affidavit stating that decedent underwent a vasectomy sometime prior to Telena's birth, and that Kristy told her Telena and Tequila were not decedent's children. Additionally, Sandy Lemons, a social

worker from Arizona State Child Protective Services, signed an affidavit stating that Kristy had indicated the decedent was not Tequila's father. Based upon this information, the children submitted Interrogatories, Requests for Admissions, and Requests for Production of Documents to Kristy, some of which concerned their paternity.

The children were dissatisfied with Kristy's responses, as some questions were only partially answered and others were merely marked "N/A". With regard to requests for admissions concerning paternity (i.e., "Admit that [decedent] had a vasectomy prior to the birth of Tequila Mindenhall," and "Admit that [decedent] is not the father of Telena Mindenhall"), Kristy responded that the information requested was irrelevant to the pending action because all of the children are descendants of the decedent as a matter of law. The children's attorney subsequently wrote to Kristy's attorney, inquiring whether Kristy would submit voluntarily to genetic testing, and informing him that if not, the children would seek court-ordered testing. Kristy's attorney responded that Kristy would not submit, and that should such testing be sought, Kristy would request attorney fees against the children for the time her attorney spent responding to the Petition. The total cost for the genetic testing, according to pleadings filed by the children's attorney, is estimated at $1500. Thus far, Kristy has requested well in excess of $10,000 to pay her ongoing attorney fees.

On July 8, 2002, Kristy filed an Objection to Tracy James' Petition for Approval and for Payment of Attorney Fees and Expenses. She asked the Court to significantly reduce the proposed fee of $11,900.58, arguing that there can be no question that she alone is entitled to 100% of the decedent's annuity. She asserted that because there is no legal or factual basis for the children's claims, the attorney fees expended on the children's behalf were unnecessary and excessive.

To date, no one has been appointed Personal Representative of decedent's estate, and the proceedings have come to an impasse over the issue of whether the children's biological paternity should dictate, or even influence, the Court's decision regarding Kristy's intestate share. On July 11, 2002, the Court gave the attorney's for both sides a timeline for submitting briefs on whether the paternity challenge should be allowed to proceed. The parties have submitted their briefs, the Court has reviewed them and conducted additional research, and following is the Court's analysis, conclusion and order.

APPLICABLE LAW AND ANALYSIS

The raison d'être of the present paternity dispute is C.R.S. § 15-11-102, which sets forth the percentage of a decedent's intestate estate to which a surviving spouse is entitled under various factual scenarios. Subsection (1) (a) states that if "…all of the decedent's surviving descendants are also descendants of the surviving spouse and there are no other descendants of the surviving spouse who survive the decedent, then the surviving spouse receives the entire intestate estate." In contrast, subsection (3) states that "[i]f all of the decedent's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, then the surviving spouse receives the first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate." Under these provisions, a determination that one or more of Kristy's children is not a descendant of the decedent significantly reduces her share of the intestate estate, with the difference passing to those of Kristy's children who are, in fact, decedent's biological issue.

The children argue, in their Petition in Paternity, that under C.R.S. § 13-25-126, the Court may order genetic testing in any suit where the parentage of any child is at issue. Kristy

maintains that pursuant to C.R.S. § 19-4-105 (1) (a), the children's parentage is not legitimately at issue; that because she and decedent were married when the children were born, decedent is legally presumed to be their natural father (this is her justification for answering "N/A" to the discovery requests regarding paternity). She argues further that even if paternity is deemed to be at issue, the Petition in Paternity should not be allowed to proceed, for three reasons: 1) the challenge is time-barred under C.R.S. § 19-4-107 (1) (b), 2) the children have failed to join indispensable parties pursuant to C.R.S. § 19-4-110, and 3) the action is not in the children's best interests. The Court will address each of these arguments in turn, and will rule on both the paternity challenge and the related fee dispute.

The Children's Petition in Paternity is time-barred by C.R.S. § 19-4-107(1) (b):
Kristy argues that C.R.S. § 19-4-107 (1) (b) precludes the children's request for genetic testing, as it requires actions to declare the nonexistence of the father and child relationship presumed under C.R.S. § 19-4-105 (1) (a) to be "…brought within a reasonable time after obtaining knowledge of relevant facts but in no event later than five years after the child's birth." She cites several cases in support of her position, the first of which is People in Interest of S.L.H., 736 P.2d 1226, (Colo. App. 1986). In S.L.H., the Colorado Court of Appeals held that a father's action to declare the nonexistence of a parent-child relationship is time-barred after the child reaches age five. The Court in that case noted, as has Kristy, that the purpose of the paternity presumptions contained in the Uniform Parentage Act (Colorado's version of which is enacted at C.R.S. §§19-4-101 to 19-4-130) is protection of the father-child relationship. Id. At 1228.

The S.L.H. Court left no doubt as to the legislature's meaning vis-à-vis "protecting the father-child relationship" when it stated that the statute "…furthers the public policy of maintaining the family unit and providing children with a means of support by limiting the time within which challenges to the presumption of fatherhood must be brought." Id. (Italics added). The court emphasized that the "…policy underlying this presumption is the improvement of the system of support enforcement." Id. The Court in S.L.H. interpreted the legislature's concern for protecting the father-child relationship as twofold: maintaining family stability and ensuring children's economic well-being.

In her brief regarding the statute of limitations, Kristy expresses great concern regarding the effect of "bastardizing" the Mindenhall children and "destroy[ing] a father and child relationship," concerns which the legislature clearly contemplated. Her concern is suspect, however, for two reasons: first, there is, unfortunately, no real "family stability" to preserve in this case. Second, because Mr. Mindenhall is deceased, he is incapable of providing support for the Mindenhall children, economically or otherwise. The father-child relationship, at least in any of the incarnations contemplated by the legislature when it adopted the UPA, cannot be destroyed here, because it no longer exists. Although Kristy asserts the importance of that relationship, her goal in this litigation is presumably to ensure that she receive 100% of decedent's intestate estate, leaving the children with no guarantee of receiving any portion thereof. Kristy's argument, ostensibly premised on a concern for the father-child relationship, is in reality an attempt to deprive the Mindenhall children of the only tangible remnant of that relationship.

The comment to the intestacy statute at issue here (C.R.S. § 15-11-102), published in West's Uniform Laws Annotated, Estate, Probate and Related Laws, Uniform Probate Code §§ 1-101 to 2-1010, states that where "…the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first $150,000 plus one-half the balance of the intestate estate. The purpose [of the statute] is to assure the decedent's own descendants of a share in the decedent's intestate estate

when the estate exceeds $150,000." In the case at bar, there is no reason to assume that any of the Mindenhall children will be beneficiaries of Kristy's estate; Kristy has consistently opposed the children's attempts to secure a portion of decedent's estate for themselves by establishing their paternity, despite the fact that she stands to inherit the largest portion of the estate under any scenario. Even if the Court could reasonably make such an assumption, the Probate Code requires that Kristy's intestate share be limited if, in fact, she has children who are not descendants of the decedent.

Kristy maintains, however, that the statute of limitations contained in C.R.S. § 19-4-107 (1) (b) bars all actions to declare the nonexistence of the father-child relationship five years after a child's birth, regardless of who brings the claim and regardless of the claim's context. The children, on the other hand, argue that the statue of limitations contained in Colorado's UPA must be read in conjunction with C.R.S. § 13-81-103, which tolls all limitations periods contained in any of the statutes of Colorado in cases where the person bringing the action claims to have been under disability when the claim accrued. The children's position is that because of their minority, the tolling statute allows their claim. They point out that it "defies common sense and reason to require that a child bring a paternity action prior to her or his fifth birthday."

The Court agrees that it defies common sense to require small children to bring claims before their fifth birthday or be forever barred. Kristy complains that the children have cited no authority for that argument. However, in adopting the UPA, the legislature seems to have noted the fact that children under five are ill-equipped to appreciate and avail themselves of their legal rights. The very statute that Kristy invokes as a bar to the children's claim contains two alternate subsections regarding the time for bringing paternity challenges. The subsection Kristy quotes does impose a 5-year limitation period, even where the child brings the claim (e.g. through his next friend). As mentioned above, the primary policy rationale for the limitation is that it safeguards children's family stability and economic security, by preventing fathers from belatedly challenging their paternity in order to escape support obligations. Even where a child is the nominal Petitioner in a paternity challenge under one of those subsections, the real party in interest is inevitably an adult responsible for that child's care, and therefore the limitation furthers the purpose of the UPA. That limitation, however, is expressly tied to the presumptions contained in C.R.S. § 19-4-105 (1) (a), (1) (b), and (1) (c).

What Kristy fails to note in her brief is that C.R.S. § 19-4-105 includes three other presumptions of paternity, located at (1) (d), (1) (e), and (1) (f), that may also be applicable. Subsection (1) (d) states that "[a] man is presumed to be the natural father of a child if, [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." Where a presumption of paternity arises under that subsection (as opposed to (1) (a)), no limitation period is imposed on actions challenging the presumption. In fact, C.R.S. § 19-4-107 (2) explicitly states that when the presumption being challenged is one of the latter three, "[a]ny interested party…may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship." (Italics added).

The question presented by these conflicting presumptions is whether subsection (1) (a) should apply, in which case the limitations period would bar the claim, or whether (1) (d) should apply, in which case there is no limitations period. Here again, the answer lies within the very statute that forms the basis of Kristy's argument. Subsection (2) (a) of the C.R.S. § 19-4-105 provides as follows:
A presumption under this section may be rebutted in an appropriate action only by clear and

convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.
Clearly, the Court has discretion to decide which, if any, of the paternity presumptions should apply in a given case. The statute expressly instructs the court to consider policy and logic in connection with the facts of the case, and to avoid mechanical application of any given presumption.

Though Kristy does not mention the Court's discretion in her brief, she does cite cases in which alternate presumptions have been presented. In M.R.D. v. F.M., 805 P.2d 1200, 1202-03 (Colo. App. 1991), the Colorado Court of Appeals held that "…a man who is presumed to be a child's father under one of two conflicting presumptions may not utilize the open-ended statute of limitations to prove the nonexisting father-child relationship more than five years after the child's birth." Kristy states that in M.R.D., the Petitioner was a minor child, and that genetic tests had established a probability of over 99% that the presumed father was not the biological father. What she does not mention is that the child's presumed father was a Co-Petitioner, and that the action was commenced in order to relieve him of a support obligation that he had assumed. The real party in interest was not the minor child, but rather an adult responsible for his care. Using its statutory discretion, the trial court concluded that the presumption of legitimacy was a weightier policy consideration than the alleged financial injury to the presumed father. In other words, the court weighed the subsection (1) (a) presumption, to which the 5-year limitations period applies, against the (1) (f) presumption, to which no time limit applies, and decided that maintaining the family stability and economic security of the minor outweighed reimbursing the presumed father for his support contributions.

Kristy also cites a Missouri Court of Appeals case, P.L.K. v. D.R.K., 852 S.W.2d 366, (Mo. App. 1993), which she urges is "on all fours" with the case at bar. In P.L.K., as in M.R.D., a child brought a paternity challenge (through his guardian ad litem). Here again, the motive for the action was child support; mother and presumed father had divorced, and presumed father wanted to rid himself of his support obligation. Because paternity had been adjudicated in the previous dissolution action, collateral estoppel precluded the presumed father from raising the paternity issue. The child, however, filed additional pleadings in order to obtain support from the putative father. The Missouri court noted the M.R.D. case from Colorado, and followed its reasoning in holding that the 5-year statute of limitations barred the paternity challenge.
P.L.K. is not on all fours with the case at bar. Missouri precedent is not binding on this court, and if it were, it would not compel a ruling in Kristy's favor. The common thread of all three cases Kristy cites is the motive underlying the paternity challenges; all three involve parents attempting to avoid support obligations. In the case at bar, no father is challenging his obligation, and none of the children is asking for support.

The only aspect of P.L.K. that relates directly to the case at bar is the dispute over whether Missouri's tolling statute affects paternity challenges. Like the Mindenhall children, the Child in P.L.K. argued that the statute of limitations for challenging paternity should be tolled during a child's infancy. The Missouri court held that that state's tolling statute applies only to specifically enumerated civil actions, and that paternity actions are not among them. The Colorado tolling statute cited by the Mindenhall children, in contrast, does not limit the types of actions to which it applies. On the contrary, the statute specifically refers to limitation periods appearing in "any of the statutes of the state of Colorado." Thus, Colorado's tolling statute arguably does apply here, especially since the alternative would be

to require children under age five to bring legal actions in order to protect their inheritance rights.

Applicable as it seems to be, however, the Court need not rely exclusively on C.R.S. § 13-81-103 in order to find that the children's Petition in Paternity is not time barred. This is a probate action, and as such, is governed primarily by the Probate Code. Numerous courts, including both the Court of Appeals and the Supreme Court of Missouri, have ruled that the statute of limitations upheld in P.L.K. is inapplicable to probate proceedings.

The P.L.K. court held that in Missouri, "[t]he Uniform Parentage Act…provides the exclusive means through which paternity may be determined." It appears that at that time, the conflict between the UPA and the Probate Code was unknown. Four years after P.L.K. was decided, the New Jersey Supreme Court was confronted with a case that is factually much closer to the case at bar, and that also involved the statute of limitations imposed by the UPA. In that case, the Court held that the UPA was not the exclusive means of determining paternity, and that in the context of probate proceedings, it should not apply at all. It reasoned as follows:
…[T]he Parentage Act and the Probate Code are independent statutes designed to address different primary rights…Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent's real and personal property. The different purposes the two statutes serve, help to explain why the Legislature contemplated different periods of limitations for filing claims under those statutes.'
Wingate v. Estate of Ryan, 693 A.2d 457, 463, 149 N.J. 227 (1997). In 1991, the New Jersey legislature amended its version of the Probate Code because of emerging conflicts between it and the UPA. The respondents in Wingate argued that the legislature intended to apply the UPA limitations period for paternity challenges to probate actions as well. The court rejected that argument, and held that the Probate Code alone governs the limitations period for proving heirship in intestacy proceedings. Id. at 464.

Even before New Jersey ruled the UPA limitations period inapplicable to probate proceedings, the very Missouri Court that had deemed the UPA the sole means of establishing paternity began to reverse its course. In State of Missouri v. Schaumann, 918 S.W.2d 393, 397 (Mo. App. 1996), that court stated that "…it is now clear that the legislature no longer intends for the UPA to be the exclusive procedure for adjudication of paternity issues." That case involved a URESA dispute, but the Court was unequivocal in reversing its previous exclusive reliance on the UPA for paternity challenges.

The same year Schaumann was decided, the Supreme Court of Missouri decided a case that is most definitely on all fours with the case at bar. The Court was directly presented the question whether an illegitimate child can prove paternity during probate beyond the statute of limitations in the UPA, and it answered unanimously in the affirmative. In the matter of: Carl Nocita, 914 S.W. 2d 358 (1996). The Respondent in that case argued that in order to inherit, the illegitimate child had to establish paternity under the UPA. The Court noted P.L.K. and other previous Missouri cases that had held as much, and explicitly distinguished them, stating that "…none deal with establishing paternity during probate…." Id. at 359.

Several other state courts have followed Missouri's lead on this issue. Just three months ago, the Minnesota Court of Appeals stated the principle most succinctly:
In contrast to children who file support claims, which accrue on the date of birth, potential heirs have no right to share in an estate until the death of the decedent. Claims under the Probate Code and the Parentage Act are subject to independent limitations periods. To hold

otherwise would grant heirship immunity to parents of children who are born out of wedlock and do not establish parentage before reaching [the statutory age under the UPA]. That would terminate many claims before they accrue…We hold that, for the purposes of intestate succession, a parent-child relationship may be established by clear and convincing evidence regardless of the time limitation imposed by the Parentage Act.
In re: Estate of James A. Palmer, 647 N.W.2d 13, 16, (Minn. App., 2002).

This Court finds that it has three grounds on which to hold that the Mindenhall children's Petition in Paternity is not time barred. First, the Court has discretion to apply the paternity presumption found at C.R.S. § 19-4-105 (1) (d), to which the UPA statute of limitations does not apply, rather than the (1) (a) presumption. Second, C.R.S. § 13-81-103, Colorado's tolling statute, does not exclude paternity actions, and thus arguably tolls even the limitations period of § 19-4-105 (1) (a). Third, and most importantly, the Court adopts the holding of the Missouri Supreme Court and the Minnesota Court of Appeals, that the UPA is not the exclusive method of establishing paternity, and is often inapplicable to probate proceedings.

The Children have failed to join indispensable parties pursuant to C.R..S. § 19-4-110:
Kristy argues that the children have failed to name indispensable parties to this action. She cites the statute above, which requires that "…each man alleged to be the natural father shall be made [a] part[y]…." In her brief, Kristy criticizes the children's failure to name any man that might be their natural father. She reminds the Court that public policy disfavors "bastardizing" children by "allowing an action in paternity to destroy a father and child relationship when there is no other ascertainable party as an alleged father." The criticism is ironic, because despite the children's efforts to discover this information, Kristy has refused to divulge it. The children have not alleged any other party's paternity, and therefore should not be charged with joining other parties.

Additionally, it should be noted that the children have not asked the Court to establish a father-child relationship between them and their natural fathers for support purposes. Rather, they have asked for a declaration of the nonexistence of a father-child relationship for intestacy and inheritance purposes. C.R.S. § 19-4-107 (1) (b) states that "…after the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party." (Italics added). Nowhere does the statute require that a declaration of nonexistence of a father-child relationship be accompanied by a determination of paternity by another. In light of the foregoing, and in light of the Court's holding that the UPA is not the exclusive method for making that declaration, the Court holds that C.R.S. § 19-4-110 does not require the children to join any party to this case.

The Petition in Paternity is not in the children's best interest:
Kristy argues fervently regarding the public policy favoring family stability, and asserts that granting a declaration of nonexistence of the father-child relationship in this case would contravene that policy. She warns that the children should not be "cast out as illegitimate children and bastards," but fails to explain, in practical terms, how the children will be harmed should the Court ultimately declare the nonexistence of a father-child relationship.

In the Court's view, those of the children that are not biological issue of the decedent have very little, if anything, to lose. Because the decedent can no longer provide them with economic support, family stability, etc., the requested declaration, if granted, will in no way jeopardize their material or emotional well-being. Furthermore, the likelihood of stigmatization as bastards seems extremely unlikely, given that the man they purportedly believe to be their father is deceased. Finally, because Kristy's parental rights have been

terminated with respect to Telena and Tequila (the two children who are allegedly not biological issue of the decedent), and because her goal in this litigation is to compromise the interests of her other two children, her arguments regarding the children's best interest seem disingenuous.

It is true that Telena and Tequila will not inherit from decedent if found not to be his children. However, if they are found to be decedent's children, Kristy will receive 100% of the intestate estate pursuant to C.R.S. § 15-11-102, and none of the children will be entitled to his or her own share. Essentially, the declaration, if granted, will guarantee two of the children a share of the estate, which is unquestionably in their best interest. At the same time, it will leave the other two children in the same position as without the declaration (i.e., as wards of ADES). The Court therefore finds no conflict between the children's best interest and the relief requested in the Petition in Paternity.

The attorney fees proposed by children's attorney are unnecessary and excessive:
Court-appointed counsel for the children has applied for attorney fees in the amount of $11,900.58. Counsel for Kristy asks that the proposed fee be substantially reduced, arguing that there can be no question that she alone is entitled to 100% of the decedent's annuity. She asserts that because there is no legal or factual basis for the children's claims, the attorney fees expended on the children's behalf were unnecessary and excessive.

C.R.S. § 15-12-720 provides that attorney fees may be allowed as follows:
Expenses in estate litigation. (1) Except as provided in subsection (2) of this section, if any . . . court-appointed fiduciary defends or prosecutes any proceeding in good faith, whether successful or not, he or she is entitled to receive from the estate his or her necessary expenses and disbursements, including reasonable attorney fees incurred.
It is appropriate to apply this statute to the instant case because the determination of heirship controls the disposition of the decedent's intestate estate.

The Court finds that the court-appointed attorney for the children has prosecuted the case in good faith. Respectfully, as set out above, the Court disagrees with Kristy Mindenhall's analysis that there can be no heir but her. But for the investigation and arguments of court-appointed counsel for the children, this issue, which appears to be of first impression in Colorado, would never have been considered or addressed by the Court.

Through the efforts of court-appointed counsel, the identity of the heirs of Dennis Mindenhall entitled to take the remainder of the annuity, and potentially to share in any recovery under a wrongful death claim, will be discovered. The attorney's services, therefore, have benefited the estate.

In determining the reasonableness of the fee, the Court is guided by the standards set out in C.R.S. § 15-12-721. The hourly rate charged was set by this Court at $115.00 per hour, a rate that is at the low end of rates customarily charged in this geographic area for attorney services. C.R.S. § 15-12-721 (2) (c). The case involved novel and complex issues of law as evidenced by the Court's opinion above. C.R.S. §15-21-721 (2) (a). The Court has given particular weight to the time and labor required in light of the resistance asserted by Kristy Mindenhall to discovery and to ultimate resolution of the issues in the case. C.R.S. § 15-12-721 (2) (a).

The detailed time records, otherwise subject to attorney-client work product privilege claims, were submitted to the Court in camera. In light of the extensive objections raised at the hearing by Kristy's counsel, it was appropriate for the Court to review the detailed time

records. Nevertheless, the Court has not reviewed the children's supplemental filing. The Court finds that the attorney fees sought by Tracey James were necessary, the work has benefited the estate by establishing a legal and factual basis for the proper determination of the heirs of Dennis Mindenhall, and the amount of the fees are reasonable.

CONCLUSION AND ORDER

Based on the foregoing, the COURT ORDERS:

1) Kristy Mindenhall shall admit that Dennis Wayne Mindenhall is not the father of one or more of her children, and shall make such other admissions as were requested in the children's Request for Admissions.
2) If Kristy Mindenhall refuses to so admit, she shall submit to the genetic testing proposed by the children's attorney, the expense of which shall be borne by the estate.
3) Kristy Mindenhall's Motion to Strike is hereby granted, as the Supplement to which she objects played no part in the Court's decision.
4) The Clerk of this Court is ordered to cut a check in the amount of $11,900.58 on the account held in the Court registry to Tracey James, Esq.

October 3, 2002

____
C. Jean Stewart
Judge, Probate Court