MOTIONS PRACTICE FOR GUARDIAN AD LITEMS (GALs) APPOINTED FOR JUVENILES IN DELINQUENCY CASES

By Diana Richett

A. Standing and authority for GALs to file motions

1. By statute:

   a. §19-2-1301(3)(b): The competency of the juvenile to proceed may be raised by motion of the prosecution, probation officer, **guardian ad litem**, or defense, made in advance of the commencement of the particular proceeding.

   b. §19-1-306(2)(a): The court, on its own motion or the motion of the juvenile probation department, the juvenile parole department, the juvenile, a respondent parent or guardian, or a **court-appointed guardian ad litem,** may initiate expungement proceedings concerning the record of any juvenile who has been under the jurisdiction of the court.

   c. §19-3-501(1): Whenever it appears to a law enforcement officer or **other person** that a child is or appears to be within the court's jurisdiction as provided in this article, the law enforcement officer or other person may refer the matter to the court which shall have a preliminary investigation made to determine whether the interests of the child or of the community require that further action be taken.

2. By Chief Justice Directive (CJD) 04-06 V.E.2.: Present independent information relevant to the juvenile's best interests through oral or written recommendations, **motions** or other acceptable means consistent with the court's appointment orders and the GAL's statutory authority and ethical obligations in a manner that does not jeopardize the legal interests or due process rights of the juvenile.

B. Competency:

1. Authority to investigate and assess:

   a. By statute §19-2-1301(3)(b);

b. By CJD 04-06 V.E.3e.: The independent investigation by a GAL for a juvenile shall assess whether there is reason to believe that a juvenile is incompetent to proceed.

2. The importance of assessing competency: Competency is the cornerstone of other substantive rights fundamental to due process.

   a. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's behalf or to remain silent without penalty for doing so." Riggins v. Nevada, 504 U.S. 127, 139-40 (1992). See also: Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

   b. Children facing charges and adjudication as a delinquent are entitled to the same fundamental due process rights as criminal defendants as set forth in In re Gault, 387 U.S. 1 (1967). As recognized by many states, including Colorado, the exercise of these fundamental rights is meaningless unless the juvenile is competent to proceed.

3. Standards and definitions of competency:

   a. Under the standards for competency enunciated by the United States Supreme Court, a competent defendant or juvenile must have the ability to understand the nature and possible consequences of the charges, the trial process, the participants' roles, and the accused rights, the ability to participate with and meaningfully assist counsel in developing and presenting a defense, as well as the ability to make decisions to exercise or waive important rights. See: Dusky v. United States, 362 U.S. 402 (1960) (The test is whether a defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has "a rational as well as a factual understanding of the proceedings against him."); Drope v. Missouri, 420 U.S. 162 (1975) (The Court also emphasized that to be competent, the defendant must be able to "assist in preparing his defense."

b. §19-2-1301(2): Statutory definition of "incompetent to proceed" for juveniles is the same definition for adults in criminal proceedings as set forth in §16-8.5-101(11).

    1) "Incompetency to proceed": As a result of a mental disability or a developmental disability, the juvenile does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that as a result of a mental disability or developmental disability, the juvenile does not have a rational and factual understanding of the criminal proceedings. §§19-2-1301(2); 16-8.5-101(11).

    2) "Developmental disability": A disability that has manifested before the person reaches twenty-two years of age, that constitutes a substantial disability to the affected individual, and is attributable to mental retardation or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation. §16-8.5-101(9).

    3) "Mental disability": A substantial disorder of thought, mood, perception, or cognitive ability that results in marked functional disability, significantly interfering with adaptive behavior. It does not include acute intoxication from alcohol or other substances or any condition manifested only by antisocial behavior or any substance abuse impairment resulting from recent use or withdrawal. However, substance abuse that results in a long-term, substantial disorder of thought, mood or cognitive ability may constitute a mental disability. §16-8.5-101(12).

4. Limitations on the GAL's ability to assess competency:

    a. The GAL is not in a position to completely assess the ability of the juvenile to participate with and meaningfully assist counsel in

presenting and developing a defense due to the limitations on confidentiality between the juvenile and the GAL as well as this area being the domain and responsibility of defense counsel. See: People v. Gabriesheski, 262 P.3d 653 (Colo. 2011) (GAL's client is the best interest of the child and therefore, the attorney-client privilege and obligations of confidentiality do not extend to communications between the GAL and the child.); CJD 04-06 V.E.1. *Commentary* (In interviewing the juvenile, the GAL's responsibilities do not include litigating the facts related to the charges or providing legal advice to the juvenile, and the GAL's interview and ongoing contact with the juvenile should not involve communication that is the responsibility of defense counsel, such as discussion about the facts of the case, advice about case objectives or information about legal strategy.).

5. Determining "reason to believe" that the juvenile is incompetent:

    a. At the initial meeting with the juvenile and any meetings with the juvenile and his parent/guardian, the GAL may determine the ability of the child to explain and understand the following:

        - The name and nature of the alleged offense and his understanding of the charge;

        - The seriousness of the charge;

        - What a trial is and the purpose of a trial;

        - Possible pleas and what would follow with each plea: for example, understanding that a trial would follow with a plea of not guilty while after a plea of guilty, the juvenile would be sentenced;

        - Whether a person who believed he was guilty could plead not guilty;

        - The possible sentencing options;

- The roles of defense counsel, the judge, the district attorney and the guardian ad litem;

- The juvenile's legal rights, for example, his presumption of innocence, his right to testify or not testify and the effect of each;

- How he believes he can help his lawyer defend him, for example, by telling his attorney the truth or by telling his attorney about any witnesses;

- What a plea bargain is, why the district attorney might offer a plea bargain, why the client might take or turn down a plea bargain and the risks associated with each; and,

- Why a juvenile might choose to have an attorney represent him and whether his attorney can tell others what the juvenile told him.

b. Gather collateral information:

- How is the child doing in school and does the child have an individualized education program (IEP);

- Has the child had a previous psychological or neuropsychological evaluation and what was the reason for the referral;

- Does the juvenile have previous mental health diagnoses, is he on medication, has he been previously hospitalized; has the juvenile been in treatment before and if so, what were the presenting concerns and what was the outcome;

- Has the child been determined to be developmentally disabled due to his IQ and adaptive functioning;

- Are there prior social services involvements and if so, what were the presenting concerns? Did the juvenile have previous

placements? Was he subject to any abuse including substance use by the mother in utero; and

- Ask the parents how the child functions at home and in other areas; do they have any developmental concerns.

6. Resources:

Thomas Grisso, Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice. (2005).

Thomas Grisso, et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 LAW & HUM. BEHAV. 333 (2003) (also known as the MacArthur Juvenile Competency Study): In this study, abilities associated with adjudicative competence were assessed among 927 adolescents (ages 11 to 17) in juvenile detention facilities as well as community settings and compared to those of 466 young adults (ages 18-24) in jail and in the community. The results of the study found that approximately one-third of 11 to 13 year olds and approximately one-fifth of 14 to 15 year olds are as impaired in capacities relevant to adjudicative competency as are seriously mentally ill adults likely to be found incompetent to stand trial by clinicians who perform evaluations for courts.

C. Evaluations

1. Raising mental health issues and services: §19-2-710

a. When raised and by whom: At any stage of the proceeding, if the court, the prosecution, the probation officer, the guardian ad litem, the parent or legal guardian has reason to believe that the juvenile could benefit from mental health services, the party shall immediately advise the court.

b. Procedure when the issue is raised:

1) Once advised, the court shall immediately order a mental health screening of the juvenile pursuant to §16-11.9-102, unless the

court has sufficient information to determine whether the juvenile could benefit from mental health services or unless a mental health screening of the juvenile has been completed within the last three months.

2) If the mental health screening indicates that the juvenile could benefit from mental health services, the court may order a mental health assessment.

a) The assessment at a minimum shall include an opinion regarding whether the juvenile could benefit from mental health services;

b) If the assessment concludes that the juvenile could benefit from mental health services, the assessment shall identify the juvenile's mental health issues and the appropriate services and treatment.

c. When the GAL believes it necessary, the GAL should request a more comprehensive psychological evaluation with projective testing or a neuropsychological evaluation.

2. Raising Developmental Disability and Procedure: §§19-2-508(3)(b)(I) and 19-2-906(2)

a. If the court has reason to believe that the juvenile may have a developmental disability, the court shall refer the juvenile to the community-centered board in the designated area **where the action is pending** for an eligibility determination.

b. When referring the juvenile to the community-centered board for an eligibility determination for developmental disabilities, the GAL will typically need the following information or documentation and consequently request the necessary evaluations:

1) Completed application obtained from the community-centered board;

2) Cognitive ability testing or psychological evaluation that measures the juvenile's I.Q.;

- To qualify as developmentally disabled most boards require an I.Q. of around 70 or below.

3) Adaptive behavior testing such as the Vineland;

- To qualify, the juvenile must have deficits or impairments in at least two areas of adaptive functioning, for example, communication, daily self-care, and social/interpersonal skills.

D. Protective orders:

1. Purpose: It may be in the juvenile's best interests to cooperate with and participate in evaluations, assessments, and subsequent treatment. Protective orders allow the juvenile to meaningfully participate in the evaluations and treatment yet afford him some protections under the Fifth Amendment privilege against self-incrimination such that his statements will not be used against him.

2. Authority for protective orders:

   C.R.S. §19-1-114: The court may make an order of protection in assistance of, or as a condition of, any decree authorized by the Children's Code and may set forth reasonable conditions of behavior to be observed by any other person who is a party to a proceeding brought under title nineteen.

   People v. District Court for 17th Judicial District, 731 P.2d 652 (Colo. 1987): The juvenile court in a dependency and neglect action had the authority to join the district attorney and law enforcement as parties and issue protective orders preventing them from questioning parents about alleged sexual abuse, and prohibiting use of statements made to therapist during the course of court-ordered treatment in any criminal proceeding. The court order expressly excluded any disclosure of future criminal conduct or past conduct unrelated to the treatment plan.

   C.R.S. §19-2-710(6): Evidence or treatment shall not be admissible on the issues raised by a plea of not guilty unless the juvenile places his

mental health at issue. If the juvenile places his mental health at issue, then either party may introduce evidence obtained as a result of a mental health screening or assessment.

C.R.S. §19-2-1305(3): Any evidence obtained during a competency evaluation or during treatment related to the juvenile's competency or incompetency is not admissible on the issues raised by a plea of not guilty.

People in Interest of C.Y., 275 P.3d 762 (Colo. App. 2012): C.R.S. §19-2-1305(3) provides the juvenile, who was found incompetent and not restorable, with immunity that is coextensive with the immunity provided by the Fifth Amendment privilege against compelled self-incrimination.

C.R.S. §19-3-207(2.5): A juvenile's statement to a professional made in the course of treatment ordered by the court (in a dependency and neglect case) shall not, without the juvenile's consent, be admitted into evidence in any criminal or juvenile delinquency case brought against the juvenile, except the privilege shall not apply to statements regarding future misconduct.

People in Interest of B.C. [unpublished case]. District Court order on Judicial Review (October 12, 2001): District court judge held in judicial review that the protections afforded by §19-3-207 in the dependency and neglect context can be applied in the delinquency context. The court concluded that the protection afforded by this statute was a reasonably necessary protection and met the requirements of C.R.S. §19-1-114 and therefore, extended these protections to a juvenile undergoing offense-specific treatment as a term and condition of his probation in a delinquency case.

E. Dependency and Neglect Filings pursuant to §19-3-501

1. Purpose in the request to order the Division/Department of Social Services to file a dependency and neglect action:

    a. To place the focus on the family and comprehensively address issues in the family with the safety and protection of the child being of paramount concern rather than focusing on the juvenile primarily and issues of public safety;

b. For juveniles who are at risk for commitment to the Division of Youth Corrections and may turn eighteen (18) years old during their commitment, and those who are almost eighteen years old and may need services to adulthood or are developmentally disabled. Youth, between the ages of eighteen (18) and twenty-one (21) years, are vulnerable to becoming homeless, being exploited and may fall through the cracks of the system without the safety net of a dependency and neglect action, which must be filed before the youth turns eighteen, and concomitant services by the Department/Division. The Department of Social Services can assume custody of the youth until he turns twenty-one years old and is eligible for adult services.

2. Procedure:

a. The GAL may file a motion pursuant to §19-3-501(2) requesting that the court order the county division of social services to file a dependency and neglect petition.

b. The motion should set forth the facts specific to the juvenile's case and situation including prior social services contacts which indicate that the juvenile has suffered abuse and that his best interests require that he be protected from the risk of further abuse.

c. The motion should emphasize that the issues in the family cannot be adequately addressed through a delinquency action alone.

d. Even though the juvenile is placed out of the home through the delinquency action, the juvenile as well as other family members could still be at risk if the juvenile is allowed to return home. See: People in Interest of D.L.R., 638 P.2d 39 (Colo. 1981) (Child may be adjudicated neglected or dependent based on a showing of prospective harm to the child if placed with the parents.).

F. Motions to obtain and have the Division/Department of Social Services pay for services

1. Authority for court orders for the Division/Department to pay for services, support the child and pay a monthly monetary amount to the physical custodian to provide for the welfare of the child:

    a. The juvenile court has exclusive jurisdiction over the juvenile and therefore, the court has the authority to determine the appropriate custody, placement and care for the child. See: §19-1-104(1)(a); People in Interest of J.H., 770 P.2d 1355 (Colo. App. 1989); City and County of Denver v. Juvenile Court, 511 P.2d 898 (Colo. 1973).

    b. In exercising this authority on behalf of a child within its exclusive jurisdiction, the court must consider first and foremost the best interests and welfare of the child. City and County of Denver v. Juvenile Court, supra.

    c. In general, it is the responsibility of the state and county departments of human services to provide child welfare services to dependent and neglected children **and** children, who if such services are not provided, are likely to become neglected or dependent. See: §§26-5-101(3) and 26-5-102(b) (Upon appropriate request and within available appropriations, child welfare services shall be provided for any child residing or present in the state of Colorado who is in need of such services.).

    d. In making determination regarding the care and placement of the child, the court is vested with the authority to direct the county social services department to provide child welfare services as well as the accompanying authority to order the department to pay for these services. See: People in Interest of J.H., supra. (Court has the authority to direct local social services department to pay for the costs of private placements even when the local department does not have custody of the child.); People in Interest of T.W., 642 P.2d 16 (Colo. App. 1981) (Court had authority to place the child in an out-of-state placement and require the State Department of Social Services to pay 80% of the funding.); City and County of Denver v. Brockhurst Boys Ranch, 575 P.2d 843 (Colo. 1978) (Juvenile court had the authority to enforce its order of support by entry of a money judgment in favor of boys ranch for reimbursement for costs of maintaining the child.); Heim v. District Court, 575 P.2d 850 (Colo. 1978) (Court had

jurisdiction to enter custody order placing a juvenile in a private facility and directing the county department of social services to pay the costs of the private treatment.).

e. As the child's legal custodian, the Division has the legal responsibility for the support of the child. Under the Children's Code, the court has jurisdiction to compel the Division to support the child and pay sums that are reasonable and which promote the child's welfare. People in Interest of R.J.G., 557 P.2d 1214 (Colo. App. 1976) aff'd City and County of Denver v. Brockhurst Boys Ranch, 575 P.2d 843 (Colo. 1978); §§19-6-101, 19-6-104 and 19-6-105.