

# **Preserving Issues for Appeal in Dependency and Neglect Cases**

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Colorado Court of Appeals**

**8/3/16 C.A.R. 3.4 training**

## **I. Preservation Generally**

- Know what appellate Issues are likely to arise and how to preserve them
  - Remember that what you don't preserve in the trial court will likely not be reviewed in the appellate court
1. Anticipate what the possible appellate issues are that are likely to occur as you are preparing your case for hearing or trial. This will help you know what pre-trial issues you may need to raise as well as identify those you can anticipate arising during your hearing/trial. For instance, is there a witness on the opposing party's witness list who you may want to keep from testifying? Will you want to challenge the admissibility of an exhibit?
  2. To properly preserve each issue for appeal you need to:
    - i. Make a timely objection. Be specific about the bases for your objection. Failing to do so may limit what the appellate court will review.
    - ii. Be clear what it is you are asking the court to do and why you believe you are entitled to that relief-Strike testimony or an exhibit? Give a limiting instruction? Declare a mistrial? Grant a continuance? Etc.
    - iii. Make sure that the court has ruled on your objection. If necessary, bring the lack of a ruling to the court's attention and ask for a definitive ruling. If the court has deferred or conditionally ruled on a pre-trial motion

make sure you have finalized the record regarding that issue during your hearing/trial.

- iv. Make sure the record reflects how you believe the error has impacted your client.
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- 3. Make sure that any off the record and bench discussions are memorialized. Informal jury instruction conferences are efficient and helpful. However, the record often does not thoroughly capture those off the record discussions. Bench conferences are often difficult to hear or have transcribed if the court and parties do not take care to ensure the party speaking is identified and voices are loud enough to be recorded.
  - 4. Jury instructions are a ripe area for review. But you must ensure that the record includes any specific objections you have to any of the instructions. Be specific about what you believe the language in an instruction should be. Tender as an exhibit any instruction which you have asked the court to give to the jury but the court has refused-make sure it is included as part of the court record. Once you approve an instruction that the court gives to the jury you may have foreclosed the opportunity on appeal to argue that the instruction was erroneous.
  - 5. Keep track of what issues arise during the case so that you or appellate counsel will be able to easily identify them
  - 6. Note the dates of hearings which relate to particular issues you are likely to raise on appeal so that you can more easily and completely complete the Designation of Record. Don't simply order every hearing! Be attentive to which hearings are necessary to address the issues you intend to raise.

## **II. Consequences of a Failure to Preserve**

- One of the worst things you can read in an opinion is that an issue that you felt was a strong one was not considered by the appellate court because it was not adequately preserved
- There may be splits between divisions as to what the consequence of failing to preserve an issue may be—we won't review the issue at all; we will exercise our discretion to review it to avoid unjust results
- Below are examples of D&N cases where preservation, or lack thereof was an issue

A. Generally, issues not raised in the trial court will not be considered on appeal. *People in Interest of T.E.R.*, 2013 COA 73, ¶ 30 (305 P.3d 414, 419 (Colo. App. 2013)); *People in Interest of D.P.*, 160 P.3d 351, 355-56 (Colo. App. 2007); *People in Interest of V.W.*, 958 P.2d 1132, 1134 (Colo. App. 1998).

1. For example, the reviewing court will not consider mother's argument that APR to father was not in the child's best interests when mother agreed to it at trial. *People in Interest of N.A.T.*, 134 P.3d 535, 537 (Colo. App. 2006).
2. Currently a split exists in the COA as to whether a parent's failure to object the appropriateness of a treatment plan will preclude review: *People in Interest of M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005) and *People in Interest of D.P.*, 160 P.3d 351, 354 (Colo. App. 2007), for the proposition that **if** a parent does not object to the adequacy of a treatment plan at the time of its adoption, he or she is deemed to have acquiesced in any inadequacies in the plan; *People in Interest of S.N-V.*, 300 P.3d 911, 916 (Colo. App. 2011), cited for the proposition that agreement to a treatment plan does *not* preclude later challenging the adequacy of the plan.

3. *People in Interest of K.B.*, 2016 COA 21, a very recent case in which the inextricable linkage between the adequacy of a parent's treatment plan and the adequacy of the services provided to implement that plan was discussed. See especially paragraphs 16-21.
  4. But the appellate court may address otherwise waived issues if necessary to avoid manifest injustice. *Robinson v. City & County of Denver*, 30 P.3d 677, 684-85 (Colo. App. 2005); *People in Interest of A.E.*, 914 P.2d 534, 539 (Colo. App. 1996).
  5. And a challenge to a court's subject matter jurisdiction is not waivable and may be raised for the first time on appeal. *People in Interest of N.D.V.*, 224 P.3d 410, 414 (Colo. App. 2009).
- B. A party seeking review of a magistrate's decision must raise the issue before the district court to preserve it for appeal. *People in Interest of K.L-P.*, 148 P.3d 402, 403 (Colo. App. 2006).
- C. Constitutional issues must be raised in the trial court to be raised on appeal. *Catholic Charities in Interest of C.C.G.*, 942 P.2d 1380, 1384 (Colo. App. 1997).
1. However, we may elect to address alleged violations of fundamental constitutional rights when fully briefed by the parties. *People in Interest of C.E.*, 923 P.2d 383, 384 (Colo. App. 1996).
- D. An appellate court will not consider issues raised for the first time in the reply brief. *People in Interest of E.I.C.*, 958 P.2d 511, 524 (Colo. App. 1998).

- E. A contention is not properly before the appellate court (and will not be addressed) if the appellant does not identify supporting facts, make specific arguments, or set forth specific authorities. *People in Interest of D.B-J.*, 89 P.3d 530, 531 (Colo. App. 2004).