

Guardian Ad Litem in Dependency and Neglect Cases

D.A.S. v. People, 863 P.2d 291 (Colo. 1993).

*also see People in Interest of O.J.S., 844 P.2d 1230 (Colo. App. 1992).

Section 19-3-203(2), 8B C.R.S. (1993 Supp.) states “the GAL shall be provided with all reports relevant to a case submitted to or made by any agency or person pursuant to this article, including reports of examination of the child or persons responsible for the neglect or dependency of the child.”

The issue here is whether a report by a psychologist falls under attorney-client privilege when the GAL seeks to have the report submitted into evidence.

The attorney-client privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential.” A mere showing that the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.

Here, testimony at trial made it clear that at the time mother’s attorney filed the motion requesting appointment of the psychologist mother knew some communications would be in the presence of her children. Also, the children participated in the evaluation and their participation was not required to make the evaluation possible. The children are a party to the action and are represented by counsel. Because the children’s presence was not required for the evaluation, and the children are a party mother could not have had a reasonable expectation of confidentiality. Also, the report was disseminated to opposing counsel prior to trial.

Attorney-client privilege did not attach to the testimony or the report of the psychologist.

In the Interest of M.N., 950 P.2d 674 (Colo. App. 1997).

The issue is whether the trial court erred in proceeding to termination of parental rights based on a motion by the GAL.

The state is the exclusive party entitled to bring a petition in dependency and neglect proceedings. However, it does not necessarily follow that only the state may file a motion for termination as the motion merely initiates another phase of the ongoing proceedings. The court retains the exclusive authority to determine whether any permanent change will be made in the parent-child legal relationship. The GAL is charged with the representation of the child’s interests.

Among other things, the GAL may “make recommendations to the court concerning the child’s welfare, appeal matters to the court of appeals or supreme court, and participate further in the proceedings to the degree necessary to adequately represent the child.” In dependency and neglect proceedings, no single “recommendation” may be more important in both adequately protecting the child’s welfare and serving the best interests of society than filing a motion for termination.

Merely because the motion to terminate was filed by the GAL as the child's advocate, the trial court did not err in entering judgment terminating parental rights.

K.D. v. People, 139 P.3d 695 (Colo. 2006).

The issue in this case is whether the trial court improperly relied upon Father's incarceration in supporting termination of parental rights under section 19-3-604(1)(c), C.R.S. (2005).

After the court denied a first motion for termination of parental rights, finding that Father had substantially complied with treatment plan but was still incarcerated, an amended treatment plan was implemented. Then, a second motion to terminate parental rights was filed and before the hearing Father was denied parole. An officer testified that Father was not paroled because the board felt he continued to be a danger to society. The caseworker testified that he had not complied with his case plan, and the child's therapist testified as to the child's need for permanence at this point. Father's parental rights were then terminated and he appeals.

A successful treatment plan corrects or improves the parent's conduct or condition or renders the parent fit. People ex rel. C.A.D., 652 P.2d at 611. Success of a treatment plan involving a child under the age of six cannot be found if the parent exhibits the same problems addressed in the treatment plan without adequate improvement, including but not limited to improvement in the relationship with the child, and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions. Section 19-3-604(1)(c)(I)(b), C.R.S. (2005).

Under Section 19-3-604(1)(c), the trial court may terminate the parent-child relationship upon the finding by clear and convincing evidence that (1) the child has been adjudicated dependent or neglected; (2) an appropriate treatment plan has not been complied with by the parent, has not been successful, or could not be devised; (3) the parent is unfit; and (4) the parent's conduct or condition is unlikely to change within a reasonable time.

An unfit parent is one whose conduct or condition renders him or her unable to give a child reasonable parental care. The court may consider a parent's incarceration in determining fitness.

Here, a treatment plan was implemented and the trial court found that Father failed to comply with that plan and that he would not change his conduct within a reasonable time. Father's incarceration was continued and he would not be able to take care or custody of his child within a reasonable time and thus the treatment plan was unsuccessful. Though the court considered Father's incarceration, the record shows that incarceration was not the sole reason for termination of parental rights. The trial court did not err in terminating Father's parental rights.

People ex rel. A.L.B., 994 P.2d 476 (Colo. App. 1999)

The issue in this case is whether father's due process rights were violated when the trial court refused to allow him to call the adoptive parents as witnesses.

A GAL is "a person appointed by a court to act in the best interests of a person whom the person appointed is representing in proceedings." Section 19-1-103(59), C.R.S. 1999. A GAL may make recommendations to the trial court by presenting his opinions based upon independent investigation or by advocating a specific result based upon the evidence.

Here, the trial court received the GAL's report into evidence without objection by the father, and it took judicial notice of all reports filed in the proceeding. The GAL report contained extensive information concerning the adoptive parents, their suitability as parents, and their relationship with the child, as well as general information concerning the child's best interests. Father was permitted to call the GAL as a witness and to cross-examine him as to his reports and opinions.

Father's due process rights were not violated because he was allowed to examine and cross-examine the GAL, the person representing his child's best interests.

People ex rel. D.G., 140 P.3d 299 (Colo. App. 2006).

The issue is whether reasonable efforts were made by the department to rehabilitate the parent and reunite the family when the department prevented face-to-face visitation after Mother was moved from prison to a community corrections facility.

In determining a parent's unfitness for the purposes of Section 19-3-604(1)(c)(II), C.R.S. 2005, the trial court may consider whether reasonable efforts by child-caring agencies have been unable to rehabilitate the parent. Section 19-3-604(2)(h), C.R.S. 2005. The purpose of a treatment plan is to preserve the parent-child legal relationship by assisting the parent in overcoming the problems that required intervention into the family. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986). A treatment plan is appropriate if it "is reasonably calculated to render the particular [parent] fit to provide adequate parenting to the child within a reasonable time" and "relates to the child's needs." Section 19-1-103(10), C.R.S. 2005.

Here, the trial court did not take into account the requirement that the treatment plan must be reasonably calculated to reunite parent and child. The court approved a treatment plan that improperly delegated to the caseworker, the CASA, the GAL, and the children's therapist the determination of when mother could have face-to-face visitation with her children. Because the caseworker, etc. decided that the children should not see their mother because it would allow them to bond more with their foster family, the court did not approve visitation. The focus of the treatment plan is reunification not termination. Had the department concluded that the establishment of a reasonable treatment plan could not be accomplished, no efforts to provide visitation would have been necessary.

Since the department was providing a treatment plan and reasonable efforts were not used, the court erred in terminating Mother's parental rights.

People ex rel. D.P., 160 P.3d 351 (Colo. App. 2007).

The parents assert that their parental rights should not have been terminated because the evidence did not support a finding that their treatment plans were appropriate.

When a parent acquiesces in the treatment plan and does not request subsequent modification of it, he or she is precluded from challenging the appropriateness of the plan at the termination hearing.

Here, the record shows the parents stipulated that the treatment plans were appropriate and were reasonably calculated to render each of them fit to provide adequate parenting within a reasonable time. The parents also never requested modification of their treatment plans. Because of this, the parents cannot now argue that the plans were inappropriate.

People ex rel. M.W., 140 P.3d 231 (Colo. App. 2006).

The issue is whether the trial court erred in refusing to allow Mother's expert witness to testify during the trial to determine whether her child was dependent or neglected.

A trial court may admit expert testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue. CRE 702. In making this determination, a court must also find that the expert's proposed testimony is relevant under CRE 402 and not unfairly prejudicial under CRE 403. The decision to admit expert testimony will not be disturbed on review absent an abuse of discretion. People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999).

Here, Mother sought to introduce expert testimony concerning Battered Woman's Syndrome and why abused women often stay with their abuser. The department and the GAL objected because the witness had not been timely endorsed, the endorsement did not adequately summarize his testimony, and the expert had not met with or diagnosed her with the syndrome. The issue before the jury was whether the child was dependent or neglected. While mother's relationship with father is relevant to that issue, the focus is the child's situation.

The trial court did not abuse its discretion in concluding that the expert testimony would likely confuse the issues and thus in excluding the witness.

People in Interest of G.S., 820 P.2d 1178 (Colo. App. 1991).

The issue is whether the trial court can dismiss a petition for dependency and neglect at the recommendation of DSS, the GAL, and Father when Grandmother was authorized to intervene and objects to dismissal.

The trial court is not required to dismiss a petition because the state does not want to

proceed. Upon the objection of the GAL to dismissal, the trial court must conduct a hearing to determine whether the petition is supported by a preponderance of the evidence and whether the child is dependent and neglected. People in Interest of R.E., 729 P.2d 1032 (Colo. App. 1986).

Here, the grandmother argues that because she was allowed to intervene, R.E. applies and the trial court was required to conduct a hearing when she objected to dismissal. Grandmother had no affirmative duty to represent the children as the GAL does. The GAL is the proper party to represent the interests of the child.

An order authorizing intervention does not have the effect of requiring the intervener to be treated as the child's representative. The GAL continues to representing the child's interests.

People in Interest of J.E.B., 854 P.2d 1372 (Colo. App. 1993).

The issue is whether a GAL may be examined and cross-examined during a termination hearing.

Section 19-3-203(3), C.R.S. (1992 Cum. Supp.) sets forth the duties of a GAL. The GAL shall be charged in general with representation of the child's interests. To that end, he shall make such further investigations as he deems necessary to ascertain the facts and shall talk with or observe the child involved, examine and cross-examine witnesses in both the adjudicatory and dispositional hearings, introduce and examine his own witnesses, make recommendations to the court concerning the child's welfare, appeal matters to the court of appeals or supreme court, and participate further in the proceedings to the degree necessary to adequately represent the child. Also, the GAL shall be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent/child legal relationship.

The requirement that a GAL make recommendations to the court may be satisfied either 1) by presenting his or her opinions based upon the guardian's independent investigation, 2) by advocating a specific result based upon evidence which has been presented before the court, or 3) by some combination of these two approaches. Whether a GAL can be examined and cross-examined depends on the manner in which the GAL chooses to proceed in fulfilling the statutory requirements of the position.

If the GAL chooses to present recommendations as an opinion based on an independent investigation, the GAL functions as a witness in the proceedings and should be subject to examination and cross-examination. If, on the other hand, the GAL's recommendations are based upon the evidence received by the court from other sources, then they are analogous to arguments made by counsel as to how the evidence should be viewed by the trier of fact. These should not be permitted to be examined and cross-examined.

Here, the GAL chose to examine the witnesses called by others and to present his recommendations in the form of legal argument based on facts and opinions testified to by others. Therefore, the GAL is not required to testify in this case.

People in Interest of M.C.P., 768 P.2d 1253 (Colo. App. 1988).

The issue in this case is whether the GAL's representation continues until final adoption or the court's jurisdiction is terminated when DSS is refusing to reveal the name and address of the adoptive home to the GAL so the GAL can make recommendations as required by Section 19-3-606, C.R.S.

Once a motion to terminate parental rights is filed, a GAL shall be appointed to represent the child's interests in any hearing determining the involuntary termination. Such representation continues "until an appropriate permanent placement of the child is effected or until the court's jurisdiction is terminated." Section 19-1-111(4), C.R.S. (1988 Cum Supp.)

A GAL appointed in a dependency and neglect proceeding has broad responsibility in determining what is best for the child even though the state is the exclusive party with authority to file a petition in a dependency and neglect proceeding.

Entry of a final decree of adoption is a form of permanent placement contemplated by the statute. The selection of an adoptive home is one of the most important that can be made for a dependent child. Initial placement will not lead to a final decree if such adoption does not serve the child's best interests, which are represented by the GAL. Further, the requirement of a GAL's independent investigation can be implemented while still protecting the confidentiality of adoption proceedings to third parties.

The appointment of a GAL continues until entry of a final decree of adoption or until the jurisdiction of the juvenile court is terminated either by operation of law or by court order.

People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

The issue in this case is whether Section 19-11-103(3), C.R.S., requiring appointment of a GAL for a respondent parent who is a minor in a termination proceeding, denies equal protection of the law because it does not require appointment of a GAL for a respondent parent who is mentally disabled.

Section 19-3-1105(2), 8B C.R.S. (1986) states, "the court may appoint a GAL for any parent [in a termination proceeding] who has been determined to be mentally ill by a court of competent jurisdiction or is developmentally disabled."

"The right to equal protection of the laws guarantees that all parties who are *similarly situated* receive like treatment by the law." J.T. v. O'Rourke, 651 P.2d 407, 413 (Colo. 1982). (emphasis added)

There are a wide variety of mental disabilities, and persons encompassed in one of the several mental disability categories do not necessarily have the same restrictions as minors. A minor is never legally competent to sue or be sued without a GAL or other fiduciary, whereas the mentally disabled may be competent to do so.

Because there are real differences between the respective disabilities and legal

incapacities of mentally disabled persons on the one hand and minors on the other, there is no constitutional requirement that these categories of persons be treated exactly the same way.

People in Interest of M.M.T., 676 P.2d 1238 (Colo. App. 1983).

The issue is whether the juvenile court abused its discretion by allowing the GAL to present his case when the court had not yet ruled on a directed verdict motion by Mother made at the close of the People's case.

In multi-party litigation the trial court has discretion in aligning parties. The child, through the GAL, is an indispensable party.

The GAL had advised the court of his intent to align the child's case with that of the People. Therefore, the court was correct in allowing him to present evidence before ruling on Mother's motion.

People in Interest of R.E., 729 P.2d 1032 (Colo. App. 1986).

The issue is whether the trial court properly granted dismissal of a dependency and neglect petition at the state's request when the GAL objected to dismissal.

The trial court is not required to dismiss a dependency and neglect petition merely because the state chooses not to pursue the proceedings. Because the state has made allegations that the child is dependent and neglected and that, for the child's own protection and well-being, he or she should be taken from existing custody, the child, through the GAL, is entitled to a determination of the merits. The petition may not be dismissed over the objection of the GAL.

Here, the GAL made an objection. The trial court must conduct a hearing and specifically determine whether the petition is supported by a preponderance of the competent evidence and the child is in fact dependent and neglected.

People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988).

The issue is whether the juvenile court erred in failing to restore legal custody to Father when Mother had filed a motion for modification of custody and the jury determined the child was not dependent and neglected.

Section 19-3-106(5), C.R.S. (1986 Repl. Vol. 8B) provides when allegations of a petition in dependency and neglect have not been proven, "the court shall order the petition dismissed and the child discharged from any detention or restriction previously ordered. His parents, guardian, or other legal custodian shall also be discharged from any restriction or other previous temporary order."

Here, the child was found to be neither dependent nor neglected. The GAL, mother, and social services argue that the juvenile court had jurisdiction to enter temporary custody order

with respect to the child because the motion for modification of custody was pending.

The juvenile court has exclusive jurisdiction to make custody determinations with respect to a child who is the subject of a valid petition in dependency and neglect, it *cannot* retain jurisdiction of a motion for modification of custody once it has been determined that the child is not dependent or neglected.