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# LAW WEEK COLORADO

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Legal General Reporting

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A Question of IQ

by Ali McNally, Law Week Colorado

## BEHIND THE VERDICT

# A Question of IQ

## Defense Prevails In Tubal Ligation Case

By **Ali McNally**  
LAW WEEK COLORADO

DENVER — After giving birth to her son Stefan in 2006, Trisha Fisher decided to get her tubes tied.

Like most women considering tubal ligation, normally a permanent procedure, she signed up for a consultation and evaluation at Denver Health. She also arranged appointments with other obstetricians and gynecologists including Westside Women's Care physician Dr. Daniel Saunders, who would perform her surgery.

But her attorney at the Colorado Cross Disability Coalition, whom she retained to represent her, subsequently argued that her doctor violated her rights. A six-person Jefferson County jury disagreed in a defense verdict on Sept. 24 in favor of the doctor.

Fisher, 27, isn't like most women. High school test results taken in 2000 revealed she had an IQ of 59. Not long before having her son, her mother was still her legal guardian. Fisher's counsel filed suit against Westside in August 2008, claiming Saunders failed to comply with a Colorado statute on sterilization rights for people with developmental disabilities.

### Different rules

The state requires extra steps for those with an IQ under 70 to obtain sterilization. A 1975 statute under the Colorado Developmental Disabilities Act requires them to get evaluations from mental health and developmental disabilities professionals before consulting doctors.

The statute's language also doesn't specify a timeframe for an updated IQ test. A person can be classified as developmentally disabled based on IQ scores taken from as far back as kindergarten. But many doctors are unaware of it, said Saunders' attorneys.

"It seems that most doctors don't know about this statute," said Beth Nesis, of counsel to Cooper & Clough who represented Saunders. "The various doctors we interviewed, [including] the head of Denver Health for example, were unaware of it. There were no other lawsuits against doctors based upon the statute."

The defense also argued that requiring a developmentally disabled person to jump through extra hoops to obtain a medical procedure is a violation of privacy under *Roe v. Wade*.

"The catch-22 is that you can't discriminate against developmentally disabled people; but if you require them to go through extra hoops, isn't that discrimination?" Rice said.

### Statute's intent

The statute wasn't intended to create an extra barrier for a developmentally disabled person to get a medical procedure, said Randy Chapman, the director of legal services at the Denver-based Legal Center for People with Disabilities and Older People.

It was written by the founders of the

Legal Center in response to a history of people with developmental disabilities being sterilized without consent, particularly people who were in institutional settings. There was also a 1970s case involving a 14-year-old girl with disabilities whose mother wanted to get her a hysterectomy so she wouldn't have to deal with her monthly periods.

"The conundrum at the time was to put together legislation to clearly prevent the involuntary sterilization of people with developmental disabilities but also put in place a process that would facilitate it if someone with disabilities wanted it," he said.

The jury found Saunders, who could not be reached for comment, as "kind and caring towards Ms. Fisher." He testified that he first talked to her about the procedure as she was lying in a hospital bed after giving birth to her son. He was unaware she was developmentally disabled, and she didn't come across as such.

"How is a doctor supposed to know if a woman is developmentally disabled? Should he ask any woman who talks slowly what her IQ is?" Rice asked. "It's hard to figure out how in real life you could require a doctor to do that without putting him into a culpable situation."

Most people with developmental disabilities go through their mental health professionals in getting sterilization, and cases of those going out on their own are rare, Chapman said. The Legal Center only gets two or three calls a year from physicians regarding the issue.

"My experience has been that most individuals are receiving [medical] services through somebody in the developmental disabilities system and do not independently go out and contact a private physician," Chapman said. "They are most often going to have a case manager, and those individuals would know this process and assist this person through it."

### Question raised

Evidence presented by the defense suggested Fisher wasn't developmentally disabled. A psychological evaluation from 2007, which she took to gain custody of her son, showed her IQ to be 79—20 points higher than the test she took in high school. In a deposition, Fisher said she considered herself developmentally "delayed" rather than disabled.

"What if you had one low test, but you figured out how to function in life?" said Saunders' attorney, Kay Rice, of Cooper & Clough.

It was also found that Fisher did not initially seek legal help from the CCDC regarding her surgery, but instead looked to the organization to help her win back custody of her son. It is unclear why Fisher decided to sue her doctor, Saunders' attorneys said.

Fisher's attorney, Carrie Ann Lucas from the Colorado Cross Disability Coalition, did not return calls for comment in time for print. •

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## Lawyers And Judges To Mix At Next Week's Roundtable

By **Matt Masich**  
LAW WEEK COLORADO

DENVER — One of your best opportunities to mix and mingle with the state's federal judges is coming up next week. Jurists from Colorado's U.S. district bench — judges, senior judges and magistrate judges alike — will take part in candid discussions of legal topics at the Faculty of Federal Advocates' annual roundtable.

The event, now in its eighth year, has elicited praise from judges and lawyers. For those on the bench, it's a rare opportunity to hear the concerns of federal practitioners in an informal setting; lawyers have used the roundtable setting to get to know the judges before whom they regularly appear in court.

There is one judge posted at each table. Attendees will rotate tables three times, depending on which topics they're interested in discussing.

Besides the interaction with the judges, lawyers find the roundtable "is an opportunity to talk to other federal practitioners about topics of interest to them," said Greg Goldberg, FFA president and lawyer at Holland & Hart. "It is a casual and open discussion environment."

This year's roster of judges includes district judges Christine Arguello and Philip Brimmer; senior judges Lewis Babcock and

Walker Miller; and magistrate judges Boyd Boland, Michael Hegarty, Kristen Mix, Gudrun Rice, Craig Shaffer, Kathleen Tafoya and Michael Watanabe.

For the last rotation, Martin Katz, dean of the University of Denver Sturm College of Law, will lead an interactive discussion on the future of legal education and preparing young lawyers for the practice of law.

"In today's legal world, we are seeing less mentoring of newly minted lawyers. Clients are balking at firms training new lawyers at the client's expense," Katz said. "Law schools can step up by providing more skills training and more training in professional identity."

Other discussion topics include Meeting Judicial Expectations for Professionalism, Bench Trial or Jury Trial — Should You Consider a Bench Trial? and Impact of the Now-Advisory Guidelines on Fair Sentencing.

The program is Nov. 6 from 8:30 a.m. to 11:45 a.m. at the Seawell Ballroom at the Denver Center Performing Arts Complex. About 95 federal practitioners had signed up as of last week, and registration might be capped. Space permitting, registration after Oct. 25 is \$110 for FFA members, \$140 for nonmembers, \$90 for government lawyers and those admitted less than five years. •

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