Office of the Child's Representative February 2017 Legal Update

2016 Developments in Caselaw, Legislation, and Rules

Legal Update

- 2016 Colorado Legislation
- 2016 Colorado Cases
- 2016 CDHS Rule Changes

Disclaimer

- This is an overview only!
- Not all cases may be final.
- Colorado-specific
  - ICWA update available on OCR's website (February 2017 webinar)
  - Preventing Sex Trafficking and Strengthening Families Act implementation strategies also on OCR's website (Margaret Burt Session @ Fall 2016 Conference)

2016 LEGISLATION

Change of Venue in D&N Proceedings

HB 1316

- *Amends §19-3-201.*
- The Act sets forth procedures and delineates factors for the court's consideration of a change of venue motion in a D&N proceeding.
- The county seeking change of venue must notify the county it proposes has proper venue ("receiving county") of the motion and the receiving county has the right to be heard regarding the proposed change in venue.
- The Act lists factors the court must consider in determining whether change in venue should not occur, including the impact of a change in venue on the continuity of services.

Effective 8/10/16

Use of Restraint and Seclusion

HB 1328

- *Amends Title 26 statutes.*
- The Act strengthens the safety provisions for the use of restraint and seclusion on individuals, particularly youths, who are being detained by a state or local agency.
- The Act clarifies that restraint or seclusion must never be used as a punishment, sanction, part of a treatment plan, for retaliation, or for protection, except in the case of demonstrated emergencies.
- The Act defines conditions for use of restraint or seclusion and also establishes a study committee to report back to the legislature on the effects of restraint or seclusion on youth.

Effective 6/10/16.

Relative Guardianship Assistance Program

HB 1448

- *Amends §26-5-110.*
- The Act expands the Relative Guardianship Assistance Program to include Allocation of Parental Responsibilities under Title 14.
- The Act also authorizes assistance to certified foster parents not known to youth 12 years-old or older prior to placement in the child welfare system under limited circumstances and upon the D&N court making findings under § 19-3-702(5)(a)(III) and (5)(b).

Effective 10/1/16.

Child Victim Privacy Criminal Justice Records

SB 110

- *Amends §24-72-304.*
- The Act requires that child victim's names and other identifying information be redacted from a criminal justice record related to an expanded list of child-victim crimes prior to release of the record.
- The Act makes an exception for sharing child victim information between identified government entities and with OCR.

Effective 9/1/16.

2016 CASELAW

Overview of Themes

- D&N:
  - Adjudication
  - Disposition/termination
  - Evidence
  - Jurisdictional Issues
- Delinquency/Direct File

Adjudication, Disposition, Termination, and EVIDENCE, Civil Claims, and Jurisdiction

DEPENDENCY AND NEGLECT

Dependency and Neglect

Adjudication

Adjudication Matters!

- *S.T.*, 2015 COA 147 (October 8, 2015)
  - Court lacks subject matter jurisdiction to enter APR orders to a relative after a father prevails at jury trial
  - Father's appeal ruled not untimely as 19-1-109(2) finality provision turns on dispositional order and challenge to subject matter jurisdiction can be raised at any time.

- *People in the Interest of N.L.W.*, 16SC731 (October 31, 2016)
  - *Certiorari* granted on following issue: Whether failure to enter a written order adjudicating a child dependent or neglected under 19-3-505(7)(a) after accepting a parent's admission to the allegations, divests the juvenile court of its subject matter jurisdiction to order a termination of the parent-child relationship.
  - Mother admits to Injurious Environment July 2015; TPR September 2015; Written Adjudication Order October 2015
  - Division of Court of Appeals in *In Interest of J.W.*, 2016 COA 125, held that without written adjudication order court lacked subject matter jurisdiction to terminate parent-child legal relationship. Division rejected reasoning of *N.D.V.*, 224 P.3d 410 (2009) (juvenile subject matter jurisdiction is dependent on fact of being dependent or neglected rather than formal order).

Adjudication Matters!

- *S.M.-L.*, 2016 COA 173 (November 17, 2016) *Petition for certiorari pending . . .*
  - After jury determined child not dependent or neglected, juvenile court lacked jurisdiction to rule on Department's Rule 59 motion for judgment notwithstanding the verdict.

When is Adjudication Order Final and Appealable?

C.A.R. 3.4

(a) How Taken. Appeals from judgments, decrees, or orders in dependency or neglect proceedings, as permitted by § 19-1-109(2)(b) and (c), including an order allocating parental responsibilities pursuant to § 19-1-104(6), final orders entered pursuant to § 19-3-612, and final orders of permanent legal custody entered pursuant to § §19-3-702 and 19-3-605, must be in the manner and within the time prescribed by this rule.

§ 19-1-109

(2) (c) An order decreeing a child to be neglected or dependent shall be a final and appealable order after the entry of the disposition pursuant to § 19-3-508. Any appeal shall not affect the jurisdiction of the trial court to enter such further dispositional orders as the court believes to be in the best interests of the child.

When is Adjudication Order Final and Appealable?

NO Adjudication=Not Final and Appealable Order

- *S.M.-L. **continued from previous slide***
  - Court also holds19-1-109(2)(c) provides that order decreeing child dependent or neglected shall be final and appealable order upon entry of disposition.
  - General Assembly could have, through expressed language, made no adjudication order final and appealable but did not

Written Adjudication Order Triggers C.A.R. 3.4 Timelines

- *J.W.*, 2016 COA 125 (2016), *certiorari granted on other grounds in N.L.W.*, 16SC731 *** see previous slide***
  - Court rejects untimeliness argument regarding post-TPR challenge to adjudicatory issues
    - This is case in which written adjudication order entered after TPR.
  - Adjudication order not final and appealable until reduced to writing.

Adjudication: Injurious Environment

- *People in Interest of J.G.,* 2016 CO 39 (May 23, 2016)
  - Jury instruction (#17) and special verdict form at issue:
    - Whether children lacked parental care through actions or omissions of parents
    - Whether children were homeless, without proper care, or domiciled with parents through no fault of parents

**unlike pattern instruction, the instruction did not require jurors to make findings with regard to each parent

Adjudication: Injurious Environment (*J.G.* Cont)

- *Troxel*'s due process requirements do not necessitate that both parents lack availability, ability, and willingness to provide reasonable parental care before a child may be adjudicated D&N under injurious environment provision.
  - SCt notes that COA created an additional factor that State must prove before a child can be adjudicated D&N: that neither parent is available, able, and willing to provide reasonable parental care. *Troxel* does not require this.

- Neither Title 19 nor *Troxel* require State to prove parental fault for adjudication of child as dependent or neglected under injurious environment provisions
  - 19-3-102(1)(c) provides child is dependent or neglected if the "child's environment is injurious to his or her welfare." Does not contain the word, parent, guardian, or legal custodian. Contains no language concerning fault.
  - Sufficient procedural protections in Article 3.

Adjudication: Injurious Environment (*J.G.* Cont)

- *"'Consistent with the [Children's] Code's emphasis on the child's best interests, [dependency or neglect] adjudications 'are not made as to the parents but, rather, relate only to the status of the child as of the date of the adjudication.'" (quoting K.D. v. People, 139 P.3d 695(Colo 2006).*

*** Court does not explain how this reasoning interacts with cases holding that an admission by one parent is not binding as to the other parent and that once a jury has determined that the allegations in the petition cannot be sustained by preponderance of evidence as to the other parent, the court no longer has jurisdiction. *See N.G*, 303 P.3d at 1213; *People ex rel. S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009); *People ex rel. U.S.*, 121 P.3d 326, 327 (Colo. App. 2005); *A.M.*, 786 P.2d at 479; *In the Interest of T.R.W.*, 759 P.2d 769, 771 (Colo. App. 1983).

Adjudication: Injurious Environment (*J.G.* Cont)

- Court does not consider propriety of Pattern Jury Instruction (#11), which defines injurious environment as harmful to child's welfare; under control of or subject to change by child's parents, sufficiently injurious that a reasonable parent would act to change it. CJI-Civ. 41:10

Treatment Plans & Required Findings

Termination of Parent-Child Legal Relationship

Necessary Findings: Appropriateness of Treatment Plan

- *In Interest of K.B.*, 2016 COA 21 (2016)
  - Treatment plan did not contain services regarding DV; mother did not object.
  - At TPR mother raised issues about sufficiency of treatment plan. Court states that mother cannot raise issues about adequacy of treatment plan but can argue lack of reasonable efforts.
  - Court of Appeals holds that court must make the following findings by clear and convincing evidence:
    - Department provided mother with a treatment plan that was reasonably calculated to render her fit to provide adequate parenting to her children within a reasonable time and which related to the children's needs;
    - Mother is unfit because the services provided were appropriate to support her treatment plan, but they were unsuccessful in accomplishing the treatment plan's purpose of rendering her a fit parent.
  - Court remands for further findings.
  - Court makes sufficient findings regarding mother's lack of compliance, best interests of children, less drastic alternatives, and reasonable efforts as to father.

Sufficiency of Evidence

- *E.S.V. v. C.E.M.*, 2016 CO 40 (May 23, 2016)
  - Treatment plan required mother to report contacts with father to GAL and caseworker; mother did not.
  - Court did not err by terminating mother's parental rights because of her repeated violations of requirement that she report contact with father to caseworker and GAL (and her untruthfulness about those contacts) and therefore could not demonstrate appropriate protective capacity that was objective of her treatment plan.
  - Court reframes question on which it granted cert to sufficiency of evidence question.

No Appropriate Treatment Plan

- *In Interest of Z.P.S.*, 2016 COA 20 (February 11, 2016)
  - Court did not err in making no appropriate treatment plan finding after having ordered a treatment plan.
  - Court did not err when it modified the dispositional order by relying on evidence that had already been considered by the court, or could have been presented to the court, at the earlier dispositional hearings.
  - Procedures used at TPR hearing did not deny

- *People in Interest of E.M.*, 16SC287 (August 1, 2016)
  - *Certiorari granted on the following issue:* Whether a juvenile court must proceed under §19–5–105 or §19–3–604 when terminating the parent-child legal relationship of the non-relinquishing parent after one parent decides to relinquish his or her parental rights to a child subject to pending dependency and neglect proceedings.
  - GAL filed TPR motion in D&N case; mother relinquished; court then proceeded to terminate

Witnesses' Credibility, Experts, Polygraphs

EVIDENTIARY ISSUES

Opinion on Witnesses' Credibility

- *S.M.-L.*, 2016 COA 173 **previously discussed**
  - Court states that it is troubled by admission of plainly inadmissible evidence (opinions regarding child's credibility)
  - Record reveals that trial court did not rely on this improperly admitted evidence in adjudicating child as to mother.

- *In Interest of G.E.S.*, 2016 COA 183 (December 15, 2016)
  - Testimony of sex abuse expert and other expert witnesses vouching for child's credibility was inadmissible.
  - Other issues . . .

Polygraphs

- *In Interest of G.E.S. (continued from previous slide)*
  - In an adjudicatory trial, evidence that father refused to take polygraph examination as requested by department and did not turn over to department results of private polygraph test was inadmissible.
- *People in Interest of L.K.*, 2016 COA 112 (July 14, 2016). (*Certiorari* granted on attorneys fees/sovereign immunity question n *C.K. v. L.K.,* 16SC638).
  - Court did not err in admitting evidence regarding father's failure to take a polygraph examination.
  - Under facts of this case, relevant to compliance with treatment plan findings at termination hearing.
  - Other holdings; no improper adverse inferences drawn from father's decision not to testify, evidence was sufficient to support termination; court's order imposing attorneys fees against department for discovery sanctions is set aside due to sovereign immunity.

Child Hearsay

- *In Interest of G.E.S. **previously discussed***
  - Evidence supported district court's finding that stepdaughter was unavailable to testify, and thus her hearsay statements were admissible.

Lay v. Expert Testimony

- *People v. Ramos*, 2017 CO 6 (February 6, 2017); *People v. Venalonzo*, 2017 CO 9 (February 6, 2017)
  - Question of when testimony is expert testimony (and qualification of expert witness is required)
  - Trial court must look to basis for opinion:
    - If based on ordinary person's knowledge or experiences=LAY
    - If witness provides testimony that could not be offered without specialized knowledge, training, experiences=EXPERT

****Venalonzo concerns forensic interviewer*

Dependency and Neglect

Civil Claims

Death of Child

- *C.G. v. J.N.*, 15 S.C. 677 (cert granted May 23, 2016)
  - Whether the court of appeals erred in holding that a dependency and neglect case in which the subject child is deceased is not moot under the "collateral consequences" doctrine because the father's request for post-judgment relief in the dependency and neglect case may impact the parents' separate federal civil rights suit.

JURISDICTIONAL ISSUES

Dependency Court's Jurisdiction to Enter Paternity Orders

- *In Interest of N.S.,* 2017 COA 8 (January 12, 2017)
  - Juvenile court has jurisdiction to enter judgment of paternity in a D&N case.
  - Juvenile court must follow procedures outlined in CO's version of the Uniform Parentage Act, 19-4-101 *et seq.*
  - Court's procedural errors in following UPA did not deprive the court of jurisdiction and were harmless in this case.

Department's Standing to Object to Pretrial Placement, "*Miranda*" Waivers, Privilege and Mental Health Exams in Reverse Transfer Hearings, Entitlement to GAL?

DELINQUENCY & DIRECT FILE

Department's Standing to Object to Pretrial Placement Orders

- *In Interest of D.Z.B.,* 2017 COA 17 (February 23, 2017)
  - Department lacks standing to appeal pretrial placement order.
    - Department is not a party.
    - Department did not suffer an injury in fact.
      - Re cost argument: "Department has a statutory duty to care for and house children removed from their homes in delinquency actions."
    - Even if Department did show an injury in fact it wasn't a legally protected interest.
      - Because Department is making statutorily based claim, court must consider whether the Children's Code can be properly understood to grant Department a right to judicial relief.
      - No express standing; no evidence of legislative intent to grant standing.
      - Children's Code does not provide protections for department but rather provides for protection, care, and treatment of juveniles subject to its provisions.

Department's Standing to Object to Pretrial Placement Orders

- *In Interest of D.Z.B. **continued from previous slide***
  - Court distinguishes *In Interest of C.A.G.*, 903 P.2d 1229 (Colo. App. 1995) on several grounds:
    - Temporary versus final adjudication order.
    - Unlike in *C.A.G.*, department was not ordered to do anything it was not already required to do by statute.
    - Different bases for argument: cost versus best interests/*parens patriae.*

Department's Standing to Object to Pretrial Placement Orders

- *People in the Interest of A.L.-C,* 2016 CO 71 (October 24, 2016)
  - Interlocutory appeal of a trial court's suppression of a juvenile's incriminating statements pursuant to § 19-2-511(1).
  - Plain language of § 19-2-511(1) requires only parental presence and does not require a determination as to whether the parent's interests were aligned with the juvenile's.
    - In this case, the juvenile faced allegations regarding sexual assault against his sister when his mother and stepfather accompanied him to the police station; some statements recorded prior to the commencement of the interrogation indicated a potential misalignment of interests.
  - The court distinguishes precedent considering whether the adult present with the child during the interrogation shares the juvenile's interests, stating those cases involved nonparents with relationships to the child not specifically enumerated in the statutory requirement.

Privilege in Reverse Transfer Hearings

- *Johnson v. People*, 2016 CO 69 (October 3, 2016)
  - A juvenile who seeks a reverse transfer of her case to juvenile court does NOT waive her psychotherapist patient privilege by seeking that transfer.
    - No statutory abrogation in the statute itself.
    - By requesting a reverse-transfer hearing, the juvenile had "not injected her physical or mental condition into the case.'"
  - The reverse-transfer hearing statute does NOT give the court the power to order the juvenile to submit to a mental health assessment.
    - The reverse-transfer hearing statute only requires consideration of mental health records "made available" to the trial court and the parties, which the Court regards as those voluntarily waived by the privilege holder.
- *Higgins v. People*, 2016 CO 68 (October 3, 2016)
  - Colorado Supreme Court declines to answer the same question posed in Johnson—whether a trial court has statutory authority to order a juvenile seeking reverse-transfer of a criminal proceeding to juvenile court to undergo a state-administered mental health assessment—reasoning that because counsel had agreed the assessment and the court had not ordered the assessment, the issue was not raised by the facts of the case.
  - The Court also does not answer the question of whether a juvenile ordered to undergo such an assessment must be advised by the court of her right against self-incrimination, reasoning that the juvenile's counsel had agreed to the assessment and that any claims regarding ineffective assistance of counsel were premature.

Entitlement to GAL Due to Conflict of Interests with Parent?

People v. Ybanez, 14 S.C. 190 (March 2, 2015)

- Whether a child charged as an adult with first-degree murder, whose parent is a victim of the crime and a prosecution witness, is entitled to a guardian ad litem to assist with his defense and to advise him regarding the waiver of his constitutional trial rights
- Whether the court of appeals properly applied plain error review to the defendant's claim that a guardian ad litem should have been appointed, when there was no objection at trial or the initial Crim. P. 35(c) motion.

2016 CDHS CHILD WELFARE RULE CHANGES

School Stability Rules

7.301.24 *et seq.,* 12CCR 2509-4

- Family Service Plan must document county's efforts to place child in reasonable proximity to home of parents and school of origin as well as a summary of school stability efforts.
- Presumption that remaining in school of origin is in child's best interests.
- Factors for best interest determination; requirement of in-person best interests determination meeting "when warranted and possible" to which several individuals, including parent, school of origin rep, child, and GAL.
- Child's wishes must be included in best interests determination.

School Stability Rules

7.301.24 *et seq.,* 12CCR 2509-4

- Procedure for disputes regarding Best Interests determinations:
  - Parent, GAL, Educational Surrogate must file motion with juvenile court within 3 business days of notification (!?)
  - If motion filed, child remains in school of origin unless specific documented threat to child's safety.
- Transportation
  - County department and LEAs shall collaborate to ensure prompt receipt of cost-effective transportation to school of origin.

Kinship Placement

7.304.2, 12 CCR 2509-4

- Assessment phase
- Evaluation of kinship placement
  - Background check for each adult living in home
- Advise kinship care providers of types of support available to them (family preservation, certification, RGAP.
- “Kinship Caregivers for Title IV-E eligible children/youth are entitled to the same level of reimbursement as non-related providers.”