COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 Appeal from the District Court of Denver County Honorable John W. Coughlin, District Court Judge Case No. 96 DR 39 **In re the interest of E.L.M.C.** ATTORNEYS FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF COLORADO: Heather R. Hanneman, #22383 1600 Stout Street, Suite 1350 Denver, Colorado 80202 Telephone Number: (720) 904-5219 Fax Number: (303) 446-9400 E-mail: heatherhanneman@msn.com Mark Silverstein, #26979 American Civil Liberties Union Foundation of Colorado 400 Corona Street Denver, Colorado 80218 Telephone Number: (303) 777-5482 Fax Number: (303) 777-1773	▲ COURT USE ONLY ▲ Case Number: 03 CA 1121

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF COLORADO

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This *Amicus* submits this brief because it is concerned about Dr. Clark's sweeping attack on the psychological parent doctrine, which serves to protect children in Colorado by protecting their significant relationships with the adults who function as parents to them. Dr. Clark essentially is asking the Court to overturn a well-settled line of cases and eliminate the doctrine from Colorado law. She relies primarily on the law of other jurisdictions and her constitutional rights as a legally recognized parent. The results of such a radical change in Colorado's law would be profound, affecting gay men and lesbians, stepparents, aunts, uncles, and other family members who have raised children but lack the legally recognized status as "parents." And most importantly, such a radical change would affect the children of such families, disrupting the strong emotional bonds that they have formed with their psychological parents.

This *Amicus* seeks to assist the Court by discussing the background and basis for the psychological parent doctrine in Colorado, which will show that it is a well-established doctrine in Colorado law and that the courts of this State have repeatedly relied upon the doctrine to protect children's best interests. This *Amicus* also seeks to assist the Court by providing a thorough analysis of the constitutional issues raised by Dr. Clark, particularly in light of the United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 (2000). The analysis will show that Colorado's psychological parent doctrine properly balances a parent's constitutional right to the care, custody and control of her children with the State's interest in protecting the interests of children, which includes protecting their relationships with psychological parents. This is particularly so when a legally recognized parent, such as Dr. Clark, intended to create a parent-child relationship between her child and a psychological

parent.

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves a petition for the establishment of parenting time with E.L.M.C. by Dr. McLeod, who lived with and functioned as a parent to E.L.M.C. for over five years. E.L.M.C. is the adopted child of Dr. McLeod's former partner, Dr. Clark. Dr. McLeod and Dr. Clark made the decision to adopt E.L.M.C. together and intended to be equal parents to her. However, because Colorado law provided that only one of the them could be E.L.M.C.'s adoptive parent, Dr. Clark formally adopted E.L.M.C. Both women flew to China to complete the adoption, and upon completion of the adoption, they changed their daughter's name to reflect both of their last names. Dr. McLeod took three months off of work to care for E.L.M.C. when she was a baby and both women reduced their work schedules to half-time so that they could each be responsible for a significant amount of E.L.M.C.'s care. The women shared major decisions regarding E.L.M.C. and the financial cost of supporting her. E.L.M.C. was integrated into the extended families of both Dr. Clark and Dr. McLeod. In a request for a joint custody order in 1996, Dr. Clark and Dr. McLeod both stated that "there is no presumption that one or the other is better" and that E.L.M.C. "knows both parties to be her mothers and knows no other parents." Significantly, E.L.M.C. calls Dr. McLeod "Mommy." In 2001, Dr. Clark and Dr. McLeod ended their relationship. What once was a shared, committed relationship which included co-parenting a child, Dr. Clark now describes in her Opening Brief as a "type of shifting economic arrangement."

This dispute between Dr. Clark and Dr. McLeod is not unique. Courts have recognized

the changing face of the American family, which often does not include the traditional husband, wife, and children. See generally, *Changing Realities of Parenthood: The Law's Responses To The Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (May, 2003). Lesbian and gay relationships sometimes end, just like their heterosexual counterparts. And, just like their heterosexual counterparts, lesbian and gay parents who have ended their relationships are not always able to amicably resolve issues regarding the custody and care of their children.

Colorado law protects children from the consequences of broken relationships between adults and recognizes the importance of maintaining a child's relationship with both parents after the parents separate – whether those parents are legally recognized or psychological parents. When lesbian and gay couples have families, there often is no legal relationship between the child and one of the parents. This leaves the children of such families in an extraordinarily vulnerable position. If their parents split, they risk losing a profound emotional bond with one of their parents – a bond that provides deep emotional security and is fundamental to the stability and psychological well-being in a child's life. The New Jersey Supreme Court recently commented on these profound emotional bonds, in a decision involving two lesbian mothers:

> [A parent-child relationship] is built on a commitment by the adults to live as a family, accompanied by the actuality of family life, involving the love, care, nurturance, protection, safety and education of the children in their care. The relationship that develops between children and those who function as their parents, within that setting, ordinarily creates a life-long bond between them. That bond is not the result of the sexual orientation of the adults or of their marital status. It does not arise solely from biology or legal adoption. Rather, it is borne out of the daily toil parents engage in to keep their children healthy and safe from harm; out of the love and attention provided to the children; and

> out of the unconditional regard returned by the children to the parental figures. When the bond exists, the parents and the children become a family--an entity greater than the sum of its parts. What is crucial is to realize that a parent-child bond is not simply a court-bestowed determination for the purpose of resolving litigation. Certainly, it affects the status of custody and visitation litigation, but that is secondary. The finding of the existence of such a bond reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and a child who are not related by blood or adoption. It is different from the bond between great friends or the bond between uncle and nephew, aunt and niece. It is the special connection between a parent and a child.

V.C. v. M.J.B., 748 A.2d 539, 557 (N.J. 2000) (Long, J. concurring), *cert. den.* 531 U.S. 926 (2000).

This Court should continue Colorado's well-settled practice of protecting children who have formed parent-child relationships with psychological parents. Maintaining such bonds clearly protects the best interests of such children. And, as discussed below, there are distinct means of protecting the rights of legally recognized parents while doing so. The United States Supreme Court decision in Troxel does not change the analysis or standards for Colorado's psychological parent doctrine. In fact, the Court in Troxel recognized that "special factors" may justify court action to protect such children. This Court should decline Dr. Clark's invitation to change the law of Colorado in such a profound manner and should affirm the decision of the district court below.

B. Statement of the Facts and Course Of Proceedings Below.

This *Amicus* adopts the procedural history recited by the district court in its Permanent Orders. For the facts of this case, this *Amicus* refers the Court to the briefs of the parties, the

decision of the district court, and the record made in the district court.

SUMMARY OF THE ARGUMENT

The psychological parent doctrine is well-established in Colorado law and protects the significant relationships between children and the adults who function as parents to them. Not only is application of the "best interest of the child" to a psychological parent's petition for parenting time consistent with Colorado law, but it also is consistent with constitutional requirements.

ARGUMENT

I. THE PSYCHOLOGICAL PARENT DOCTRINE IS FIRMLY ESTABLISHED IN COLORADO LAW AND PROTECTS THE RELATIONSHIPS BETWEEN CHILDREN AND THE ADULTS WHO FUNCTION AS PARENTS TO THEM.

A. The Psychological Parent Doctrine In Colorado.

Dr. Clark argues that the district court must absolutely defer to the parenting time schedule proposed by her even though the court found beyond any reasonable doubt that E.L.M.C. has attached to both Dr. Clark and Dr. McLeod and considers both to be her mother (i.e. that Dr. McLeod constitutes a psychological parent to E.L.M.C.). She argues that because she is the legal adoptive parent of E.L.M.C., her preference as to the parenting time schedule for E.L.M.C. must prevail over any concerns of the court in maintaining the relationship between E.L.M.C. and her psychological parent.[1] In asserting these arguments, Dr. Clark is asking this Court to discontinue the longstanding practice in Colorado of protecting children by safeguarding their relationships with the adults who, although not their legally recognized parents, function as

[1] Although Dr. Clark stresses in her Opening Brief that she has not attempted to deprive Dr. McLeod of all parenting time or contact with E.L.M.C., her arguments essentially request the Court to grant her the power to do so.

parents to them. She is essentially asking this Court to reverse a long line of cases and abolish the psychological parent doctrine in Colorado.

Colorado courts, however, have long protected the best interests of children in this state through application of the psychological – or *de facto* parent – doctrine. See, e.g., Devlin v. Huffman, 339 P.2d 1008 (Colo. 1959) (awarding custody to grandparents who had cared for children for six years); Root v. Allen, 377 P.2d 117 (Colo. 1962) (denying a habeas corpus petition of natural father for return of child from stepfather where "effect would be very damaging" because she had lived with stepfather for many years); In re the Marriage of Martin, 42 P.3d 75 (Colo. App. 2002) (discussing the psychological parent doctrine); In the Interest of E.C. and A.C., 47 P.3d 707 (Colo. App. 2002), *cert. den.* June 10, 2002 (affirming continued placement of children with psychological parents); see also In re Custody of A.D.C., 969 P.2d 708, 710 (Colo. App. 1998) (noting legislative recognition of significance of "psychological parenting"); In re the Matter of V.R.P.F., 939 P.2d 512, 514 (Colo. App. 1997) ("statutory grant of standing to a non-parent to seek legal custody of a child constitutes legislative recognition of the importance of 'psychological parenting' to the best interests of a child").

The Colorado Supreme Court definitively recognized the psychological parent doctrine in the case In the Matter of the Custody of C.C.R.S., 892 P.2d 246 (Colo.), *cert. den.* 516 U.S. 837 (1995). In C.C.R.S., two non-parents ("respondents") sought custody of a child who had lived with them for four and one-half years. The biological mother had initially consented to custody of the child by the respondents in anticipation of a formal adoption, but later changed her mind and attempted to revoke her release of custody. Id. at 249. The lower court found that a parent-child relationship had developed between the respondents and the child and that "severance of

that relationship would be psychologically traumatic to the child." Id. at 250. Although the court found that the biological mother could be "a fit an proper parent," it nonetheless awarded custody to the respondents, concluding that the child's bests interests were served by remaining in their custody. Id.

In its decision, the Colorado Supreme Court specifically recognized the psychological parent status of the respondents. Id. at 255. The court also addressed the biological mother's argument that the award of custody to the respondents in the absence of a finding of parental unfitness violated her fundamental liberty interest in the care, custody, and management of her child. The court relied upon the psychological parent status of the respondents in distinguishing the case from those in which a parent's due process rights were implicated. Id. at 255. It recognized that disrupting the bond between a child and his psychological parents "ignores the welfare of the child and is likely to have a detrimental effect on his emotional and psychological well-being." Id. at 258. The court thus held:

> [W]e conclude that the best interests of the child standard is the prevailing determination in a custody contest between biological parents and psychological parents. Our foremost priority is therefore to resolve the dispute in a way that minimizes the detriment to the child. . . . [T]he best interests of the child standard is the paramount consideration in a custodial dispute between a natural parent and the psychological parents. Accordingly, the trial court's award of custody to the respondents, because it was in the best interests of the child, was proper.

Id. at 258-59 (footnotes omitted).

The psychological parent doctrine, therefore, protects the emotional well-being of children who have formed parent-child relationships with adults who are not their legally recognized parents. The doctrine recognizes that severing such relationships can be

psychologically traumatic and damaging to children and that their best interests are served by protecting their effective parent-child relationships. It addresses the realities of children's emotional lives – the bond that forms as a result of the love, attention, care and protection provided to a child by an adult as opposed to a legally conferred designation as a "parent." While ordinarily, a third party must show that the legally recognized parent is unfit in order to obtain custody or parenting time with a child, as the Colorado Supreme Court has determined, if a court determines that the third party is a psychological parent to the child, the petition will be evaluated according to the best interest of the child test.

Dr. Clark argues that the psychological parent doctrine should not be applied in this case because Colorado courts have only applied the doctrine when the legal parent was either unfit or had relinquished custody and control of the child. Opening Brief, at 13, 18. Colorado courts, however, have firmly established that neither a showing of unfitness or a relinquishment of custody and control by the legally recognized parent is necessary for application of the psychological parent doctrine. To the contrary, the Colorado Supreme Court in C.C.R.S. found that a showing of parental unfitness was not a necessary precursor to application of the psychological parent doctrine or to meet due process standards. C.C.R.S., 892 P.2d at 251, 257-58. See also Root, 377 P.2d at 120 (stepfather awarded custody even though natural father "fit and proper person"); In the Interest of K.M.B., 2003 WL 22309061, *3 (Colo. App. Oct. 9, 2003) (C.R.S. § 14-10-123(1)(c), which recognizes the psychological parent doctrine, "applies even when the child's parents have retained some measure of caretaking responsibility").

Moreover, Dr. Clark's argument wholly ignores the underlying purpose of the psychological parent doctrine. The focus of the doctrine is on the emotional and psychological

bond formed between a child and an adult that has served as a parent to her, not on the relative fitness or fault of the legally recognized parent. To say that the psychological parent doctrine will only apply where the legally recognized parent is either unfit or has relinquished custody of the child is to deny the very purpose of the doctrine – to protect the emotional and psychological well-being of the child. This Court, as other Colorado courts have done, should decline the invitation to place the focus of the psychological parent analysis on any alleged deficiencies of the legally recognized parent as opposed to where it should be – on the best interests of the child. See C.C.R.S, 892 P.2d at 257; see also Petition of R.H.N., 710 P.2d 482, 485 (Colo. 1985) (best interest standard, as opposed to parental fault, should be used in step-parent adoption cases).[2] A child risks suffering emotional harm as a result of the loss of her psychological parent whether or not her legally recognized parent also functioned as a parent. Dr. Clark's argument to the contrary is akin to the absurd suggestion that a child would not suffer from the death of her mother as long as she had a surviving father.

In light of the well-settled law in Colorado addressing psychological parents, the district court properly considered E.L.M.C.'s relationship with Dr. McLeod in its parental responsibility and parenting time order. It properly relied upon well-established law when it considered the best interests of E.L.M.C. in its order. Dr. Clark's claim that the district court erred by applying the best interests test and by failing to defer absolutely to her wishes regarding E.L.M.C. has no basis under Colorado law.

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[2] See also In the Interest of A.M.K., 68 P.3d 563, 565 (Colo. App. 2003) (rejecting father's contention that showing of unfitness required before parental responsibilities can be allocated to psychological parents); In the Matter of R.A. and T.A., 66 P.3d 146, 149 (Colo. App. 2002), *cert. den.* April 14, 2003 (due process does not require a showing of parental unfitness before psychological parenting and best interests analysis is performed).

B. In Determining Whether A Third Party Has Become A Psychological Parent To A Child, The Court Should Examine Whether The Legally Recognized Parent Intended To Create A Psychological Parent-Child Relationship And Whether Such A Relationship In Fact Developed.

Dr. Clark argues that the district court's decision places E.L.M.C. "at risk of having numerous 'psychological parents' control her life, without the knowledge or consent" of Dr. Clark. Opening Brief, at 19. In fact, she argues that the court's decision sets a precedent for "every boyfriend, nanny, or uncle who spends time in the home to seek 'parenting time' with the child." Id. at 17. This argument ignores one of the most critical facts in this case: Dr. Clark herself planned for and intended Dr. McLeod to develop and maintain a parent-child relationship with E.L.M.C. And, over the course of approximately five years with both the consent and approval of Dr. Clark, a parent-child relationship did develop between E.L.M.C. and Dr. McLeod. This is why application of the psychological parent doctrine is appropriate in this case and why Dr. Clark's claims of a slippery slope with respect to "numerous" future psychological parents controlling E.L.M.C.'s life is without merit.

Much like in this case, the legal mother in C.C.R.S. first approved of and consented to the care and nurturance of her children by the petitioners, but then later changed her mind. C.C.R.S., 892 P.2d at 248-49. In V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000), which involved facts very similar to this case, the New Jersey Supreme Court determined that such approval and consent by the legally recognized parent was central to application of the psychological parent doctrine. In the case, a former domestic partner, V.C., who had been in a lesbian relationship with a biological mother, M.J.B., sought custody of and visitation with the mother's twin children. The two women and children had functioned as a family until the children were approximately

twenty-three months old, when M.J.B. ended her relationship with V.C. Id. at 543-44. M.J.B. permitted V.C. to visit the children for nine months, but then refused any continued visitation. Id. at 544.

M.J.B. argued that an award of custody or visitation against her will would be a violation of her fundamental right to the custody, care and control of her children. Id. at 548. She also argued that because there was no showing that she was unfit or had abandoned the children, the court could not interfere with her constitutional rights. Id. at 549. The New Jersey Supreme Court, however, rejected her arguments, finding that V.C. was the psychological parent of the children. Id. at 553-54. Key to the court's decision was the fact that M.J.B. had consented to and fostered the relationship between her children and V.C. Id. at 552.

The court found that in order to avoid the situation where a nanny or babysitter could theoretically qualify for psychological parent status, the legally recognized parent "must have fostered the formation of the parental relationship between the third party and the child." Id. According to the court, this consent places control within the hands of the legally recognized parent. Id. The court stated:

> [The legally recognized parent] has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

Id.

The court also found that although the intent of the legally recognized parent is key to the psychological parent analysis, "the focus is on that party's intent during the formation and

pendency of the parent-child relationship," not after the relationship between the adults ends. Id. The obvious reason for this is that the break in the relationship between the adults does not end the bond that has formed between the child and the psychological parent. Id. A legally recognized parent cannot "turn back the clock" by ending her personal relationship with the psychological parent. As a result, the court determined, "that may mean protecting those relationships despite the later, contrary wishes of the legal parent in order to advance the interests of the child." Id.

The court ultimately determined that it was in the best interests of the children to maintain a visitation schedule with their psychological parent, V.C. Id. at 555.[3] In making its ruling, the court summarized the key aspects of its decision:

> This opinion should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation. . . . Once a third party has been

[3] Because of the pendency of the case, at the point of the court's decision, V.C. had not been involved in decision-making for the children for nearly four years. Id. at 555. The court, therefore, determined that it would not order joint legal custody in the case. Id.

> determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard. . . .

Id. at 553-54 (emphasis added; citations omitted).

Just as the court did in V.C. v. M.J.B., when considering whether a petitioner is a psychological parent to a child, this Court should include in its analysis a determination as to whether the legally recognized parent intended the parent-child relationship to be created between the psychological parent and the child. The district court clearly made this inquiry in arriving at its decision. It specifically found that both Dr. Clark and Dr. McLeod intended that they would co-parent E.L.M.C. It noted that upon E.L.M.C.'s adoption, Dr. Clark changed E.L.M.C.'s name to reflect Dr. McLeod's last name and that Dr. Clark and Dr. McLeod expressed their intentions to have E.L.M.C. "raised by Clark and McLeod as one family with two parents." The women shared major decisions regarding E.L.M.C. and the financial cost of supporting her. E.L.M.C. calls Dr. McLeod "Mommy," and Dr. Clark "Momma." In a request for a joint custody order, Dr. Clark and Dr. McLeod both stated that "there is no presumption that one or the other is better" and that E.L.M.C. "knows both parties to be her mothers and knows no other parents." In short, the evidence was overwhelming that Dr. Clark intended to foster a parent-child relationship between E.L.M.C. and Dr. McLeod.

Courts in other states have similarly focused on the intent of the legally recognized parent in forming and fostering a parent-child relationship between a psychological parent and a child. See, e.g., T.B. v. L.R.M., 786 A.2d 913, 919 (Pa. 2001) (biological mother encouraged and consented to lesbian partner's assumption of parental status); Rubano v. DiCenzo, 759 A.2d 959,

976 (R.I. 2000) (biological mother "agreed to and fostered" parental relationship between lesbian partner and child for many years); In re Custody of H.S.H.K., 533 N.W.2d 419, 435 (Wis. 1995) (biological mother "exercised her constitutional rights to include another adult to act as a parent"). Legal commentators have also noted that this intent requirement protects the legally recognized parent's autonomy while protecting the child's relationship with her psychological parent. See, e.g., Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet The Needs Of Children In Lesbian-Mother and Other Non-Traditional Families, 78 Geo. L.J. 459, 464 (1990) (both parental autonomy and the best interests of children are served by recognizing as a parent "anyone who maintains a functional parental relationship with the child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature").

Although most of the court decisions involving psychological parents in Colorado have not expressly discussed the role of the intent of the legally recognized parent, this lack of discussion may result from the fact that such consent is often implicit. See, e.g., C.C.R.S., 892 P.2d at 249 (biological mother first consented to custody by respondents); In re Custody of A.D.C., 969 P.2d at 709 (mother voluntarily placed child with grandparents); Devlin, 339 P.2d at 1009 (mother voluntarily left children with her mother and stepfather). An express recognition of such an intent requirement by this Court will alleviate any concerns that uninvited third parties, such as nannies, babysitters, or "a limitless number of future partners," as Dr. Clark has posited, can be deemed psychological parents. Here, Dr. Clark's expression of her intent to develop and foster the parent-child relationship between E.L.M.C. and Dr. McLeod was clear. Moreover, the fact that a parent-child relationship did develop between Dr. McLeod and

E.L.M.C. is also clear. Under these circumstances, the district court's determination of parental responsibility and parenting time was entirely appropriate and necessary.

C. This Court Should Reject Dr. Clark's Arguments To Overturn Colorado's Psychological Parent Doctrine In Favor Of The Law Of Other Jurisdictions.

Dr. Clark attempts to persuade this Court to overturn Colorado's well-established psychological parent doctrine in favor of the law of other jurisdictions. As the Colorado Supreme Court noted in C.C.R.S., the law concerning the claims of psychological parents for custody and visitation is split among the jurisdictions. C.C.R.S., 892 P.2d at 256. Some states have adopted strict interpretations of statutes governing custody and visitation, while others have taken a more flexible approach in order to protect the psychological attachments of children to parental figures. Colorado is among this second group. Dr. Clark, in contrast, focuses on the law of states that have taken the less flexible route.

For example, contrary to the law of Colorado and most other states, some states have never applied the psychological parent doctrine to custody or visitation cases of any kind, let alone same-sex parent cases. See, e.g., In re Thompson, 11 S.W.3d 913, 923 (Tenn. App. 1999) (no prior precedent in Tennessee applying "de facto" parenthood). Other courts have found that they are constrained by their state statutes from applying equitable or common law doctrines to custody or visitation decisions. See, e.g., Guardianship of Z.C.W. and K.G.W., 84 Cal.Rptr.2d 48, 50 (Cal. App. 1999). Colorado courts, in contrast, have noted the legislative recognition of the significance of psychological parenting. See In re Custody of A.D.C., 969 P.2d at 710; In re the Matter of V.R.P.F., 939 P.2d at 514. Colorado courts have also applied equitable doctrines in the context of family law cases. See In re Marriage of Dennin, 811 P.2d 449, 450-51 (Colo.

App. 1991) (applying equitable estoppel); In re Marriage of Wisdom, 833 P.2d 884, 887 (Colo. App. 1992) ("special considerations of an equitable nature" may arise in domestic relations cases).

Because Colorado's law regarding psychological parenting and the protections afforded to children and their psychological parents is well-settled, Dr. Clark's reliance on cases from other jurisdictions is misplaced. Such cases do not represent the law in Colorado. Therefore, they are not relevant to the Court's analysis in this case.

II. APPLICATION OF THE "BEST INTEREST OF THE CHILD" TEST TO A PSYCHOLOGICAL PARENT'S PETITION FOR DETERMINATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME IS CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

A. A Parent's Right To The Custody, Care, And Control Of Her Child Is Not Absolute; It Must Be Balanced Against The State's Interest In Protecting Children.

Dr. Clark argues that the district court's recognition of E.L.M.C.'s relationship with Dr. McLeod in its permanent orders violates her constitutional right to the custody, care, and control of her children. She argues that the district court was compelled, pursuant to her constitutional right as a parent, to defer absolutely to her wishes regarding E.L.M.C. Dr. Clark, however, fails to recognize or acknowledge that the constitutional right to parental autonomy is not absolute and must be balanced against the State's interest in protecting the best interests of children.

Parents have a constitutionally protected liberty interest in the care, custody and control of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 398 (1923). That right, however, is not absolute. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("the family itself is

not beyond regulation in the public interest"); Lehr v. Robertson, 463 U.S. 248, 256 (1983) (connection between parent and child merits "constitutional protection in *appropriate* cases") (emphasis added). Parental rights are moderated by their children's best interests, and the State has a substantial interest in protecting those interests. See, e.g., Santosky, 455 U.S. at 766 ("the State has an urgent interest in the welfare of the child"); Prince, 321 U.S. at 166 ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control. . . ."); In re Petition of J.D.K, 37 P.3d 541, 544 (Colo. App. 2001) ("parental rights must yield to the interests and welfare of the child").

Thus, under certain circumstances, the State may restrict a parent's control of her child where necessary to protect the child's best interest. The State may require, for example, that parents send their children to school. See Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); Pierce, 268 U.S. at 534. The State may also prohibit child labor. See Prince, 321 U.S. at 166; Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 326 (1913). And the State may even terminate parental rights when necessary to preserve and protect the welfare of the child. Santosky, 455 U.S. at 766. A parent's constitutional rights, therefore, must be balanced against the State's interest in protecting children.

This State interest also extends to ensuring that custody and visitation determinations serve the best interests of children. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."). Indeed, Colorado, like all

other states, recognizes that the State's primary mission in custody and visitation proceedings is to ensure that the child's best interest is promoted. See, e.g., C.C.R.S., 892 P.2d at 256 ("the interest and welfare of the child is the primary and controlling question"). This includes protecting children's important relationships with parents and psychological parents. See In re the Custody of A.D.C., 969 P.2d at 710 (Colorado General Assembly has recognized importance of "psychological parenting"); In re the Matter of V.R.P.F., 939 P.2d at 514 (noting legislative recognition of the importance of "psychological parenting").

This point was emphasized by the U.S. Supreme Court in Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816 (1977), where the Court stated:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id. at 844; see also Lehr, 463 U.S. at 261 (stepfather's actual relationship with child was determining factor in considering degree of protection afforded to parent-child link).

B. The United States Supreme Court's Decision In Troxel v. Granville Does Not Destroy Or Otherwise Alter Colorado's Psychological Parent Doctrine.

Dr. Clark argues that the Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 (2000), essentially negates Colorado's psychological parent doctrine. See Opening Brief, at 20 ("Troxel Requires that the Court Defer to the Parenting Time Schedule Proposed by Dr. Clark."). She argues that because she is not an unfit parent, under Troxel, her preference for a parenting time schedule must be absolute and the district court could not consider E.L.M.C.'s best interests

in maintaining a relationship with her psychological parent, Dr. McLeod. The Troxel decision, however, simply does not support such a radical departure from the psychological parent doctrine or the well-settled principle that a parent's constitutional rights must be balanced against the best interests of her child.

In Troxel, the U.S. Supreme Court in a plurality decision, struck down the application of a Washington State statute that permitted "any person" to petition a court for visitation rights at "any time" if the court determined that it was in the best interests of the child. Troxel, 530 U.S. at 67. The Court found the statute "breathtakingly broad" because of the language permitting "any person" at "any time" to seek such visitation. Id. The Court determined that the statute, as applied to the particular grandparents who had sought visitation, violated the constitutional right of the children's mother to make decisions regarding the care, custody, and control of her daughters. Id. at 72.

Significantly, the Court noted that the trial court's order awarding visitation to the grandparents "was not founded on any special factors that might justify the State's interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters." Id. at 68. For example, there was no evidence that the grandparents had become the psychological parents of the children. Moreover, the Court specifically stated:

> Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice

> Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care". . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id. at 73 (emphasis added; citation omitted).

Thus, contrary to Dr. Clark's argument, Troxel does not require the court to disregard the psychological parent status of Dr. McLeod in this case and the best interests of E.L.M.C. in making a decision regarding parenting responsibility and time. Troxel did not consider the affect of the psychological parent doctrine on decisions involving visitation. Nor does application of the psychological parent doctrine in this case make C.R.S. § 14-10-123 as "breathtakingly broad" as the Washington statute in Troxel. As discussed above, Dr. Clark specifically approved of and fostered the parent-child relationship between E.L.M.C. and Dr. McLeod. This fact completely distinguishes this case from Troxel, in which "any person" at "any time" could be granted visitation rights with a child. Dr. McLeod is not just "any person." To E.L.M.C. she is "Mommy." And it was Dr. Clark who consented to and fostered the development of E.L.M.C.'s relationship with her "Mommy." As a result, application of Colorado's psychological parent doctrine under a best interest of the child standard here is entirely consistent with constitutional requirements.

Although the Supreme Court in Troxel declined to define specifically the "special factors" referenced in its decision, Dr. Clark nonetheless urges this Court to do so. She argues that the Supreme Court's use of the phrase "special factors" must mean either a finding that the legal parent is unfit or that some "other harm" will befall the child. Nothing within the Troxel

decision, however, suggests such a constrained approach.[4] In fact, as discussed above, the Troxel plurality expressly refused to consider whether all non-parental visitation statutes require a showing of harm or potential harm to a child as a condition precedent. Id. at 73.

In Lehr v. Robertson, 463 US. 248 (1983), the U.S. Supreme Court noted in the context of a parental rights claim that when due process rights are "invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State." Id. at 256. It is *only after* the nature of the private interest is identified that the Court can evaluate the adequacy of the State's process. Id. This is consistent with the Court's refusal to define the precise scope of the parental due process right in Troxel or to require all non-parental visitation statutes to require a showing of harm or potential harm to the child before visitation is granted. Troxel, 530 U.S. at 73. In fact, the Troxel plurality stated "we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'" Thus, Dr. Clark's argument that Troxel's "special factors" language mandates specific findings of harm to the child or unfitness of the legal parent is contrary to the "care" that the Supreme Court took in the decision to avoid absolutes in the area of parental rights claims.

Here, the "precise nature" of Dr. Clark's "private interest" must be viewed in light of her actions and intent to foster and develop a parent-child relationship between E.L.M.C. and Dr.

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[4] Even if Troxel had mandated such a showing, Colorado's psychological parent doctrine would withstand constitutional scrutiny. Inherent within a finding that a person constitutes a psychological parent to a child is the determination that a lack of regard for that relationship in a parental responsibility or parenting time decision would be harmful to the child.

McLeod. Where a legally recognized parent actually invites a third party into her child's life and fosters a parent-child relationship between her child and the third party, she has, through her own actions, reduced her expectation of autonomous privacy in the relationship with her child. It is with this reduced expectation of privacy in mind that a Court must evaluate the adequacy of the procedures involved.

In light of her constitutional interests as a legal parent, the district court gave "special weight" to Dr. Clark's position regarding parenting responsibility and parenting time. The district court concluded, however, that any presumption in favor of Dr. Clark's position was outweighed by "special factors." Those factors considered by the court were those that essentially justify and constitute the psychological parent doctrine – that Dr. Clark intended to develop and foster a parent-child relationship between E.L.M.C. and Dr. McLeod and that, in fact, such a relationship did develop between E.L.M.C. and Dr. McLeod. Because Dr. Clark's interest in the privacy of the relationship with E.L.M.C. was diminished by her own actions, the process afforded by the district court did not violate constitutional standards. Under such circumstances, a showing of unfitness of the legal parent is not required.

In contrast to this case, Troxel did not deal with the situation of a psychological parent or a situation in which a parent had, by her own acts, reduced her expectation of privacy in the relationship with her child. Therefore, nothing within Troxel destroys or otherwise alters Colorado's well-settled law regarding psychological parents.

C. Troxel Does Not Require Application Of A Clear And Convincing Standard Of Proof In Cases Involving Psychological Parents.

Although the district court made its findings of fact in the decision below according to the standard of "clear and convincing evidence,"[5] neither Troxel nor Colorado law require such a standard of proof in cases involving psychological parents. Troxel did not address standard of proof issues. Two post-Troxel decisions in Colorado, however, do specifically address the required standard of proof in the context of parental rights claims.

In the case In the Interest of R.W. and T.W., 10 P.3d 1271 (Colo. 2000), the Colorado Supreme Court considered whether a mother's right to due process was violated by a court's use of the "preponderance of the evidence" standard with respect to a guardianship order. The order awarded custody of her children to the Department of Human Services, "appointed the foster parents as permanent legal guardians, and ordered that she have no contact with her children until they were over eighteen years old. . . ." Id. at 1276. Specifically noting the Troxel decision, the court addressed the constitutional significance of the lower court's use of a "preponderance of the evidence" standard of proof. Id. at 1275-76. Although the court acknowledged that the mother was "losing the majority of her parenting rights," the "preponderance of the evidence" standard was the appropriate standard of proof. Id. at 1276-77. The court rejected the mother's argument that a "clear and convincing" standard of proof was necessary to protect her constitutional rights. Id. at 1276. The court stated that "the standard of proof necessary turns in large part on both the nature of the threatened private interest and the permanency of the threatened loss." Id. Because the lower court's order did not actually terminate the mother's parent-child relationship, the court

[5] The district court also noted that the facts were established "beyond a reasonable doubt."

found that the "preponderance of the evidence" standard afforded her sufficient procedural protection. Id.

Similarly, In the Interest of A.R.D. and K.F.D., 43 P.3d 632 (Colo. App. 2001), *cert. den.*, April 15, 2002, held that a "preponderance of the evidence" standard was appropriate in a determination regarding parenting time. Id. at 635. The underlying order denied the father any parenting time with his children and appointed the children's stepfather as their guardian. Id. at 633. Citing Troxel, the court found that use of the "preponderance of the evidence" standard did not violate the father's constitutional right to the care, custody, and control of his children and rejected the father's argument that a "clear and convincing evidence" standard was necessary. Id. at 635.

Both R.W. and A.R.D. involved deprivations profoundly greater than the parenting time order of the district court in this case. And, as the Colorado Supreme Court stated in R.W., "the greater the deprivation, the greater the procedural protection provided to parents." R.W., 10 P.3d at 1276. Thus, even though the district court applied a "clear and convincing evidence" standard, according to Colorado law, such a standard was unnecessary for purposes of its decision.

Also, it is worth noting that the potential effect of heightening the standard of proof "could be pernicious." R.W., 10 P.3d at 1277. In R.W., the court noted its concern that a heightened standard of proof would interfere with the state's ability to protect the best interests of children. Id. at 1277-78. Here too, a determination by this Court requiring a heightened standard of proof could interfere with the ability of courts to protect those children who have formed bonded relationships with psychological parents but whose legally recognized parents have changed their minds regarding the ongoing nature of those relationships. This Court should not

hamstring future courts from protecting those relationships and the best interests of such children.

D. Post-Troxel Decisions Support Continued Application of the Psychological Parent Doctrine and Use of the Best Interests of the Child Standard.

In addition to the Colorado court's decisions in R.W. and A.R.D., post-Troxel decisions of other courts also support continued application of the psychological parent doctrine and use of the best interests of the child standard.[6] In Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000), the court determined that a biological mother's former same-sex domestic partner had a right to visitation with a child that they had raised together for four years. Id. at 977. Noting the language in Troxel stating that "special factors" may justify the State's interference with a parent's right to make decisions regarding her children, the court determined that because the domestic partner had formed a psychological parent relationship with the child, the biological mother's rights did not "trump the child's best interests." Id. at 973. In particular, the court stressed the fact that the biological mother had agreed to and fostered the relationship between her child and her domestic partner for many years. Id. at 976. The court stated:

> [The biological mother's] constitutional rights as the child's natural mother to superintend his future upbringing and his associations with adults other that [herself] are not absolute. By her conduct in allowing [her domestic partner] to assume an equal role as one of the child's two parents, and by her conduct in agreeing to and signing an order that granted [her domestic partner] "permanent visitation" rights with the child because it "is in the

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[6] Other post-Troxel Colorado cases also support the continued viability of the psychological parent doctrine. See In re the Marriage of Martin, 42 P.3d 75, 77-78 (Colo. App. 2002) (discussing the legislative recognition of psychological parenting and the importance of a psychological parent to a child's emotional development); In the Interest of E.C. and A.C., 2002 WL 58900, *3 (Colo. App. Jan. 17, 2002) (continued placement of children with psychological parents in their best interests).

> best interests of the minor child" to do so, [the biological mother] rendered her own parental rights with respect to this boy less exclusive and less exclusory then they otherwise would have been had she not by word and deed allowed [her domestic partner] to establish a parental bond with the child and then agreed to allow reasonable visitation.

Id. at 976.

Similarly, in T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001), a lesbian former partner of a biological mother sought partial custody and visitation with a child who she had raised with the biological mother for three years. The court determined that the partner had standing to seek partial custody and visitation because she stood "*in loco parentis*" to the child. Id. at 920. The biological mother argued that her former partner could not meet the requirements of the "*in loco parentis*" doctrine because the state's statutory authority precluded same-sex marriages and adoptions by same-sex partners. Id. at 918. The court firmly rejected her argument, stating:

> Simply put, the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands in loco parentis to A.M. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties. What is relevant, however, is the method by which the third party gained authority to do so. The record is clear that Appellant consented to Appellee's performance of parental duties. She encouraged Appellee to assume the status of a parent and acquiesced as Appellee carried out the day-to-day care of A.M. Thus, this is not a case where the third party assumed the parental status against the wishes of the biological parent.

Id. at 918-919. The court also noted that the biological mother offered "no persuasive reasons why the facts of this particular case warrant such a far-reaching change in the common law – a change that could potentially affect the rights of stepparents, aunts, uncles or other family

members who have raised children, but lack statutory protection of their interest in the child's visitation or custody." Id. at 917.

Both of these post-Troxel decisions discussed the constitutionally significant fact that the legally recognized mother had invited and encouraged the psychological parent to establish and develop a parent-child relationship with her child – a fact that is present in this case. In contrast, the post-Troxel decisions cited by Dr. Clark do not address such a situation. See Crockett v. Pastore, 789 A.2d 453, 458 (Conn. 2002) (grandmother failed to establish parent-like relationship with child); Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001) (no allegations of psychological or *de facto* parenthood); State Dept. of Social and Rehab. Service v. Paillet, 16 P.3d 962, 967 (Kan. 2001) (insufficient evidence that grandparents had "substantial relationship" with child); Brewer v. Brewer, 533 S.E.2d 541 (N.C. App. 2000) (no allegations or showing of psychological or *de facto* parent status).

CONCLUSION

For the reasons set forth above, this Court should continue Colorado's well-established practice of protecting the relationships between children and the adults who function as parents to them through the psychological parent doctrine. Application of the best interests of the child test to a psychological parent's petition for parenting time is not only consistent with Colorado law, but also with constitutional requirements.

Dated this 30th day of December, 2003.

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