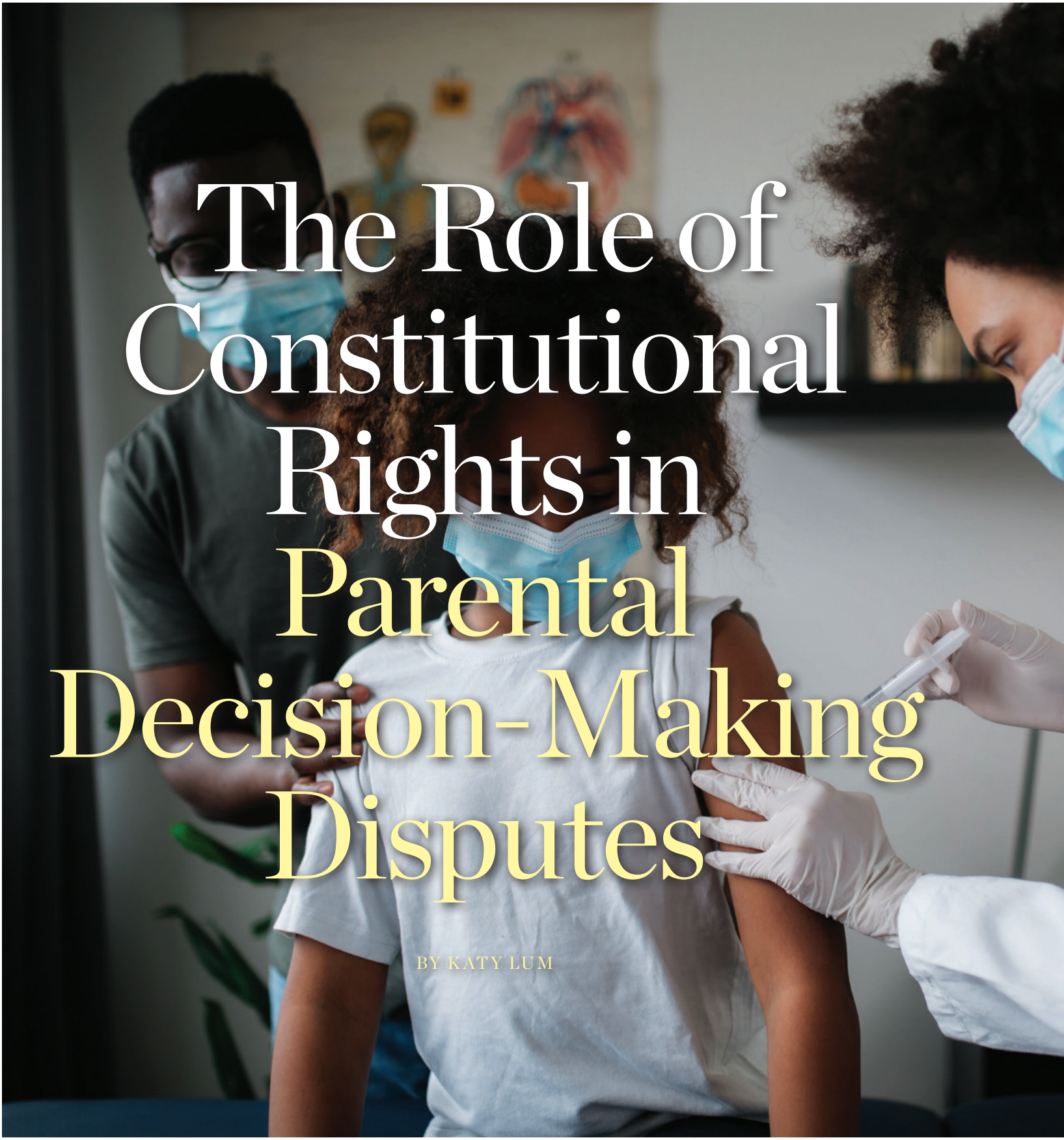

The Role of Constitutional Rights in Parental Decision-Making Disputes

BY KATY LUM

This article discusses In re Marriage of Crouch, *which incorporated the constitutional rights of parents into the statutory framework for modifying parental authority for decision-making.*

As of May 2021, Colorado was one of 12 states to permit medical, religious, and personal exemptions for vaccine requirements for all vaccines and all school-aged children.[1] During the 2019–20 school year, at least 33,867 Colorado children were exempted from at least one of the otherwise required vaccines.[2] Currently, COVID-19 vaccines are being tested and approved for use in children under the age of 12, yet part of the population in Colorado remains COVID vaccine-hesitant.[3]

Given this background, it is likely that conflicts between parents with shared medical decision-making authority may soon arise with greater frequency. Under the recent Colorado Court of Appeals decision *In re Marriage of Crouch*, when parents disagree on whether (or on what schedule) to vaccinate a child, courts must balance the child's best interests and the parents' constitutional rights, particularly when a parent objects to vaccination on religious grounds. Further, *Crouch*'s analysis of constitutional rights implicates modifications of parental decision-making generally.

This article explores how *Crouch* incorporated the constitutional rights of parents into the statutory framework for modifying decision-making and offers practitioners suggestions for handling future disputes between joint decision-makers.

Statutory Framework for Modifying Decision-Making

CRS § 14-10-131 governs the modification of parental decision-making authority. Under CRS § 14-10-131(2), a court "shall not modify a custody decree ... allocating decision-making responsibility unless it finds, [based upon] facts that have arisen since the prior decree . . . that a change has occurred in the circumstances of the child or the child's custodian . . . and that the modification is necessary to serve the best interests of the child."

In making its decision, the court is required to maintain the prior allocation of decision-making authority except in the enumerated circumstances set forth in CRS § 14-10-131(2)(a) to (c). Most of these circumstances—for example, modifications of decision-making based upon agreement, a change in parenting time, or where one parent repeatedly consents to the sole decisions of the other[4]—are rarely litigated and are not particularly useful when parents are unable to agree on a decision that must be made jointly.

In general, the standard for modification articulated in CRS § 14-10-131(2)(c) is most commonly used for modifying decision-making where joint decision-makers cannot agree on one or more issues. To modify decision-making under this subsection, the moving party must demonstrate that the current allocation of decision-making "would endanger the child's physical health or significantly impairs the child's emotional development" (prong 1) *and* that the harm likely to be caused by the modification "is outweighed by the advantage of the change to a child" (prong 2).[5]

The *Crouch* Construction

Announced in January 2021, *Crouch* is Colorado's first published Court of Appeals decision regarding a modification of decision-making triggered by vaccine-related disputes.[6] In *Crouch*, the parents entered into a parenting plan pro-

viding for shared medical decision-making authority, including a provision stating that "[a]bsent joint mutual agreement or court order, the children will not be vaccinated."[7] Approximately one year after the parties' divorce, father changed his stance and wanted the children to be vaccinated.[8] Mother opposed vaccination on religious grounds and due to concerns related to vaccine side effects.[9] Father moved to modify decision-making pursuant to CRS § 14-10-131(2)(c), requesting sole medical decision-making authority.[10]

Following a hearing, the trial court found that failure to vaccinate endangered the children's physical health,[11] but it also stated that because vaccination would "interfere with mother's 'right to exercise religion freely,'" father had an additional burden to "prove substantial harm to the children" if they were not vaccinated.[12] Because father had not met this additional burden, the trial court denied father's motion to modify.[13]

On appeal, neither party challenged the trial court's factual findings related to endangerment.[14] Rather, the Court of Appeals considered only (1) the legal standard applicable to father's motion, and (2) how to balance the parents' constitutional concerns and the children's best interests within the CRS § 14-10-131(2)(c) framework.[15]

The Court first analyzed whether the trial court was required to apply a heightened legal standard in determining whether to modify decision-making, given mother's religious objection to vaccination. The Court held that an allocation or re-allocation of decision-making authority between two parents does not trigger a heightened standard related to either parent's constitutional rights because the allocation of decision-making responsibility "merely expand[s] one parent's fundamental right at the expense of the other parent's similar right."[16]

The Court distinguished the allocation of decision-making authority between parents from instances in which the court, as a state actor, placed conditions on parenting time or decision-making that infringed on a parent's constitutional free exercise rights.[17] Where courts impose infringing conditions, their decisions are subject to strict scrutiny and require a compelling state interest, such as substantial harm to the child, to justify the infringement.[18] However, in *Crouch*, the trial court merely allocated authority to make medical decisions to father; therefore the parents' constitutional rights were not implicated. Accordingly, the trial court erred in requiring father to meet the heightened burden of "substantial harm" before modifying decision-making.[19]

Although the allocation of decision-making authority to one parent or the other does not implicate constitutional rights in a way that provokes strict scrutiny, the Court held that such rights could nevertheless be considered under the second prong of the CRS § 14-10-131(2)(c) analysis.[20] Specifically, to the extent that either parent's constitutional rights were relevant to the endangerment finding, those rights could be considered, without any special weight or deference, in assessing whether the harm likely to be caused by the re-allocation of decision-making authority was outweighed by the advantage of the change to the child.[21]

Handling Decision-Making Disputes

Although *Crouch* centered on a vaccine dispute, its holdings suggest new guidance for practitioners faced with any type of deadlock between joint decision-makers.

First, *Crouch* has made the second prong of the CRS § 14-10-131(2)(c) analysis more complex because it requires courts in certain circumstances to consider the effect that the reallocation of decision-making will have *on the parents* rather than solely considering the effect on the child.[22] Practitioners must now be prepared to explicitly address the parents' competing constitutional interests when assessing whether the harm caused by the modification of decision-making is outweighed by the advantage of the change. Although the Court of Appeals noted that these constitutional interests should be addressed "to the extent . . . relevant to the endangerment finding,"[23] some constitutional argument is likely to arise in many cases involving a move from joint to sole decision-making because such cases involve, at the very least, some loss of a parent's fundamental right to make decisions regarding a child's upbringing.[24]

Second, practitioners should carefully consider what relief they are seeking from the court on behalf of their clients. Although it is sometimes tempting to request that a court break a tie between joint decision-makers rather than modify decision-making authority (particularly in cases where endangerment may be difficult to prove), the act of breaking the tie may trigger a strict scrutiny analysis. *Crouch* noted a critical distinction between allocating decision-making authority and making the decision itself. For example, had the trial court ordered the children to be vaccinated over mother's religious objection, that decision would have infringed on mother's free exercise rights and been subject to strict scrutiny.[25] It is therefore important for practitioners to consider the constitutional implications of the particular decision about which the parties disagree before requesting that the court break a tie as opposed to re-allocate decision-making responsibility.[26]

Third, practitioners must weigh the potential risks and benefits of using arbitrators or decision-makers to resolve disputes over decision-making. Many attorneys opt to use arbitrators or decision-makers for this purpose due to the time-sensitive nature of some child-related decisions and because judges can be reluctant to act as tiebreakers.[27] However, unlike a proceeding before a judge, there is no guarantee that constitutional rights will be addressed by an arbitrator or decision-maker. Arbitrators are not bound to follow procedural or substantive law, except as provided in the arbitration agreement.[28] Similarly, decision-makers appointed pursuant to CRS § 14-10-128.3 are not bound by substantive law, though they are required to follow the substantive intent of current court orders.[29]

Arbitrators and decision-makers therefore have complete discretion as to whether and how they will consider a party's constitutional rights. Accordingly, practitioners contemplating arbitration as a tie-breaking method should carefully review the terms of the arbitration agreement and consider specifying what laws will apply, as well as the manner in which constitutional rights will or will not be considered. Likewise, parties using decision-makers may wish to incorporate similar substantive parameters regarding the resolution of joint

decision-making disputes directly into their separation agreement or other agreement appointing the decision-maker.

Further, private arbitrators appointed by agreement of the parties are not state actors, so their decisions cannot infringe on either party's constitutional rights.[30] Though no cases yet explicitly address whether decision-makers are state actors, decision-making under CRS § 14-10-128.3 is essentially specialized arbitration (the agreed upon appointment of a private third party neutral to settle specific disputes) and would likely be treated in the same way for purposes of determining the existence of state action. Attorneys using arbitrators or decision-makers as tiebreakers should therefore advise their clients that they risk giving up constitutional protections that would otherwise be present were the court to decide the issue.

Conclusion

Crouch clarified the role of constitutional rights in the analysis of whether to modify the allocation of decision-making under CRS § 14-10-131(2)(c) and distinguished the act of allocating decision-making authority from the act of making the decision itself. Attorneys must be prepared to present arguments about the parents' constitutional rights in future modifications of decision-making authority and must carefully consider both the type of relief sought and the type of entity from whom the relief is requested when determining how best to advocate for a client facing a joint decision deadlock. CL

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NOTES

1. Immunization Action Coalition, Exemptions Permitted for State Immunization Requirements, https://www.immunize.org/laws/exemptions.asp. *See also* https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.

2. Colo. Dep't of Pub. Health, State of Colorado 2019/2020 School and Child Care Immunization Data, https://www.dcphrapps.dphe.state.co.us/Reports/ReportList/Partners. Out of 1,007,974 enrolled students, 3.36% (33,867) claimed an exemption to the varicella vaccine. Exemption rates for other vaccines varied.

3. Daley, "Is Colorado Seeing More COVID Vaccine Hesitancy? The Number of Appointments Available Says Yes," CPR News (May 4, 2021), https://www.cpr.org/2021/05/04/colorado-covid-vaccine-hesitancy. *See also* Rodriguez, "The FDA is expected to soon authorize Pfizer's COVID-19 vaccine for teens. Some parents are excited, others are still undecided.," *USA Today* (May 9, 2021).

4. *See* CRS § 14-10-131(2)(a) to (b.7).

5. *See* CRS § 14-10-131(2)(c).

6. *In re Marriage of Crouch*, 2021 COA 3.

7. *Id.* at ¶ 4.

8. *Id.* at ¶ 5.

9. *Id.* at ¶ 6.

10. *Id.* at ¶ 8.

11. *Id.* at ¶ 10.

12. *Id.*

13. *Id.* at ¶¶ 10–11.

14. *Id.* at ¶¶ 18–19.

15. *See id.* at ¶¶ 15–16, 30.

16. *Id.* at ¶ 27 (citing *In re Marriage of McSoud*, 131 P.3d 1208 (Colo.App. 2006)).

17. *Id.* at ¶ 24. For example, in *McSoud*, the Court of Appeals held that a condition prohibiting mother from taking the child to her church during her parenting time impermissibly infringed on mother's free exercise rights. *Id. See also McSoud*, 131 P.3d at 1219.

18. *Crouch*, 2021 COA 3 at ¶ 24.

19. *Id.* at ¶ 28.

20. *Id.* at ¶ 32.

21. *Id.*

22. The Court of Appeals' instruction to consider the constitutional rights of the parents in the weighing and balancing of harms versus benefits is an expansive reading of CRS § 14-10-131(2)(c). Under the second prong of subsection (2)(c), a court must retain the current allocation of decision-making authority unless "the harm likely to be caused *by a change of environment* is outweighed by the advantage of the change to the child" (emphasis added). The Court appears to have read "harm likely to be caused by a change of environment" as broadly encompassing any harm that might arise from the modification, including harms to the constitutional rights of parents. *See Crouch*, 2021 COA 3 at ¶ 32.

23. *Id.*

24. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (parents have a fundamental liberty interest in the care, custody, and control of their children).

25. *Crouch*, 2021 COA 3 at ¶¶ 25–26.

26. On September 16, 2021, the Court of Appeals held that trial courts unequivocally have the authority to break a tie between joint decision-makers who disagree, resolving longstanding uncertainty regarding that issue. *In re Marriage of Thomas*, 2021 COA 123 ¶¶ 33–36. Notably, the Colorado Supreme Court accepted original jurisdiction over the same issue approximately two weeks before *Thomas* was announced. *See In re Marriage of Flores*, Case No. 2021SA260. As of the time of this writing, the Supreme Court had not yet issued a decision in *Flores*.

27. Some arbitrators or decision-makers may be so uncomfortable with breaking a particular tie that they withdraw from their role. In *Crouch*, for example, the parties originally appointed a decision-maker specifically to decide the vaccine issue when they reached a deadlock. However, after hearing both parties' positions, the decision-maker declined to issue a decision because she felt the matter was outside her expertise and akin to "practicing medicine without a license." *Crouch*, 2021 COA 3 at ¶ 7.

28. *R.P.T. of Aspen, Inc. v. Innovative Commc'ns, Inc.*, 917 P.2d 340, 343 (Colo. App. 1996).

29. CRS § 14-10-128.3(1).

30. *See, e.g.*, *Porush v. Lemire*, 6 F.Supp.2d 178, 186 (E.D.N.Y. 1998). *See also* Cole, "Arbitration and State Action," 2005 *B.Y.U. L. Rev.* 1, 4 n.11 (listing federal cases in which no state action was found in contractual arbitration).