Issue 2, 2009

OFFICE OF THE CHILD'S REPRESENTATIVE

Summer

OCR updates serve to inform OCR attorneys and other interested professionals of recent court decisions, studies, and current events relating to child advocacy, OCR activities, GAL activities, and resources and events that may be beneficial to you or your clients. Please feel free to email the OCR with any feedback or information that you wish to have posted in the next update.

Inside this issue:

OCR NEWSLETTER

Court Opinions

The summaries below highlight aspects of cases relevant to child representation, but they are neither official nor complete court opinions. Decisions may be subject to multiple interpretations, and attorneys should consult with the original decision prior to citing it. The full text of many of the following decisions can be accessed on the Colorado Court of Appeals website, http://www.courts.state.co.us/coa/coaindex.htm, or the Colorado Supreme Court website, http://www.courts.state.co.us/supct/supctcaseannctsindex.htm. If you are not able to access a decision online, please feel free to contact the OCR's Staff Attorney, Sarah Ehrlich, (303-860-1517, ext. 106), for assistance.

U.S. Supreme Court

Forest Grove School District v. T.A., No. 08-305:

On June 22, 2009, the Supreme Court held that the Individuals with Disabilities Education Act (IDEA) permits a tuition reimbursement award, requiring school districts to pay for private education, when the child had not been receiving special education in the public school and was enrolled in private school without district consent/input. The key legislation is a 1997 amendment to IDEA mandating "free appropriate public education" for children with disabilities. The school district argued that it should not be responsible for the private school tuition because the child never received special education services while enrolled in the school district, and therefore is ineligible for reimbursement under federal disabilities law. T.A., arguing for the appellate court's ruling to be affirmed, contended that if school districts are not required to reimburse even where special education services were not rendered in the public school, there will be a clear disincentive for school districts to provide such services. The federal Department of Education and many disability rights groups filed amicus briefs for the Court of Appeals' ruling to be upheld, and the motion of Solicitor General of the U.S. was granted to participate in oral argument as amicus curiae.

Colorado Court of Appeals Cases

ICWA

People in the Interest of N.D.C., No. 08CA2304, 2009 Colo. App. LEXIS (Colo. App. April 30, 2009):

In a proceeding to terminate parental rights, the Denver Department of Human Services violated the Indian Child Welfare Act (ICWA) by not filing copies of notices or return receipt cards sent to mother's tribe. The error was not harmless because the record did not show that the tribe knew relevant information, such as that the mother was an enrolled tribal member or that she had lived on the reservation. In termination of parental rights, the tribe has an interest in Indian children distinct from, "but equivalent to, parental interests," and therefore must have an opportunity to be heard. If the state knows, or has reason to believe, that an Indian child is involved, it must provide notice to the child's tribe (registered mail with return receipt requested) of pending proceedings. 25 U.S.C. § 1912(A) (2001).

The Guidelines for State Court: Indian Child Custody Proceedings (44 Fed. Reg. 67,584, 67,586) require return receipt cards be filed with the court as soon as possible. Although not binding, the appellate court found these Guidelines persuasive and the filing requirement "an essential component of the ICWA notice process." Notice was required in this case because the mother asserted she was enrolled in the tribe, which should prompt ICWA's applicability. Because key information was missing from the notice demonstrated in the record, the notice did not comply with 25 C.F.R. §§ 23.11(d)(1)-(4) nor 23.11(e)(2)-(7). The appellate court also held that subsequent notices sent to the tribe were insufficient because they did not

conform to the ICWA requirements for information. Unless the record indicates that the tribe agreed to be notified in the same manner as the other parties, subsequent notices must comply with ICWA requirements. The error was magnified because the original notice lacked critical information regarding the mother's tribal status.

Finally, the appellate court rejected the mother's argument that the ICWA's substantive provisions should apply in this case. The court held that ICWA's substantive provisions, such as different standards for removing Indian children from their homes, apply only when the child is known to be an Indian child. Because the trial court could not, based on the record, find that the child was an Indian, the ICWA's substantive provisions did not apply.

Judgment was vacated, and the case remanded so that notice may be given in accordance with the ICWA and the Children's Code. The court provided that if the tribe does not seek to intervene upon proper notice, the original termination may be reinstated and the court need not apply the substantive ICWA standards.

In the Interest of T.M.W. and S.A.W., No. 08CA2335 & 08CA2336, 2009 Colo. App. LEXIS (Colo. App. April 2, 2009):

Appellant was the mother of two children for whom the Denver DHS filed separate petitions placing her children with their paternal grandparents. The mother entered no-fault admissions for both petitions. Although it initially pursued allocation of parental responsibilities to the grandparents, the department subsequently sought termination, which was granted in two separate but identical judgments for each child. The mother appealed, asserting that the trial court erred in finding that the Indian Child Welfare Act (ICWA) did not apply (because mother was not enrolled in a tribe), and also that the department failed to make reasonable efforts to reunite her and the children.

As to the applicability of the ICWA, the court of appeals found that proper notices were not sent to the tribes for which the mother believed the children were eligible. Because the state did not give proper notice for either child, under 25 U.S.C. § 1912(a) (2001) and C.R.S. 19-1-126(1)(a)-(b), the court vacated both judgments and remanded so that the state may give proper notice.

On the second issue, the mother argued that because the department did not implement in-home services after such services ended two months after the treatment plan in the case of the older child was adopted, it failed to make "reasonable efforts" to reunite her with her children. The state is required to make reasonable efforts to reunify families when possible, including necessary services such as home-based services if there is funding. The court held, however, that it is the parent's responsibility to ensure the success of treatment plans, and in so doing, must bring any deficiencies in the department's efforts to the trial court's attention. Therefore, mother's failure to bring any perceived deficiency to the trial court's attention constituted a waiver of her right to raise the reasonable efforts issue on appeal.

The judgments of the trial court were vacated and remanded with instructions that the state give proper notice, in accordance with the ICWA and the Children's Code.

Adoption

In the Matter of the Petition of J.N.H., No. 08CA1235, 2009 Colo. App. LEXIS (Colo. App. April 16, 2009):

Petitioner, whose adoption decree was finalized in 1965, sought access to his adoption records through court order. The magistrate ordered that he utilize a confidential intermediary, pursuant to C.R.S. 19-5-305(2)(a). Petitioner unsuccessfully sought district court review, and appealed to the court of appeals, where a motions division of the court of appeals issued an order to show cause regarding the finality of the order requiring a confidential intermediary; it deferred the issue to the division. The appellate court held that because the magistrate's order ended the trial court proceeding—as petitioner sought only access to his adoption records and requiring him to use the confidential intermediary before concluding his appeal would "effectively prejudge[] the appeal's merits"—the order was final for purposes of appeal.

Reminder!

The OCR has new phone extensions!

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Sheri Danz– #102

Ryan Burke– #103

Sheree Coates– #104

Theresa Spahn– #105

Sarah Ehrlich– #106

Linda Weinerman– #107

On petitioner's claim that the trial court erred in its interpretation of the statute requiring the use of a confidential intermediary because 19-5-305(2)(a) allows adoptees from adoptions finalized before July 1, 1967 access to their adoption records "without limitation," the appellate court agreed. It found that the language of the statute was ambiguous. The statute makes an exception for the names of parties to adoptions finalized before July 1, 1967. Although the language regarding adoption records could be interpreted to require a confidential intermediary (by reading the statute to have two separate provisions limiting access: a provision regarding anonymity, which did not apply to petitioner; and a provision dealing with access to records, which did apply, and finding that the second provision made no distinction between pre-1967 and post-1967 adoptions), the appellate court found that interpretation to be erroneous.

The court found that first, "the statutory scheme treats persons differently" based on their date of adoption and the 1967 change intended to make biological parents anonymous to all persons, rather than the pre-1967 availability to parties involved in the adoption process. Second, the legislative declaration to C.R.S. section 19-5-305 indicates that the General Assembly, in 1967, intended adoptions finalized after 1951 but before July, 1967, to be treated differently in access to information. Finally, the court found illustrative that the statutory language provides that "the names of parties ... shall remain anonymous *if* the adoption was finalized on or after July 1967," (emphasis added in the opinion). The court of appeals concluded, therefore, that the legislature intended that in adoptions finalized before July 1, 1967, but after July 1, 1951, the adoptee may have access to the names of his/her birth parents and all court records and papers regarding the adoption, without the use of a confidential intermediary. The court order requiring use of a confidential intermediary to access adoption records was reversed, and the case remanded to the trial court to issue an order allowing petitioner access to his records.

Delinquency

People in the Interest of H.W. III, No. 08CA0840, 2009 Colo. App. LEXIS (Colo. App. April 16, 2009):

Petitioner, H.W., appealed the judgment adjudicating him delinquent based on acts that, if committed by an adult, would constitute a class 4 felony of accessory to the crime of attempted murder. He also appealed his placement in the Department of Corrections Youth Offender System. The People alleged that H.W. assisted Lamont Norris in the evasion of prosecution while "knowing that person was charged by pending information, indictment, or complaint" with attempted murder. H.W. moved for acquittal based on the claim that the People failed to provide any evidence of their original allegation: that H.W. had "knowledge that Norris was charged by pending information, indictment, or complaint," the motion was denied, and the juvenile court adjudicated H.W. delinquent.

On appeal, H.W. argued that he was entitled to an acquittal because there was a "fatal variance" between the petition and the evidence presented at trial; the petition alleged that he assisted Norris "knowing that Norris was *charged with a crime,*" but the People proceeded on the theory that H.W. gave assistance "knowing that Norris had *committed a crime*." (Emphasis in original) The division agreed that the variance, which occurs when the charge in the charging instrument differs from the charge of which the defendant is convicted, required reversal of H.W.'s adjudication. The court outlined two types of variances: a simple variance, which "occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged;" and a constructive amendment, which "changes an essential element of the charged offense," altering the "substance of the charging instrument." Constructive amendments are per se reversible error, as they raise the risk of conviction for an offense not included in the original charging instrument. Although C.R.S. § 18-8-105 allows an accessory charge if the offender knows they are assisting a person who "has committed... or is charged ... with a crime," the People alleged in their petition that H.W. assisted Norris "knowing that person *was charged by pending information, indictment, or complaint with* the crime" of attempted murder. However, the evidence presented was based on the theory that H.W. "knew Norris had committed a crime when he drove him away from the scene of the shooting," and therefore effectively amended the charge. The court held that the prosecution failed to prove the charge it alleged.

The court also held that the prosecution's failure to prove the offense charge gave rise to double jeopardy protections on that charge. It considered whether there was a lesser offense to the one charged (but not proved) that had sufficient evidence to sustain the conviction, and found there was not. The court found that the other offenses of § 18-8-105(5) and (6) are alternative bases for liability, but are not lesser forms of the charged offense, and therefore that not only did the adjudication need to be reversed, but the case against H.W. required dismissal. The court's final analysis held that "the prosecution proved an offense it did not charge; it charged an offense it did not prove; and the proof it provided would not sustain any lesser included offense;" and therefore, that "H.W.'s adjudication must be reversed," and remanded the case to the juvenile court with directions to enter a judgment of acquittal.

In the Interest of A.B.-B., No. 07CA1292, 2009 Colo. App. LEXIS (Colo. App. January 22, 2009):

A.B.-B. appealed a judgment adjudicating him delinquent, as he was found to have committed acts that, if committed by an adult, would constitute one count of sexual assault on a child and one count of sexual assault on a child as part of a pattern of sexual abuse.

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Please note:

Changes to Appellate Rule 32's provisions on certificate of compliance, and to Rule 52 regarding the time for petitioning!

After a petition was filed by the People, a magistrate granted A.B.-B.'s oral request for a jury trial based on the People's plan to charge him as an aggravated juvenile offender. However, the People subsequently declined to pursue that charge, and the juvenile court found that A.B.-B. was not entitled to a jury trial; further, the juvenile court declined to exercise its discretion to grant A.B.-B. a jury trial. Following the bench trial, the court held that the charges against A.B.-B. had been proven beyond a reasonable doubt and adjudicated him delinquent. A.B.-B. appealed the court's denial of a jury trial.

Reviewing the juvenile court's denial of a jury trial de novo, the court of appeals affirmed. The court of appeals reiterated that the goal of the juvenile justice system—"to provide guidance and rehabilitation" and protect society—differs from the goal of the criminal justice system, which is to establish guilt and punishment. Courts are to follow the legislative intent aimed at "rehabilitation and reformation, and not punishment as such, even though the actions of the child if committed by an adult would justify a criminal proceeding." While the U.S. Constitution provides the right of jury trial to adults accused of serious crimes, the court of appeals found that courts have not extended this right to juvenile delinquency proceedings. In declining to do so, courts have aimed to protect the "idealistic prospect of an intimate, informal, protective proceeding," and to avoid the more adversarial nature of adult criminal proceedings.

Colo. Rev. Stat. § 19-2-107(1) creates a right to jury trial when a juvenile is "alleged to be an aggravated juvenile offender," and leaves discretion with the courts to grant a jury trial when juveniles are charged tion with the courts to grant a jury trial when juveniles are charged with felony offenses. The court of appeals considered whether A.B.-B. was charged with an act constituting a "crime of violence" under Colo. Rev. Stat. § 18-1.3-406; specifically, "any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim." § 18-1.3-406(2)(b)(I). The court of appeals held that although A.B.-B. was charged with an unlawful sexual offense, he was not charged with effecting bodily injury to the victim, or with using threats, intimidation or force. Therefore, the court of appeals held that the statute did not entitle him to a jury trial. Further, the court held that the offense charged is not a violent crime defined in § 18-1.3-406, "even though a conviction of this crime does require violent crime sentencing," and cited the General Assembly's delineation of crimes not falling within the mandatory sentencing statute's definition of "crime of violence," but still subject to the statute's sentencing requirements (referred to as "per se crimes of violence").

Additionally, the court found that the Colorado Children's Code's jury provisions were plain, entitling a juvenile in delinquency proceedings to a jury trial only when charged with what would constitute a "crime of violence" under § 18-1.3-406, if committed by an adult. The Children's Code's jury trial provisions were reviewed by the General Assembly in 1996, and although the difference between crimes of violence and per se crimes of violence had been established, the legislature declined to extend the jury trial right to juveniles accused of what would be per se crimes of violence, if committed by adults. Sexual assault on a child as part of a pattern of abuse is a per se crime of violence, but not a crime of violence under § 18-1.3-406(2). Because A.B.-B. did not cause bodily injury to the victim or use threats, intimidation or force, A.B.-B. was not charged with a crime of violence and was not statutorily entitled to a jury trial.

Even if the statute did not entitle him to a jury trial, A.B.-B. argued that the juvenile court should have exercised its discretion to grant him one. The court of appeals reviewed the juvenile court's decision not to grant a jury trial for abuse of discretion, and found no evidence of arbitrariness, unreasonableness, or unfairness. The People argued that the 5-year-old victim, whose testimony formed the basis for the accusations against A.B.-B., would be further traumatized by having to testify before a jury, and A.B.-B. offered no evidence or argument to refute that claim. Although his adjudication required A.B.-B. to register as a sex offender, which the court of appeals recognized may expose him to social stigma, the court found nothing "manifestly arbitrary, unreasonable, or unfair" in the juvenile court's denial of a jury trial. The court of appeals affirmed the judgment.

In the Interest of O.R., No. 08CA1219, 2008 Colo. App. LEXIS (Colo. App. December 24, 2008):

O.R. appealed a juvenile court's adjudication of him as delinquent, based on its finding that O.R. committed acts that would constitute the offense of carrying a concealed weapon, if committed by an adult. The court of appeals reversed the juvenile court's finding, and remanded for dismissal of the delinquency petition.

The juvenile court heard testimony from the arresting officer that he had seen a silver object sticking out of O.R.'s pocket, and recognized that object to be the end of a pistol. The juvenile court held that a firearm need not be completely concealed to be considered a concealed weapon under Colo. Rev. Stat. § 18-12-105(1)(b), and that a firearm being "partially obstructed" was sufficient. While the court of appeals found that whether a firearm was concealed was a question of fact, the issue of whether a "partially concealed but readily discernible" weapon can be a concealed weapon under § 18-12-105(1)(b) was considered a question of statutory interpretation and reviewed by the court de novo.

The crime of carrying a concealed weapon is committed when a person "carries a firearm concealed on or about" his/her person. § 18-12-105(1)(b). The appellate court, in striving to ascertain the intent of the General Assembly, found that the test of concealment is "whether a weapon is so carried as not to be discernible by ordinary observation." The court concluded that, for the purposes of § 18-12-105(1)(b), "concealed" means "out of sight so as not to be discernible or apparent by ordinary observation," and that to hold otherwise would render unlawful the carrying of a gun in a holster, if any part of the gun was concealed by the holster—"clearly" not the intent of the General Assembly. Therefore, the court held that the juvenile court erred in finding O.R.'s "partially concealed but readily discernible firearm" was concealed under § 18-12-105(1)(b). Further, the court found that the evidence, even viewed in the light most favorable to the prosecution, was insufficient to prove beyond a reasonable doubt that O.R. "carried, or even attempted to carry, a concealed firearm." The judgment was reversed, and the case remanded with instructions to dismiss the delinquency petition.

Termination— use of Polygraph

People in the Interest of M.M., Jr., No. 08CA0119, 2009 Colo. App. LEXIS (Colo. App. April 16, 2009):

Father appealed the termination of his parental rights as to his son (1-year-old) and daughter (2-years-old), arguing that the trial court erred in admitting the results of polygraph tests. The court of appeals addressed the admissibility of polygraph results in dependency and neglect cases, termination hearings, and in opinions and recommendations from expert witnesses.

The father's permanency plan included a domestic violence polygraph examination, which the magistrate ordered to be filed with the court and sealed. The polygraph included two responses that were determined to be deceptive: whether the father had put any object in daughter's "butt"; and whether father had put any object in daughter's "private body parts." At a second polygraph examination, the father was found to be deceptive on questions "essentially the same" as the earlier deceptive questions. Although the daughter made an allegation of sexual abuse by the father, that allegation later proved unfounded.

The father's individual therapist and a forensic psychologist testified that deceptive polygraph responses constitute a "probability statement" as to the facts, but not as conclusive indications of the answerer's having done or not done that specific thing. The father had completed or was completing all other steps of his treatment plan (including substance abuse treatment, parenting program, group and individual therapy, and a clarification letter). After the second deceptive polygraph, the mother asked the father to leave the home. The court appointed a CASA volunteer, who reported that placement with the father would be a safety risk due to the failed polygraph examinations; she also stated that the father's individual therapist did not know why the father failed the polygraphs.

The trial court's order terminating parental rights of both parents expressly stated that it "did not take into account the allegations of sexual abuse or the polygraph results." Rather, the trial court maintained that the termination was based on father's failure to fully and honestly participate in treatment, and failure to internalize and employ the treatment.

Although evidence of polygraph test results and testimony of examiners are per se inadmissible in criminal and civil cases, the trial court admitted the polygraph evidence on the bases that the "prejudicial effect of improperly admitted evidence is generally presumed to be innocuous" in a trial to the court. The trial court cited *In re Marriage of McCaully-Elfert*, where the court admitted a witness' response that her allegations were based on a "lie detector test that [husband] took." 70 P.3d 594 (Colo. App. 2007). However, the court of appeals distinguished *McCaully-Elfert* because there was other competent evidence of the allegations in that case. Here, finding that the trial court had erred, the court of appeals held that the polygraph evidence and reactions of the treatment professionals to it (who based their opinions, in whole or in part, on the polygraph results): "(1) consumed most of the trial; (2) supplanted father's treatment plan; (3) controlled or significantly influenced every recommendation by the treating and supervising professionals concerning unsupervised visitation and father's fitness as a member of a reunited family; and (4) thereby essentially eliminated any chance father had to retain a parent-child relationship with both of his children." Further, the court found that because the underlying basis for the expert opinions and recommendations is not admissible, "the expert's testimony itself is inadmissible;" and the trial court should not have heard or

considered opinions based, to any degree, on the polygraph results. The court also held that the admission of polygraph evidence prejudiced the father and required reversal. The appellate court found that the first polygraph failure led to a revision of the permanency plan and restriction of father's visitation to weekly one-hour supervised visits. At the termination hearing, the supervisors and therapists testified that the failed polygraphs dissuaded them from recommending unsupervised visitation. The court therefore held that the "polygraph evidence had consumed the trial and supplanted the treatment plan."

Despite the trial court's assurance that it was not relying on polygraph evidence in finding father unfit, the court of appeals concluded that that separation "could not be done." The testimony of the experts consistently showed that but for the first failed polygraph, the father could have had unsupervised visits, and that after the polygraph, his release from treatment required the father's disclosure of the issues that caused the deceptive results, which could only be verified by passing the polygraph. The court found that there was "insufficient admissible evidence to support a finding, by clear and convincing evidence, that father was an unfit parent." The judgment was vacated and remanded for further proceedings consistent with the court's holding.

Editor's note: This case has significant and far-reaching implications. Please stay tuned to the OCR for any possible appeals or updates.

Rights to Adoption Records

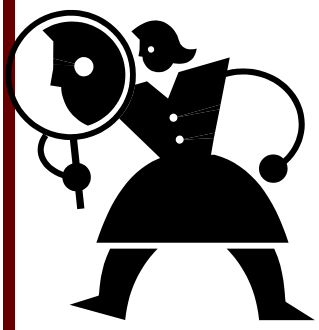
In the Matter of the Petition of J.N.H., No. 08CA1235, 2009 Colo. App. LEXIS (Colo. App. April 16, 2009):

Petitioner, whose adoption decree was finalized in 1965, sought access to his adoption records through court order. The magistrate ordered that he utilize a confidential intermediary, pursuant to C.R.S. 19-5-305(2)(a). Petitioner unsuccessfully sought district court review, and appealed to the court of appeals, where a motions division of the court of appeals issued an order to show cause regarding the finality of the order requiring a confidential intermediary; it deferred the issue to the division. The appellate court held that because the magistrate's order ended the trial court proceeding—as petitioner sought only access to his adoption records and requiring him to use the confidential intermediary before concluding his appeal would "effectively prejudge[] the appeal's merits"—the order was final for purposes of appeal.

On petitioner's claim that the trial court erred in its interpretation of the statute requiring the use of a confidential intermediary because 19-5-305(2)(a) allows adoptees from adoptions finalized before July 1, 1967 access to their adoption records "without limitation," the appellate court agreed. It found that the language of the statute was ambiguous. The statute makes an exception for the names of parties to adoptions finalized before July 1, 1967. Although the language regarding adoption records could be interpreted to require a confidential intermediary (by reading the statute to have two separate provisions limiting access: a provision regarding anonymity, which did not apply to petitioner; and a provision dealing with access to records, which did apply, and finding that the second provision made no distinction between pre-1967 and post-1967 adoptions), the appellate court found that interpretation to be erroneous.

The court found that first, "the statutory scheme treats persons differently" based on their date of adoption and the 1967 change intended to make biological parents anonymous to all persons, rather than the pre-1967 availability to parties involved in the adoption process. Second, the legislative declaration to C.R.S. section 19-5-305 indicates that the General Assembly, in 1967, intended adoptions finalized after 1951 but before July, 1967, to be treated differently in access to information. Finally, the court found illustrative that the statutory language provides that "the names of parties ... shall remain anonymous *if* the adoption was finalized on or after July 1967," (emphasis added in the opinion). The court of appeals concluded, therefore, that the legislature intended that in adoptions finalized before July 1, 1967, but after July 1, 1951, the adoptee may have access to the names of his/her birth parents and all court records and papers regarding the adoption, without the use of a confidential intermediary.

The court order requiring use of a confidential intermediary to access adoption records was reversed, and the case remanded to the trial court to issue an order allowing petitioner access to his records.



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Abandonment & Termination of Parental Rights

In the Matter of the Petition of J.A.V., No. 07CA2169, 2009 Colo. App. LEXIS (Colo. App. March 5, 2009):

Father appealed the district court's finding that he had abandoned his daughter and, based on that finding, granted stepparent's petition for adoption. The parties became involved in three cases, beginning with father's petition to modify parenting time and for the appointment of a child and family investigator (CFI), followed by mother's petition—which was granted—for a restraining order against father that prohibited any contact with daughter and limited contact with mother to email regarding daughter's well-being and emergencies. In the final case, the stepfather initiated a step-parent adoption proceeding, which was granted, and which the biological father appealed.

Father argued that the allegation that he intentionally abandoned his daughter was not supported by clear and convincing evidence, but rather demonstrated his attempts to exercise his parental rights. C.R.S. § 19-5-203(1)(d)(II) allows stepparent adoption if the biological parent has abandoned the child for at least a year prior to the filing of petition for adoption. In establishing abandonment for a stepparent adoption proceeding, the clear and convincing evidentiary standard is used because of the liberty interest in the parent-child relationship at stake. *See In re I.R.D.*, 971 P.2d 702, 705 (Colo. App. 1998). The court here held that abandonment is a "question of intent," and that in determining the intent, the trial court must look at the "totality of the circumstances," and may not find abandonment unless the circumstances indicate the parent has left the child willfully and without intent to return. The trial court found that the father had failed to pursue a relationship or access to his daughter "in spite of a clear court record that ability to have access to the child was afforded by the court."

The court of appeals disagreed, finding that the evidence did not support that conclusion, as the father was under a court order prohibiting contact with the child for most of the one-year period and did file for allocation of parental responsibilities. The court found error in the district court's application of the definition of abandonment, and that regardless of whether the father might have done more to exercise his parental rights, the record shows that he did not intend to abandon his rights. The court also found that the impact of the trial court's stay of the modification of parental responsibilities case was significant—if that case had not been stayed, the father may have been awarded parenting time and the magistrate could not have later found that he abandoned his child. The appellate court concluded that the magistrate erred in proceeding with the stepparent adoption without a decision of father's motion for parenting time. Although the court agreed that the father could have been more aggressive in his exercise of parental rights, it held that a "determination of abandonment was precluded by the efforts he made in the parental responsibilities case."

The court of appeals reversed the order terminating father's parental rights, and remanded the case for resolution of father's petition for parental responsibilities.

Domestic Relations — Military Disability Benefits

In re the Marriage of Obremski and Williamson, No. 07CA2432, 2009 Colo. App. LEXIS (Colo. App. February 19, 2009):

Wife appealed the trial court's order denying her request to divide the military Temporary Disability Retired List benefits being paid to husband. The parties' marriage was dissolved in 2001, and the court entered orders for husband to pay child support and maintenance, and that husband's future "pension/retirement benefits shall be evenly divided." When husband was diagnosed with multiple sclerosis, he was placed on the Temporary Disability Retired List (TDRL), and his monthly pay was reduced, from $5400/month to $1629/month. Husband filed a motion for modification of child support, and wife opposed the modification and requested that husband's TDRL be divided 50-50, treated as pension/retirement benefits. Husband's motion was granted by the trial court, and wife's request for 50-50 division of the TDRL benefits was denied. Wife appealed.

The court of appeals, finding that the appeal presented a mixed question of law and fact, reviewed the trial court's factual findings regarding husband's TDRL benefits for abuse of discretion, but reviewed de novo the issue of whether benefits are divisible under the original permanent orders. As to the issue of husband's TDRL benefits, the court of appeals found that military retirement benefits are usually distributable as marital property, but distributable benefits are limited to "disposable retired pay." TDRL benefits are provided when a member of the armed forces is diagnosed with a disability rating of 30% or greater, and the disability is not immediately diagnosed as permanent. 10 U.S.C. § 1202 (2008). TDRL placement is distinguishable from retirement benefits, being limited to five years duration and generally available to all members of the military, while retirement benefits require 20 years of military service.

Wife argued that divisibility of TDRL benefits depended on whether they were considered "retirement benefits" by the military, that they should qualify as retirement benefits subject to distribution, and pointed out that there was no Colorado law on the issue. The court held, however, that if the TDRL benefits were "disability retirement benefits," they were not distributable regardless of whether the military considered husband "retired." Further, the court of appeals found helpful the analysis in *In re Marriage of Franz*, 831 P.2d 917 (Colo. App. 1992), where the husband was on TDRL at the time of dissolution. There, the permanent orders of the court provided that if the husband's status should change to allow him "regular" retirement pay, it would be considered marital property and subject to distribution. When the husband in *Franz* was placed on permanent disability retire-

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ment, his wife was awarded one-half of his non-VA benefits. The court of appeals held that all benefits "based and computed on" a member's disability are excluded from division as marital property. Here, the trial court found that husband's military benefits were based and computed on his disability. Because retirement status requires twenty years of service, the appellate court held that husband would be ineligible for any military retirement benefits "but for his disability," and therefore the benefits were not divisible as marital property. Further, the court found that husband's waiver of a portion of his benefits, in order to receive VA disability benefits, did not affect its holding because the waived benefits were also disability benefits. Whether the benefits came under VA disability or other military disability benefits was found to be "immaterial" by the appellate court because "no such benefits are available for distribution as marital property under 10 U.S.C. § 1408(a)(4)."

Child Support and Disability Payments

In re the Marriage of Guillar, No. 07CA2224, 2009 Colo. App. LEXIS (Colo. App. March 19, 2009):

Mother appealed the district court's order crediting father with an overpayment of child support and sanctioning her for failing to disclose income. The court of appeals affirmed in part and reversed in part.

When their marriage was dissolved in 2000, mother was granted primary custody and father was to pay $420 monthly in child support and maintain health coverage for the child. In 2005, mother sought contempt charges against the father for failure to pay child support and medical expenses, seeking to garnish father's wages. Father objected and filed a motion to modify child support, providing evidence that due to mother's disability, she had been receiving Social Security payments on behalf of the child because she was disabled. The magistrate found that mother's disability payments were the child's income and reduced the child's need for support. The magistrate therefore found that father had overpaid his child support obligation, and reduced the amount of child support arrearages payable by father. Further, the magistrate held that mother intentionally did not notify father about the Social Security payments and should not profit from her deceit, and ordered mother to pay father's attorney fees. This effectively reduced father's arrearages owed to zero. The district court adopted the magistrate's order. Upon its review, the court of appeals held that the district court's review of the magistrate's factual findings and judgment is appellate in nature, and the court of appeals' role is "similar to a second level of appellate review."

The court of appeals rejected mother's argument that the magistrate made a mistake of law in finding the disability payments were part of the child's income. The court, focusing on the subsections of Colo. Rev. Stat. § 14-10-115, held that the General Assembly addressed two situations where disability payments might affect child support (where custodial parent receives benefit payments because noncustodial parent is disabled, noncustodial parent's payment is reduced by amount of benefits, and where child or custodial parent receives benefit payments because child's stepparent is dead or disabled, such payments are not treated as child's income) but did not directly address the situation in this case—where a parent may receive Social Security Disability benefits, on his/her own behalf or on behalf of the child, because she becomes disabled.

The issue before the court of appeals was whether the disability benefits "actually received by a parent" due to his/her disability refers only to benefits conferred directly upon the parent (and therefore part of parent's gross income calculation), or if it includes benefits received by a parent on behalf of the child. If the payments are treated as gross income of the mother, the father's child support payments would be reduced proportionately, but not eliminated, because mother's income would have increased while father's remained the same. Treating the benefits as the child's income, however, would reduce father's obligation on a dollar-for-dollar basis. The appellate court held that the phrase "actually received" in subsections (7)(a)(I)(A) and (16.5) refers only to "the disabled parent's own disability benefits." It does not include disability benefits the disabled parent receives on behalf of the child. Therefore, the child's disability payments in this case were rightly not included in determining the mother's gross income. In calculating the child support obligation, a court may reduce payments "by an amount that represents 'the reduction in need'" when the child's income

diminishes the child's basic needs. The trial court is not bound to a strict formula for reduction of support obligation, but rather "must determine to what extent such income reasonably should be applied to reduce parental support." The court of appeals held that the magistrate, governed by sub-sections (2)(b)(I) and (11)(b), "expressly found" the child's need was reduced by the disability payments and did not abuse his discretion by deciding that father's child support should be reduced "by the entire amount of the child's disability payment," and that father had therefore overpaid. The court of appeals affirmed the district court's adoption of the magistrate's decisions on these issues.

Other Notable Cases

State v. Moreno, 2009 UT 15 (Utah February 20, 2009):

Utah's Supreme Court deemed unconstitutional state laws allowing courts to order drug tests for parents of children in delinquency proceedings. The court held that a court order requiring parent(s) to participate in drug tests constitutes a search under the Fourth Amendment, and that the order here for juvenile's father to submit to drug testing violated his Fourth Amendment protections from unreasonable search and seizure. U.S. Cont. amend. IV. While the government may have an interest in requiring a parent to submit to drug testing, the burden of establishing probable cause was not found to outweigh the privacy interest of the parent. Therefore, the court order for the father to undergo drug tests was unreasonable and unconstitutional.

In re Nolan W., 45 Cal. 4th 1217 (Cal. 2009):

Mother appealed juvenile court's contempt judgment and sentence of 300 days in custody as a result of her failure to enter drug treatment—a stipulation of her reunification plan. The Court of Appeal reversed the judgment, holding that it was an abuse of the juvenile court's discretion, and the California Supreme Court agreed with the Court of Appeal's finding. It granted cert to determine if the juvenile court had authority to order mother to a substance abuse program as a component of the reunification plan, and if the Welfare and Institutions Code section 213 gave the court authority to hold mother in contempt and place her in custody for failing to enter that substance abuse program. As to whether the juvenile court had authority to order mother into a substance abuse program, the court held that it did have that authority. As to the second question, of whether contempt sanctions are available as punishment for failure to comply with a reunification plan, the court found that they were not.

The state agency filed a juvenile dependency petition asserting that the mother had failed to protect her child as a result of her substance abuse. Mother consented to participation in a reunification plan, which included her enrollment in substance abuse treatment. The trial court instructed mother that her failure to comply with the substance abuse program could result in being held in contempt and sentenced to five days in jail for each violation. After multiple violations of the program, the court found the mother in contempt (on 60 counts of noncompliance) and sentenced her to a total of 300 days in jail.

The court found well-settled that reunification programs are voluntary, and therefore participation by an unwilling parent cannot be compelled. The California statutory scheme outlines the available remedies for failure to comply with a reunification plan, and the court found no evidence that the legislature intended to allow use of incarceration as a sanction for non-compliance. Cal. Welf. & Inst. Code §§ 361.5, 366.21, 366.22 (2009). The legislature gave juvenile courts "broad discretion to fashion reunification orders" to resolve issues that resulted in the dependency proceeding. In this case, although the juvenile court properly ordered mother into a treatment program, the parties and court disagreed as to how that order could be enforced. The juvenile court's local rules outlined sanction standards for each violation of court-ordered substance abuse treatment, and a study indicated that incarceration is frequently imposed.

The supreme court held that "not every violation of a court order is subject to punishment as a contempt of court," and that the contempt power serves to "protect the dignity of the court in the exercise of its jurisdiction," but it "does not extend to punishing violations of substantive law" where those violations do not offend the dignity or functioning of the court. Citing California case law, the court maintained that while the juvenile court's authority over a delinquent or dependent minor is direct, its authority over respondent parents is ancillary. A court order to follow a reunification plan "directs the parent to do and refrain from doing many things," substantially affecting his/her life. The supreme court found no case delineating

the extent of a juvenile court's authority to utilize contempt sanctions for parent's noncompliance with reunification orders in California. Further, parents do not come under the court's jurisdiction due to being convicted of a crime, but rather to protect custody of their children. In dependency cases, the juvenile court's intervention is to protect the child, "not to punish the parent." The court held that parent's participation in the reunification plan is voluntary, and cannot be forced upon a parent who becomes unwilling to participate. While the agency in this case argued that a parent's participation becomes compulsory once treatment services are ordered, it failed to provide any case law or statute that would support that claim, and the court declined to accept the agency's contention that a parent "cannot change her mind." Because the court found the contempt order against the mother to be "purely punitive," it found it to be criminal in nature and beyond the scope of the juvenile court's discretion to enforce compliance with mother's reunification plan.

The California Supreme Court affirmed the ruling of the court of appeal, but limited the holding "to the use of contempt power to punish a parent's failure to satisfy a condition imposed simply to facilitate reunification." Justice Baxter filed a separate opinion, concurring in part and dissenting in part.

CASE TO WATCH:

People v. Gabriesheski, NO. 07CA1016, Sept. 4, 2008 – Many entities, including the NACC and the American Bar Association, are expected to file amicus curiae briefs in this case. The Supreme Court granted cert in this case on April 30, 2009. The OCR will be filing an amicus brief in the case.

Benefits of a Degree:

Average lifetime income for a high school graduate is $1.2 million, compared to $2.1 million for a bachelor's degree, and $1.6 million for an associate's degree.

Annually, associate's degree holders earn an average of $8000 more than high school graduates, with bachelor's degrees netting an average of $23,300 more than high school graduates each year.

*Information from the United States Census Bureau survey (2000 and 2003)

FEDERAL LEGISLATION

Information on Federal Legislation can be found at ***http://thomas.loc.gov/***

- Economic Recovery Package includes funds for TANF and Extension of TANF (approx. $2.8 billion)
- S.B. 244: Senators Bond and Murray– Education Begins at Home Act, providing $500 million for early childhood home-visiting for prevention of abuse and neglect

Federal College Financial Aid Changes for 2009-2010 Benefit Foster Care; Homeless, Unaccompanied; Emancipated; Legal Guardianship Youth

For the 2009-2010 Free Application for Federal Student Aid (FAFSA/Title IV, HEA program), these groups are considered independent and do not have to report parent income:

- Individuals who had no living parent (biological or adoptive) at any time since they turned age 13, even if now adopted
- Individuals who were in foster care at any time since they turned age 13, even if no longer in foster care as of today
- Emancipated minors or minors in legal guardianship at any time since the individual turned age 13, even if no longer a dependent/ward of the court as of today
- Individuals verified as unaccompanied youth who are homeless children or at risk of being homeless

*Note that the financial aid administrator may require individuals to provide proof of their status. For more information, contact the college financial aid office, CollegeInvest at 303-376-8800 or 800-448-2424, or go to www.fafsa.ed.gov.

STATE LEGISLATION

For more Information on the legislative session see http://www.leg.state.co.us/. The General Assembly ended on May 6, 2009, and this is only a small segment of the many legislative changes from the past session. Several changes occurred at the end of session in this year's House and Senate, with the resignation or retirement of several elected officials; in the Senate President Sen. Groff has resigned to take a position with the Obama administration. Newly appointed Sen. Michael Johnston will fill his vacancy in Senate District 33. Majority Leader Sen. Shaffer will become President, and Sen. Morse will become Majority Leader. Sen. Jennifer Viega has resigned, and Pat Steadman was appointed to her seat in the Senate Distric 31. Rep. Gwyn Green has retired, and Max Tyler was appointed to her seat in House District 23. Rep. Anne McGihon has resigned and Rep. Daniel Kagan was appointed to her seat in House District 3.

Bills of Interest:

HB 1078– Sen. Hodge, Rep. Ryden–Foster parent training for IEP's–requires the department to make Foster parent training available on IEPs. (Signed by the Governor on 3/19/09.)

HB 1044–Sen. Morse, Rep. Roberts–concerning expungement of records relating to the a criminal matter for which a juvenile is sentenced as a juvenile after being charged by direct file. Juvenile who is charged as an adult in a direct file case is eligible for expungement of JD records/ eligible to petition the court for expungement. (Signed by the Gov. on 3/18/09.)

HB09-1122–Rep. Roberts, Sen. Morse–expands eligibility to allow certain offenders at 18 or 19, and who are sentenced prior to 21 to be sentenced to the system, allows court to sentence after 19th birthday, as long as before 21st birthday. (Signed by the Gov. on 4/02/09.)

HB09-1314–Rep. Judd, Locked Doors in Day Treatment Centers–Allows day treatment centers to use locked doors in order to protect the public and others in treatment. The bill was killed in Senate Health and Human Services.

HB09-1306 Sen. Renfroe, Rep. Nikkel - Youth Corrections Facilities Reporting–Requires employees of the department of human services (department) to file an incident report any time a youth in the youth corrections system in the department claims to have been injured as a result of child abuse or neglect, the inappropriate use of force or restraint, or an assault by another person in the facility that is facilitated by a facility employee. This bill was killed in committee.

HB09-1321–Rep. Levy, Sen. Morse–The bill is the result of two instances in 2008 where a juvenile was killed or harmed in an adult facility while awaiting trial. The federal act that controls this area of law is scheduled to be renewed in 2009 and contains very similar language as found in HB 1321. The bill was significantly amended in the House Judiciary Committee. As passed, the bill requires the district attorney and defense counsel to make a reasonable attempt to consider the appropriate place of pretrial confinement within 30 days after charges are direct filed. The bill also lists specific factors that must be considered by the district attorney and defense counsel when considering the place of confinement. (Signed by the Gov. on 6/1/09.)

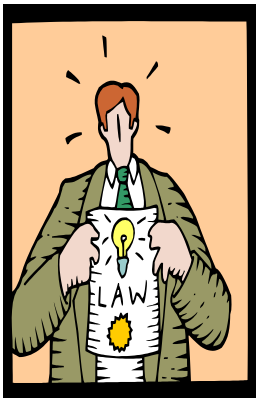
SB 09-69–Court Appointed Parenting Coordinators, Sen. Boyd and Rep. McCann–provides for parenting coordinator immunity if appointed by the court and within scope of duties, specifies when PC may be required to testify (if parties have agreed in writing) or produce records (to the extent necessary to determine a claim against a party or PC). (Signed by the Gov. on 4/16/09.)

SB 09-79 Sen. Newell, improving the well-being of children in the foster care system by improving the ability of birth siblings to maintain long term connections, allows potential adoptive parents to consider and present to the court information concerning whether a child is bonded with an adult who is willing to raise the child; considers the child's attachment to his or her psychological parent when deciding permanent placement; plans for sibling groups to have continued contact; allows confidential intermediary access to D&N records. (Signed by the Gov. on 3/25/09.)

SB 09-104 Sen. Sandoval– For youth leaving foster care, requires the city or county responsible for a youth in foster care to provide youth with documents such as social security card and birth certificate. (Signed by the Gov. on 5/2/09.)

SB 164 Sen. Newell, Rep. Miklosi -Creates the Child Welfare Training Academy–requires DHS to create rules to establish a training academy, IDs job titles that shall be required to attain certification from the academy as mandatory condition of academy. (Signed by the Gov. on 5/19/09.)

SB 268–Sen. Tapia, Rep. Pommer–Budget Reduction Bill, clarifies the appointment of a GAL to exceptional/extraordinary circumstances in truancy cases, requires indigency findings for both parties in order to qualify for state pay CFI/CLR, clarifies appointments in delinquency proceedings. (Signed by the Gov. on 5/1/09.)



www.votekids.org– tracks legislation affecting children at federal and state levels

BLOGS

http://jonathanturley.org/ - legal news from noted constitutional law scholar (and frequent MSNBC contributor); voted #1 legal theory blog by readers of ABA Journal

www.thecompletelawyer.com — posts on career issues as well as quality of life topics for all lawyers

employmentlawpost.com/thatswhatshesaid/ — tracking the potential litigation claims from the NBC series, "The Office"

RESOURCES

Articles and periodicals are on file in the OCR library. Stop by the office or call Melanie to check out materials.

Journal of the Association of Family and Conciliation Courts: Family Court Review, Volume 47, Number 1 (January 2009)—Special Issue: *Mediation and Conferencing in Child Protection Disputes.*

Maria Sullivan, *The LGBT Community Continues the Fight for Equal Rights*, ABA The Young Lawyer, February-March 2009, at 2 (considering the discrimination and challenges faced by LGBT persons in marriage, adoption, and domestic violence). *See also* The ABA Commission on Sexual Orientation and Gender Identity: www.abanet.org/dch/committee.cfm?com=CC103270.

B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children, 2nd Edition; available online at www.abanet.org/abastore.

ARTICLES

Articles and periodicals are on file in the OCR library. Stop by the office or call Melanie to check out materials.

- Eli Wald, *Attorney-Client Communications in Colorado*, The Colorado Lawyer, April 2009, at 59. (Discussing the relevant provisions in Colorado Rules of Professional Conduct governing attorney-client communications— Colo. RPC 1.2, 1.4, 1.6, 1.13, and 1.5.)
- Tamar Lewin, *Supreme Court to Address Meeting the Needs of Special-Education Students*, N.Y. Times, May 30, 2009, at A14 (reviewing the upcoming Supreme Court decision on the appeal of *Forest Grove School District v. T.A.*, No. 08-305).
- Jim McElhaney, *Persuasive Direct*, ABA Journal, January 2009, at 22 (discussing creative approaches to direct examination of witnesses, including use of leading questions and the present tense).
- Mark S. Kiselica, *Reaching Nonresident Fathers in the Child Welfare System: Understanding Male Help-Seeking Behaviors*, 27 ABA Child Law Practice 161 (2009) (addressing barriers to father involvement, practice tips for engaging fathers, and a "check-up" for child welfare agencies); part of a series: "Engaging Fathers"
- Christine A. Coates, *What in the World is Parenting Coordination?*, Boulder County Bar Newsletter, February 2009, at 1.
- Richard Fullerton, *The Ethics of Mediation-Arbitration*, The Colorado Lawyer, May 2009, at 31.

Conferences

Family Law Institute Conference on Domestic Relations Law in Times of Economic & Family Crisis: August 7-9, 2009, Breckenridge, CO. Register by phone (303-860-0608) or online (www.cobar.org/cle)

NACC Conference: August 19-22, 2009, Brooklyn, N.Y.. See naccchildlaw.org for registration information.

AFCC 47th Annual Conference: June 2-5, 2010, Sheraton Denver, CO

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National Adoption Day, celebrating adoption and raising awareness of opportunities to adopt:

November 21, 2009; www.nationaladoptionday.org

OFFICE OF THE CHILD'S REPRESENTATIVE

1580 Logan St., Suite 340
Denver, CO 80203

Phone: 303-860-1517
Fax: 303-860-1735
E-mail: resourcecenter@coloradochildrep.org

Check out the web site

www.Coloradochildrep.org

- Russell P. Butler, *Child Victims Need Lawyers Too: Tips for Child's Counsel in Criminal Cases*, 27 ABA Child Law Practice 177 (2009) (discussing the role of the child's counsel and the differences between GALs and attorneys for children, as well as practice tips).

- Theresa Sidebotham, *An Overview of Special Education Law* (a two-part article), The Colorado Lawyer, January 2009 & March 2009, at 25 and 59, respectively (discussing IDEA (Individuals with Disabilities Education Improvement Act), section 504 of the 1973 Rehabilitation Act, and specific challenges for children in the child welfare and juvenile justice systems).

- Online Tutorial: *Substance Use Disorders, Treatment, and Family Recovery: A Guide for Legal Professionals*, developed by the National Center on Substance Abuse and Child Welfare and the ABA Center on Children and the Law; available at: http://www.ncsacw.samhsa.gov/tutorials/tutorialDesc.asp?cid=3

Congratulations to ***Andrew Allen,*** who won the Karl Ranous Professionalism Award. It is awarded annually based on nominations from the practicing bar in Gunnison to the attorney who has most exemplified professionalism in their practice in the previous year. Andrew lives in Crested Butte, performing GAL and respondent parents' counsel services in the Gunnison area.

Congratulations to ***Simone Jones***, Director of Broomfield and Adams Counties CASA who received the National CASA award in April, 2009. Simone helped found the CASA program in these counties in 1999, and her work has allowed the number of children served by CASA to more than triple.

Congratulations to ***Jeff Koy***, who was presented the GAL of the Year aware at the 2009 Colorado Summit on Children, Youth and Families. Jeff is the Director of Litigation at Rocky Mountain Children's Law Center, where he has worked for 10 years, and provides GAL services in Adams and Jefferson counties.