JUVENILE CASE LAW UPDATE

Survey of Colorado Case Law
2012–2013

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I. DEFERRED ADJUDICATION

Can a parent, who is subject to a deferred adjudication that has neither expired nor been revoked, be barred by his no-fault admission from presenting evidence of events that have occurred during the deferral period, before entry of the adjudicatory order?

Does the Troxel presumption apply to a dependency and neglect hearing that has gone forward on the basis of a deferred adjudication?

In *People in the Interest of N.G.*, _P.3d_ (Colo. App. No. 12CA0417, August 2, 2012), father, who was operating on the basis of a deferred adjudication following his no-fault admission to a dependency and neglect petition, appealed a magistrate's order allocating permanent custody and parental responsibilities to the child's maternal uncle. The magistrate entered the order without first entering a final adjudication of the child as to father or deciding father's custody petition. The district court denied father's petition for review. Father appealed, contending (1) the court erred in finding that the magistrate could proceed without first addressing father's deferred adjudication, and (2) the award of permanent custody to a nonparent under such circumstances violated his constitutional right to the care, custody, and control of his child.

The court of appeals vacated both orders. First, the division determined that, when operating under a deferred adjudication, the court should reconsider a child's status following the deferral period and any additional evidence related thereto before entering an adjudicatory order. Thus, a parent subject to deferred adjudication, which has neither been revoked nor expired, should be permitted a hearing to present such evidence before entry of an adjudicatory order. Second, the division held that at the adjudicatory hearing such a parent still enjoys the constitutional presumption of fitness under *Troxel*.

The division remanded the case for the magistrate to make findings on whether the child is dependent or neglected as to the father, in light of new evidence presented and the constitutional presumption afforded him.

II. DUE PROCESS/ TERMINATION OF PARENTAL RIGHTS

A. Statutory Right to Counsel

Does the deprivation of a parent's statutory right to counsel at a termination hearing constitute reversible error per se?

In *People in the Interest of R.D.*, 277 P.3d 889 (Colo. App. 2012), father appealed a judgment terminating his parental rights. Father contended that the trial court violated his statutory and due process rights to counsel when, on the first day of hearing, it prohibited father's attorney from participating on his behalf and entered a default judgment against him. When the court reconvened a week and a half later, the court sua sponte allowed father's counsel to withdraw, permitted father to participate pro se, and ultimately terminated father's parental rights.

The court of appeals vacated the judgment. The division held that the trial court violated C.R.S. § 19–3–202(1), which grants parents in dependency and neglect proceedings a legal right to counsel, and C.R.S. § 19–3–602(2), which requires court advisement of that right, when it deprived father of his right to counsel during *substantial parts* of the termination hearing. Moreover, the division determined that this violation was not subject to harmless or structural error review. Rather, given the importance of the statutory right to counsel in termination hearings, the deprivation of that right constitutes reversible error per se. The division noted that the holding is limited in scope and does not address the deprivation of the right to counsel at an earlier stage of a dependency and neglect proceeding or the brief absence of counsel during a termination hearing.

B. Appealable Orders

Is an order, which does not terminate parental rights but only finds no appropriate treatment plan could be devised, an appealable order?

In *Parents in the Interest of M.S.*, 292 P.3d 1247 (Colo. App. 2012), parents appealed an order adjudicating their child dependent and neglected. The order did not terminate their parental rights and only found that no appropriate treatment plan could be devised for them. The court of appeals dismissed the appeal for lack of a final order. Pursuant to C.R.S. § 19–1–109(2)(c), an order decreeing a child to be dependent and neglected is only appealable after entry of the final disposition. Accordingly, the matter was not ripe for review because the termination hearing had not been held nor a final disposition entered.

III. INTERVENORS

A. Foster Parents

a. Constitutionally-Protected Liberty Interest

Do pre-adoptive foster parents of a child whose parental rights have been terminated have a constitutionally protected liberty interest in a continuing relationship with the child and a right to due process concerning removal of the child from the parents' home?

In *M.S. v. People,* _ P.3d _ (Colo. No. 11SC725, June 10, 2013), the court held that "preadoptive" foster parents have no legal rights to a child placed in their care and are not entitled to due process concerning removal of the child from their care. The foster parents in this case, though identified by the juvenile court as prospective adoptive parents, had not yet initiated the adoption process.

The court found that such "preadoptive" or "prospective" foster parents are "indistinguishable from a typical foster care placement." The court affirmed that placement decisions are focused on the best interests of the child, noting "[n]o provisions in the dependency and neglect statutes prohibit the removal of a child from a foster placement. Instead, the court must consider and act on the child's best interests." Because it decided that that the preadoptive foster parents in this case do not have a constitutionally-protected liberty interest, the court did not consider whether a due process violation occurred when the Department of Human Services removed the child from the home without prior notice to the foster parents.

In *Elwell v. Byers*, 699 F.3d 1208 (10th Cir. 2012), the court held that foster parents who had a boy in their care almost his entire life have a constitutionally protected liberty interest in the care of this child. The department removed him from their care without notice based on an unsubstantiated complaint of emotional abuse of another child in their care. The court, however, held that the department was entitled to qualified immunity because the foster parent's due process rights were not clearly established at the time of the child's removal.

b. Full Participation at a Termination Hearing

When foster parents meet the criteria of intervenors pursuant to C.R.S § 19–3–507, may they participate in a termination hearing without limitation? Does this participation violate the due process rights of the natural parents?

In *A.M. v. A.C.*, 296 P.3d 1026 (Colo. 2013), the Colorado supreme court reviewed the court of appeals opinion affirming the termination of father's parental rights and reversing the termination of mother's on the grounds that the trial court erred by allowing foster parent intervenors to participate fully in the termination hearing. The court of appeals interpreted C.R.S. 19–3–507 narrowly, holding that foster parent intervenors possess only a limited right of participation at a termination hearing. Accordingly, the division held that the full participation of foster parents at the termination hearing violated mother's due process rights warranting reversal.

The supreme court disagreed, stating that section 19–3–507(5)(a), which sets forth the intervention criteria, says nothing about the extent of intervention. As a result, the court concluded that foster parent intervenors are afforded the same degree of participation as all other parties. Foster parents who meet the required statutory criteria to intervene may fully participate in a termination hearing without limitation. In addition, considering the factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court held that the full participation of intervenor foster parents does not undermine the fundamental fairness of a termination hearing and does not impact the parents' due process rights.

B. Grandparents and Final, Appealable Orders

Must grandparents have had a child in their care for more than three months to intervene in a case pursuant to C.R.S. § 19–3–507(5)(a)?

Is an order denying a party's motion to intervene a final, appealable order?

In *People in Interest of O.C.*, _ P.3d _ (Colo. App. No. 12CA0649 2012), the child's grandparents appealed a trial court order denying their motion to intervene pursuant to C.R.S. §19–3–507(5)(a). The court determined that the grandparents did not have the right to intervene because they did not have the child in their care for more than three months.

The court of appeals disagreed and reversed the district court order, holding that the requirement of C.R.S. § 19–3–507(5)(a) that potential intervenors have the child in their care for more than three months applies only to foster parents—not parents, grandparents, or other relatives. These latter individuals can intervene in a dependency and neglect proceeding at any point after adjudication. The division subsequently remanded the case to the trial court to allow the grandparents to intervene.

In addition, the GAL contested the grandparent's appeal, arguing that the order denying grandparents' motion to intervene was not a final, appealable order. The court of appeals disagreed, holding that the denial of a motion to intervene as a matter of right constituted a final, appealable order. The division determined that concluding otherwise would deprive interveners the opportunity to be heard at critical stages of the proceedings by delaying their ability to appeal until all litigation concluded.

The supreme court granted certiorari, but an opinion has not been issued.

IV. DEPARTMENT OF HUMAN SERVICES

A. Qualified Immunity

May Department employees be exposed to individual liability for failing to protect a child who was placed in an abusive foster home?

In *Schwartz v. B*ooker, 702 F.3d 573 (10th Cir. 2012), a federal appellate court affirmed the federal district court's denial of motions to dismiss based on qualified immunity; the court held that based on the "special relationship" doctrine the alleged facts exposed two DSS employees to individual liability for the death of a seven-year-old child, Chandler, in foster care. The court explained:

> Overall, the personnel at Chandler's school filed at least four written complaints to [Denver DSS] regarding Chandler's continued absence and suspected neglect and abuse. Despite the school's concerns, [the Denver DSS supervisors] did not investigate [the later complaints and] ultimately closed the case, contrary to the Colorado Department of Human Services' procedure requiring a within 24–hours response to suspicions of child abuse. On May 6, Chandler was found in a locked closet in an emaciated state and taken from Jon Phillips's home; Chandler died later that day from cardiac arrest caused by severe dehydration and starvation.

The federal appellate court determined that the supervisors could be held personally liable under the "special relationship" exception because they "failed to exercise professional judgment" by ignoring "known or likely injuries and abuse to Chandler, chose not to further investigate such possible abuse, and ignored the danger posed by his continued residence in Jon Phillips's home."

B. Restitution

Is the Department of Human Services (DHS) a "victim" entitled to restitution under C.R.S. § 18–1.3–601 to –603?

In *People v. Padilla-Lopez*, 279 P.3d 651 (Colo. 2012), the defense appealed a judgment awarding DHS almost $20,000 in restitution for expenses related to the out-of-home placement of two children who were recently removed from the home of their mother, Padilla-Lopez. The removal followed the conviction of Padilla-Lopez on a guilty plea of illegal drugs, theft, and misdemeanor child abuse.

The defense argued DHS was not a "victim" as defined by the restitution statute, sections §§18–1.3–601 to –603. The court of appeals agreed, holding that because the underlying crime of child abuse requires wrongful conduct *against a child*, DHS—a governmental agency charged with the care of dependent and neglected children—could not be a victim of the underlying crime. Consequently, DHS is not a victim within the meaning of the restitution statute.

The supreme court agreed with the court of appeals, reiterating that C.R.S. § 18–1.3–601 to –603 does not classify DHS as a victim for the purpose of recovering costs incurred while fulfilling its statutorily mandated duty to provide necessary care to dependent and neglected children.

V. PRIVILEGE

L.A.N. mines!

Issues raised in this opinion seem to focus on the following:

1. *Is there a privilege?*
2. *Whether it should be asserted in a particular case?*
3. *What is too young for a child to assert the privilege?*
4. *Do courts provide an advisement for the child? Is there a presumptive age? 13-90-106 (child under 10 presumption); 27-65-103(2) (child 15 consent to voluntary mental health services)*
5. *What are adverse interests?*
6. *What about the exception to privilege in 19-3-311?*

How should a juvenile court determine the scope of a GAL's waiver of a child's psychotherapist–patient privilege in a dependency and neglect proceeding?

In *L.A.N. v. L.M.B*, 292 P.3d 942 (Colo. 2013), mother appealed a juvenile court order terminating her parental rights as to her child, L.A.N., claiming the court erred when it denied mother's request for production of L.A.N.'s therapist's case file. The juvenile court denied the original request, finding that psychotherapist–patient privilege under C.R.S. § 13–90–107(1)(g) protected the case file from disclosure, subject to waiver by the juvenile court, not L.A.N. or mother. The court of appeals reversed and determined that mother was entitled to at least a portion of the case file because the GAL partially waived the privilege when she disseminated the therapist's letter regarding L.A.N.'s progress to the juvenile court and all of the parties. The GAL and DDHS petitioned the supreme court for certiorari.

The supreme court granted certiorari to address the following issues: (1) whether a GAL in a dependency and neglect proceeding can waive the child's psychotherapist–patient privilege, and (2) whether the court of appeals erred in determining that privilege was waived with respect to certain materials in the therapist's file.

First, the court held that, in certain circumstances, the GAL holds the child's psychotherapist–patient privilege. The court applied the following rationale. To start, C.R.S. § 13–90–107(1) does not specify who holds a child's psychotherapist–patient privilege in a dependency and neglect proceeding. Generally, under Colorado case law, the patient holds the psychotherapist–patient privilege. When the patient is a child, who is too young or otherwise incompetent, the child's parent assumes the role. However, when the parent's interest as a party contravenes the child's interest in patient–therapist confidentiality, a third party must assume the role of privilege holder. The

court then determined that the GAL, not the department of human services or the juvenile court, is in the best position to hold the child's psychotherapist–patient privilege due to the nature of the GAL's statutory duties and the knowledge gained in representing the child's best interests.

Second, the court affirmed the court of appeals determination that the GAL partially waived the privilege when she disseminated the therapist's letter. However, the court disagreed with the court of appeals' procedure for determining the scope of that waiver and adopted the following procedure instead. First, after determining that a waiver occurred, a court shall consider the words or conduct that waived the privilege and decide whether the scope of the waiver is readily apparent. If so, the court may order disclosure pursuant to its judicial discretion. If not readily apparent, the court shall instruct the GAL to prepare a privilege log identifying which documents should remain privileged despite the waiver. However, if any of the parties or the court contend that disclosure of certain documents in the log is still warranted, the court may conduct an *in camera* review of the documents at issue. Next, the court shall determine the scope of the GAL's waiver by balancing the competing interests for and against disclosure.

The court remanded the case for proceedings consistent with this process.

VI. INDIAN CHILD WELFARE ACT (ICWA)

A. Active Efforts and Relative Placement Preferences

Does the "active efforts" standard under ICWA require more effort than the "reasonable efforts" standard used in non-ICWA cases?

What findings must a court make to deviate from ICWA's placement preferences?

In *People in the Interest of A.R,*__P.3d __ (Colo. App. No. 12CA195, Nov. 8, 2012), mother appealed the termination of her parental rights to A.R. (an Indian child under 25 U.S.C. § 1903(4)), and the department appealed the court's denial of the placement of A.R. with relatives A.W. and C.W.. The trial court made findings that the department had exercised "best efforts" to rehabilitate mother and subsequently terminated mother's parental rights. As well, the court gave the department the authority to consent to the adoption of A.R., but it did not grant authority for the adoption by relatives A.W and C.W.. The court found good cause to overcome the relative placement preference presumption because (1) there was no evidence that, if placed with A.W. and C.W., A.R. would receive services equivalent to the services currently in effect; (2) A.W. and C.W. made no showing that a full-time caretaker would be available to care for A.R.; (3) A.W. and C.W. lacked appreciation of A.R.'s needs;

and (4) the disruption of A.R.'s attachment to her foster family would result in harm not outweighed by the cultural benefits of being placed with relatives.

The court of appeals affirmed the termination judgment. However, the division noted that, considering the policies behind ICWA and case law in other jurisdictions, ICWA's "active efforts" standard requires more effort than the "reasonable effort" standard applied in non-ICWA cases. In so doing, the division declined to follow the ruling of another division in *People in the Interest of K.D.*, 155 P.3d 634, 637 (Colo. App. 2007).

Next, the division concluded that the trial court incorrectly deviated from ICWA's placement preferences when it denied the department authorization to place A.R. with relatives A.W. and C.W.. The division reversed the trial court's judgment in this regard. After reviewing the record and BIA relative placement preference guidelines, the division addressed each of the trial court's good cause findings and made the following determinations. First, evidence existed regarding the services available to A.R. if placed with A.W. and C.W., and those services need not be the "equivalent" to the child's current services. Second, a qualified expert witness is required to establish that the child needs full-time care, and the trial court erroneously relied solely on the testimony of the foster mother. Third, the trial court erroneously relied on only one factor when determining whether the relatives fully appreciated A.R.'s needs. And fourth, the disruption of the child's attachment to the foster family did not constitute good cause to overcome the relative placement preference.

B. Active Efforts and Expert Testimony

Is expert testimony necessary to support a finding that active efforts were made before terminating the parental rights of a parent in an ICWA case?

In *People in the Interest of A.V. and J.V.,* 297 P.3d 1019 (Colo. App. 2012), father appealed an order, which terminated father's parental rights after concluding, beyond a reasonable doubt, the department met ICWA's "active efforts" standard. Father contended that (1) the department failed to take active efforts as required under ICWA and (2) the trial court violated his due process rights by failing to take expert witness testimony and by not applying the "clear and convincing" evidence standard to the "active efforts" review.

The court of appeals affirmed the order, expressly agreeing with the division in *A.R.* that ICWA's "active efforts" standard requires more than "reasonable efforts." The division concluded that the department actively attempted to provide remedial and rehabilitative services to father, including substance abuse treatment, supervised visits, and parenting education. The record supported termination. The division also rejected father's argument that his due process rights were violated. The division relied on the plain language of 25

U.S.C. §1912(d) in determining that no expert testimony is necessary to make a finding that "active efforts" were made.

C. Transfer to tribal court

What constitutes good cause to deny a motion to transfer jurisdiction to tribal court, and must an evidentiary hearing be held to determine good cause?

In *People in the Interest of T.E.R.*, __P.3d __ (Colo. App. 12CA2196, May 9, 2013), mother and father appealed the juvenile court's denial of a motion to transfer jurisdiction to a tribal court in Michigan. The trial court heard arguments on the transfer issue and, without taking evidence, found good cause to deny the motion based on BIA good cause guidelines. Specifically, the court found that the proceedings were at an advanced stage, and the transfer would cause undue hardship to the parties and witnesses. The parents contended the juvenile court erred in finding good cause to deny the transfer. Mother further contended the court erred by not conducting an evidentiary hearing on the issue or articulating the standard it applied.

The court of appeals affirmed the denial of the motion, also relying on the BIA guidelines. The division noted that the eighth-month delay in filing the motion (post tribal intervention and department notification of termination) was sufficient to show that the proceedings were at an advanced stage. The division also determined that a transfer to Michigan would cause undue hardship to the parties because only the mother resided there. Finally, the court concluded that BIA guidelines do not require the court to hold an evidentiary hearing on the issue of good cause; rather, "all parties need [is] an opportunity to present their views to the court." The juvenile court provided mother this opportunity.

D. Definition of "Parent"

Can a non-custodial parent invoke the Indian Child Welfare Act (ICWA) to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law?

Does ICWA define "parent" to include an unwed biological father who has not complied with state law rules to attain legal status as a parent?

In *Adoptive Couple v. Baby Girl*, 2013WL3184627 (U.S., June 25, 2013), the biological mother of Baby Girl did not live with the father while pregnant and the father did not support the mother financially. The mother texted the father asking if he would rather pay child support or relinquish his parental rights. He texted back, saying that he would relinquish his rights, though he later testified that he thought he was relinquishing his rights only to the mother. The biological father was a registered member of the Cherokee Nation ("the

Nation"). The biological mother attempted to verify this status, but spelled the father's name wrong and misrepresented his birthday in the request, so the Nation could not locate the father's registration. The mother listed Baby Girl's ethnicity as "Hispanic" instead of "Native American" on the birth certificate. The mother decided to put Baby Girl up for adoption because she had two other children that she struggled to support.

Adoptive Couple, a non-Indian couple who resided in South Carolina, began adoption proceedings in that state. The Cherokee Nation finally identified the father as a registered member and filed a notice of intervention, stating that Baby Girl was an "Indian Child" under ICWA. The father stated that he did not consent to the adoption and would seek custody of Baby Girl. After trial, the family court denied Adoptive Couple's petition for adoption and granted custody to the biological father. The family court held that the biological father was a "parent" under the ICWA because of his paternity and pursuit of custody as soon as he learned that Baby Girl was being put up for adoption. Adoptive Couple did not follow the procedural directives in the ICWA to obtain the father's consent prior to initiating adoption proceedings. The Supreme Court of South Carolina affirmed.

Justice Samuel Alito delivered the opinion of the Court. The Court held that ICWA was designed to stop the practice of unwarranted removal of Indian children from Indian families "due to the cultural insensitivity and bias of social workers and state courts." In this case, however, the Court noted that the biological father never had either legal or physical custody of Baby Girl and had previously relinquished his parental rights. Because the biological father gave up custody before birth, and because Baby Girl had never been in his legal or physical custody, ICWA's goal to prevent the breakup of Indian families did not apply. Furthermore, the Court held that ICWA's preference for placing an Indian child with family, other members of the tribe, or other Indian families did not apply in this case because no other parties beside the adoptive parents had come forward to adopt Baby Girl. The Court feared that applying the lower court's rationale could lead to a scenario where a biological Indian father could play an "ICWA trump card" to override the mother's decision and the child's best interests.

VII. MAGISTRATES

Must a juvenile magistrate's suppression order be reviewed and adopted by the district court before an appeal can be filed?

In People v. S.X.G., 269 P.3d 735 (Colo. 2012), the State filed a petition to review a magistrate's order granting the juvenile's motion to suppress certain statements he made to police during an investigatory interview. The district

court denied the State's petition, stating that it lacked the authority to review the juvenile magistrate's order. The State filed an interlocutory appeal under C.R.S. §§16–12–102, 10–1–109(5.5), 19–2–903(2), and C.A.R. 4.1. Because the district court did not adopt or review the magistrate's order, as required by C.R.S. §19–1–108(5.5) and C.R.M. 7(a)(11) before an appeal may be filed, the supreme court concluded that it lacked appellate jurisdiction to review the merits of the suppression ruling and dismissed the appeal.

VIII. CUSTODY AND CHILD SUPPORT

A. Equitable Estoppel

Can the equitable estoppel doctrine be used to enforce an oral agreement to modify child support payments?

In *In re the Marriage of Nicole Beatty and Jeff W. Turner,* 279 P.3d 1225 (Colo. App. 2012), wife appealed a magistrate's order that modified husband's child support obligation and support arrearages. After a 2001 dissolution decree, the court ordered father to pay child support. In 2009, the father sought to modify (retroactively and prospectively) the order in light of an oral agreement by the parties to reduce the obligation. The magistrate ordered the modification, finding that the parties reached an out-of-court agreement and the mother was equitably estopped from collecting the difference between the court-ordered support and the agreed-upon support. The district court affirmed.

The court of appeals reversed and remanded on the issue of equitable estoppel. The division first noted that any stipulation regarding the amount of child support must be reviewed and approved by the court for adequacy. The division then held that in order for the equitable estoppel doctrine to provide relief from arrearage, the party claiming estoppel must demonstrate reasonable and detrimental reliance on the other party's representation. The division noted that the magistrate's order made no findings that the father detrimentally relied on the mother's representations; it only found that it would be unfair and unjust to enforce the original support payments.

B. Child Support Modification Due to Physical Change

Must a parties' stipulation to change the physical care of the child be written in order to retroactively modify child support under C.R.S. § 14–10–122(5)?

In *In re the Marriage of Paige,* 282 P.3d 506 (Colo. App. 2012), father appealed the trial court's denial of his motion to modify child support. In 2000, the court designated mother the primary residential parent and ordered father to make monthly child support payments. In 2008, mother motioned for contempt sanctions against the father for failure to pay child support. Before hearings on

the motion, the father filed a motion to modify the 2000 order, stating that, pursuant to an unwritten agreement, the child lived with him during a large part of the time alleged in mother's contempt motion. Father argued that this change in physical care warrants a corresponding retroactive modification of child support during those times. Without a hearing, the trial court denied father's motion to modify the support order, stating that it could only retroactively modify child support based on a change in physical care if the mutual agreement is in writing.

The court of appeals reversed, finding that C.R.S. § 14–10–122(5) does not require that the parties' agreement be written, only that the agreement be mutual. The division remanded the case to the trial court to hold an evidentiary hearing on father's original motion.

C. Initial Jurisdiction Over Child Custody Issues

Can a parent's intent to reside with the child in Colorado be used to establish initial jurisdiction for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act after the trial court finds Colorado is not the child's home state?

In the Interest of Madrone, 290 P.3d 478 (Colo. 2012) concerns a child and her parents, Lorrena and Karah, who moved to Colorado from Oregon. After residing in Colorado for less than six months, Lorrena and the child moved to another state. Karah remained in Colorado and sought APR of the child. The trial court determined that Colorado was not the home state of the child, but the court still exercised initial jurisdiction based on the parties' intent to indefinitely change their residence to Colorado. Lorrena sought review of the trial court's order arguing the court did not have jurisdiction over the case.

The court of appeals agreed and vacated the order, stating that whether the parties intended to reside in Colorado is not the test for jurisdiction over initial child custody issues under Colorado's UCCJEA, C.R.S. § 14–13–201. Rather, absent emergency jurisdiction, a court must analyze its jurisdictional authority under the two-step process set forth in section 14–13–201. First, the court must conduct a home state analysis, and next, in the event that no state qualifies as the child's home state, the court must look to the three alternative jurisdictional grounds enumerated in the statute. Although the trial court correctly found that Colorado was not the child's home state, it erred when it looked to the intent of the parties and skipped the crucial second step. The division remanded the case for a full analysis under section 14–13–201.

D. Calculating Child Support

When calculating child support, must a trial court make findings regarding a parent's voluntary underemployment and the exclusion of dividends from her income?

In *In re the Marriage of Krejci,* 297 P.3d 1035 (Colo. App. 2013), husband appealed the trial court's findings regarding wife's income used to calculate her child support obligations. Husband contended that wife was voluntarily underemployed, and thus her obligations must be calculated based on her potential income pursuant to C.R.S. § 14–10–115(5)(b)(I). He asserted that the trial court abused its discretion in failing to make findings on this issue. Husband also argued that the trial court abused its discretion in failing to include in wife's income the dividends she earns on her investments.

The court of appeals agreed as to both contentions. First, the division stated that deciding whether a parent is voluntarily underemployed requires the trial court to make factual findings and then apply a legal standard. Here, the trial court erroneously calculated child support obligations based on wife's actual income and made no findings concerning the reasonableness of wife's efforts to find full time employment. Second, the division stated that, under C.R.S. § 14–10–115(5)(a)(I)(F), a parent's gross income for child support purposes includes dividends. The trial court did not include wife's dividends and failed to explain the omission.

As such, the division remanded the case for the trial court to reconsider the voluntary underemployment of wife and include dividends in the wife's income.

E. Issuing QDRO to Collect Funds Under ERISA

Can a parent's Employee Retirement Income Security Act (ERISA) retirement plan be assigned under a qualified domestic relations order (QDRO) to satisfy domestic support arrearages?

In *In re the Marriage of Drexler and Bruce, Jr,* __P.3d__ (Colo. App. No. 11CA2202 & 12CA192, March 28, 2013), husband appealed the trial court's holding that his ERISA retirement plan could be assigned under a QDRO. Husband accumulated $101,486 in support arrearages after he declined to comply with his child support and maintenance obligations following his divorce. Wife moved for a QDRO to collect the arrearages from the funds in husband's ERISA retirement account, and the trial court granted her motion. When the husband refused to sign the documents to assign his retirement funds to wife, the trial court ordered that the QDRO transfer be completed without his signature.

The court of appeals affirmed the trial court's ruling, despite father's argument that C.R.S. § 13–54–101(1)(s) exempts retirement plans from levy and sale under writ of attachment or execution. The division noted that ERISA preempts section 13–54–101(1)(s) and allows a QDRO to be used to enforce child support and maintenance obligations under a divorce decree.

IX. CHILD HEARSAY

A. State and Federal Confrontation Clause Rights

Does the state or federal confrontation clause require a literal "face to face" confrontation right? Are a victim's hearsay statements made to public school employees, a police officer during a welfare check, and a caseworker testimonial or nontestimonial?

In *People v. Phillips,* __P.3d__ (Colo. App. No. 08CA2013, Oct. 25, 2013), defendant appealed his conviction of first degree murder and child abuse resulting in death on the grounds that the trial court violated his state and federal confrontation rights when it admitted hearsay statements of the victim. Specifically, the defendant contended that the court erroneously allowed the victim's brother to testify over Close Circuit Television (CCTV) and erroneously admitted victim statements made to public school employees, a police officer during a welfare check, and a caseworker.

The court of appeals disagreed and affirmed the convictions. Relying on *Maryland v. Craig*, 497 U.S. 836 (1990), the division noted that a state's

procedure allowing a child witness to testify over CCTV does not violate the confrontation clause as long as the procedure is necessary to protect the child, the child would be traumatized by the defendant's presence, and the child would suffer more than *de minimus* distress in the defendant's presence. The division also held that the state confrontation clause does not require the greater protection of "eyeball-to-eyeball" confrontation, as that contention was rejected in *Compan v. People*, 121 P.3d 876 (Colo. 2005).

Regarding the various hearsay statements made by the victim to public school employees, a police officer during a welfare check, and a caseworker, the division determined all statements nontestimonial for the purposes of confrontation clause analysis. The victim's statements made to public school employees were nontestimonial because the questioning was informal and the purpose was to assess the child's welfare during an "ongoing emergency," not to prove facts potentially relevant to a later criminal prosecution. The division employed a similar analysis to assess the statements made to the police officer and caseworker. Notably, the division rejected the argument that, because the school employees and caseworkers were mandatory reporters, they were acting as agents of law enforcement, thus making their statements testimonial.

B. Child Competency and Admissibility of Child's Statements Through Other Witnesses

What findings must a trial court make to allow a six-year-old to testify, and does a child's failure to remember her own statements render those hearsay statements inadmissible?

In *People v. Stackhouse*, __P.3d__ (Colo. App. No. 10CA1346, Nov. 21, 2012), defendant appealed his conviction of sexual assault on a child and sexual assault on a child by a person in a position of trust. The defendant contented the trial court erred in (1) allowing the victim, M.A., to testify when she was not competent to do so, and (2) admitting M.A.'s statements (which she did not remember making) through other witnesses in violation of his confrontation, due process, and fair trial rights.

The court of appeals affirmed the sentence and judgment, first considering whether the trial court held a proper competency hearing pursuant to C.R.S. § 13–90–106(1)(b)(II). The court found no error in the trial court's competency evaluation; the child was able to tell the difference between a truth and a lie and testify to her name and age. Second, the division determined that the court's admission of M.A.'s hearsay statements through other witnesses was not erroneous, regardless of whether the child was unable to remember making them. The statements were reliable, in part due to their spontaneity, and the child was available for cross-examination at the trial.

X. ALLOCATION OF PARENTAL RESPONSIBILITIES

A. Nonparent Standing

a. Parental Consent Not Required

Under C.R.S. §§ 14–10–123(1)(b) and (1)(c), is parental consent required for a nonparent to have standing to seek allocation of parental responsibilities (APR)?

In *In the Interest of B.B.O.*, 277 P.3d 818 (Colo. 2012), V.O., half-sister of minor child B.B.O., petitioned for APR following B.B.O.'s father's passing. B.B.O. had resided with V.O. for over six years. Mother moved to dismiss V.O.'s petition. The trial court determined V.O. had standing to petition for APR and found it in B.B.O.'s best interest to reside primarily with her. Mother appealed. The court of appeals reversed on the grounds that V.O. lacked standing. The division found that to establish standing under C.R.S. §§ 14–10–123(1)(b) and (1)(c), the parents must have voluntarily permitted the nonparent to share in parental responsibility for the child's care.

The supreme court reversed, looking to the plain language of the statute and holding that nonparent standing hinges, not on parental consent to nonparent care, but on who has, or recently had, physical care of the child.

b. Sharing Physical Care of a Child Between a Parent and Nonparent

When does a nonparent, who shares physical care of a child with a parent, have standing under C.R.S. § 14–10–123(1)(c)?

In *In re Parental Responsibilities of D.T.*, 292 P.3d 1120 (Colo. App. 2012), mother's friend, C.L., appealed a judgment dismissing her petition for parental responsibilities of D.T., mother's child. The trial court found that C.L. did not have standing under C.R.S. §14–10–123(1)(c) because C.L. assumed more of a "grandmotherly role" and mother did not concede her parental rights, but rather continuously directed and supervised C.L.'s care of the child.

The court of appeals affirmed, noting that when a nonparent meets the six-month physical care requirement and shares physical care of the child with the child's parent, the court must consider the nature, frequency and duration of the contacts between the child and the parent and nonparent. As such, a nonparent who serves in a role similar to a nanny and provides care under the direction and supervision of a child's parent does not have standing under C.R.S. §14–10–123(1)(c).

c. Great-Grandparents and Standing

Does C.R.S. § 19–1–117, which provides that grandparents have standing to seek visitation, similarly provide standing to great-grandparents?

In *In re the Parental Responsibilites Concerning M.D.E.*, 297 P.3d 1058 (Colo. 2013), father appealed the district court's order allowing great-grandmother to intervene and seek visitation of M.D.E.. The trial court liberally construed C.R.S. § 19–1–117 and allowed the intervention. The district court affirmed the order.

The court of appeals reversed, finding that visitation statutes should not be liberally construed in light of Troxel. Additionally, the principle of liberal construction cannot contravene the plain meaning of the statute. The visitation statute clearly refers only to grandparents who are defined as "a person who is the parent of a child's father or mother." Thus, great-grandparents do not have standing to intervene and seek visitation.

B. Nonparent Versus Parent and Troxel Presumption

a. Post-stipulation Request to Modify Parenting Time

Is a parent, who requests a modification of parenting time after voluntarily agreeing to allocate parental responsibilities to a nonparent couple, still entitled to a Troxel presumption?

In re the Parental Responsibilities of B.R.D., 280 P.3d 78 (Colo. App. 2012) concerns a dispute between a father and a couple with whom the father's child was living. The parties previously agreed upon an arrangement allocating parental responsibilities to the couple. When the father petitioned the court to modify the parenting time arrangement, the district court denied the petition and awarded sole decision-making responsibility, primary residential care, and majority parenting time to the couple. Relying on the "endangerment" standard set forth in *In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106 (Colo. App. 2008), the court did not accord the father a *Troxel* presumption and found the child's current environment with the couple to be in the child's best interest. Father appealed.

Noting that *M.J.K.* was rejected by the Colorado supreme court in *In re D.I.S.*, 249 P.3d 775, 781–82 (Colo. 2011), the court of appeals vacated the trial court decision and held that father was entitled to a Troxel presumption regardless of the fact that he previously agreed to allocate parental responsibilities to the couple. As well, the *Troxel* presumption prevails over any competing

presumption in favor of an "established custodial environment," as discussed by the trial court. To rebut this presumption, the non–parent couple must show, by a preponderance of the evidence, that (1) the proposed modification of parenting time would not be in the best interests of the child, and (2) the existing parenting time order is in the best interests of the child. The division remanded the case to the trial court to make new findings under these standards.

b. A Showing of Unfitness Not Required

Must the court find the biological parents are unfit or likely to make decisions not in the child's best interest to support allocating parental responsibilities to a nonparent?

In *In re the Parental Responsibilities of M.W.*, 292 P.3d 1158 (Colo. App. 2012), mother's former boyfriend, Shane Taylor, appealed the trial court's judgment denying him allocation of parental responsibilities. The court determined that, although Taylor had standing, it could not allocate parental responsibilities to him unless it also found that the mother and father were unfit or would likely make parenting decisions that were not in the best interests of the child.

The court of appeals reversed and remanded, holding that when a nonparent has standing to move for APR, the court need not make a finding that the parents are unfit in order to grant the motion. Instead, the court must employ a three part test where first, the *Troxel* presumption favors parental determination. Second, to rebut the presumption, the nonparent must show, by clear and convincing evidence, that the parental determination is not in the child's best interests. Third, the nonparent must show, by clear and convincing evidence, that the requested allocation is in the child's best interest. After applying the test, the court must make findings that identify the "special factors" on which it relied.

X. PATERNITY

Does a district court have jurisdiction to resolve matters in a paternity action when each man presumed to be the children's father and each man alleged to be the children's natural father are not made parties to or given notice of the action?

In *In re the Support of E.K., J.K, and P.K., 2013COA99,* a matter of first impression in Colorado, P.W.K. (Obligor) appeals the district court's judgment adopting the magistrate's order that established his paternity of three children, E.K., J.K., and P.K. The children's mother gave birth to E.K. in 2003 while she was in the process of dissolving her marriage to obligor. Mother and Obligor were divorced in 2004. Mother and Obligor reconciled. When Mother gave birth to J.K. in 2005, Obligor agreed to be named as the father on J.K's birth certificate. Mother and Obligor

lived together until shortly before Mother gave birth to P.K. in 2006. In 2012, the Arapahoe County Delegate Child Support Enforcement Unit (CSEU) filed a verified petition for paternity in 2012. CSEU proffered genetic testing results that excluded Obligor as the biological parent of E.K. and J.K. Mother then identified the separate biological fathers (not Obligor) for E.K. and J.K. and that each had met their child. Obligor did not dispute that he was P.K.'s biological parent.

Following the hearing, the magistrate adjudicated Obligor, in written order, the parent of the three children, erroneously indicating that Obligor had admitted that he was their parent and ordered him to pay child support and costs of genetic testing.

CSEU admits that the alleged biological fathers of E.K. and J.K. were not made parties to or given notice of the paternity action, so the judgment was vacated because CSEU failed to follow the statutory requirements of the Uniform Parentage Act (UPA) to invoke the district court's subject matter jurisdiction. No published Colorado appellate decision appears to have addressed the district court's jurisdiction to establish paternity in the absence of joinder or notice to all presumed fathers and any alleged natural fathers of the children at issue. The court of appeals notes that C.R.S. § 19-4-110 formerly required that any child at issue in a paternity action be made a party to that action; the court treats the required joinder of presumed and alleged natural fathers similarly. The matter was remanded to the district court for further proceedings in compliance with the UPA.

XI. DELINQUENCY

Does a defendant's sentence of 84 years for non-homicide crimes committed as a juvenile, with the first opportunity for parole at fifty-seven years old qualify, defacto, as a sentence of life without parole in violation of Graham v. Florida*, 560 U.S. 48 (2010)?*

In *People v. Lucero*, 2013WL1459477 (Colo. App. April 11, 2013), a defendant appeals the trial court's order denying him his C.R.Crim. P. Rule 35(b) postconviction motion seeking reduction of his aggregate 84 year sentence for non-homicide crimes committed as a juvenile. The defendant asserts that this sentence violates the Cruel and Unusual Punishments Clause of the federal constitution's Eighth Amendment and article II, section 20 of the Colorado Constitution, citing *Graham v. Florida*, 560 U.S. 48 (2010).

The Colorado Court of Appeals found that this defendant's sentence is constitutional for three reasons. First, the defendant concedes that the life expectancy for persons born in 1989, the year of his birth, is seventy-five years. Thus, he will be eligible for parole well within his natural lifetime. The court of appeals rejected the juvenile's argument that a 20 year sentence takes 16 years off of a prisoner's life-expectancy, because he had not presented this argument at the trial court level. Second, a previous division of the court has found constitutional a sentence of 40 years for a juvenile (*People v. Banks*, 2012WL4459101 at ¶¶ 129-131 (Colo. App. Sept. 27, 2012)); a sentence of 42

years is similar to that scenario. Third, the defendant's opportunity for parole appears consistent with rulings in courts in other jurisdictions applying *Graham*.

Does a defendant's aggregate sentence of 112 years for non-homicide crimes committed as a juvenile, with the first opportunity for parole at 75 years old, qualify, defacto, as a sentence of life without parole in retroactive violation of Graham v. Florida*, 560 U.S. 48 (2010)?*

In *People v. Rainer*, 2013WL1490107 (Colo. App. April 11, 2013) a defendant filed a motion for post-conviction relief pursuant to C.R.Crim.P. Rule 35(c), asserting that his aggregate term-of-years sentence was the functional equivalent of a life sentence without the possibility of parole, and thereby constituted cruel and unusual punishment in violation of the Eighth Amendment, pursuant to *Graham v. Florida*, 560 U.S. 48 (2010). The Colorado Court of Appeals overturned the trial court's denial of the defendant's motion, remanded for resentencing consistent with this opinion, and directed that the defendant be appointed counsel to represent him at the resentencing hearing.

The court of appeals found that *Graham* does apply retroactively here because the trial court erroneously relied upon *Edwards v. People*, P.3d 977 (Colo. 2006). *Edwards* does not control here because it applies only to new constitutional rules of criminal procedure, and *Graham* created a new substantive rule of constitutional law. *Edwards* relies on *Teague v. Lane*, 489 U.S. 288 (1989) which sets out a framework for determining retroactivity, including that the infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction. Even if *Teague* applied here, the court concluded that *Graham* applies retroactively because, applying the rule in this case would seriously diminish the likelihood of obtaining an accurate conviction. *Graham* should apply to all cases involving juvenile offenders under the age of eighteen at the time of the offense, including those cases on collateral review. The defendant's appeal, though not timely, was found to fall under the exception for justifiable excuse or neglect.

The defendant argues that statistics show that he will have a life-expectancy of only between 63.8 and 72 years, and thus he will likely die while incarcerated, since he will be eligible for parole first at 75 years old. He also argues that it is statistically unlikely that his first attempt at parole will succeed.

The parties in this case did not cite any Colorado law on this matter. After summarizing the U.S. Supreme Court's decisions leading to *Graham*, *Graham* itself, and other jurisdictions' applications of *Graham*, the court looked to California and Florida decisions that point out that common sense should dictate that a juvenile who is sentenced at the age of 18 and who is not eligible

for parole until after he is expected to die does not have a meaningful opportunity of release. The Court also looked to Colorado statutory law, adopted both before and after *Graham*, and noted that recent changes to Colorado statutory law indicate that it is consistent with the principles cited in the cases leading up to *Graham*.