

THE ROLE OF THE GUARDIAN AD LITEM IN RAISING AND DETERMINING COMPETENCY OF JUVENILES IN DELINQUENCY CASES

A. Standing and authority for GALs to raise competency

1. By statute: §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.
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. Further, the independent investigation by a GAL for a juvenile shall assess whether there is reason to believe that a juvenile is incompetent to proceed. See: CJD 04-06 V.E.3e.

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

1. "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).
 - a. 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.

C. Standards and definitions of competency and other relevant definitions:

1. 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."
2. §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).
 - a. "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).
 - b. "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).

- c. “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).
- 3. “Competency evaluation”: A court-ordered examination of a juvenile either before, during or after trial, directed to developing information relevant to a determination of the juvenile’s competency that is performed by a competency evaluator and includes evaluations concerning restoration to competency. §16-8.5-101(5).
- 4. “Least Restrictive Environment”: An environment that represents the least departure from the normal patterns of living and that effectively meets the needs of the person receiving services. Least restrictive environment may include, but need not be limited to, receiving services from a community-centered board, service agency or a family caregiver in the family home. §27-10.5-102(24).
- 5. “Restoration services”: Services designed to restore the competency of a juvenile, who has been determined by the court incompetent to proceed but may be restored to competency. The services are based upon the recommendations in the competency evaluation unless the court makes specific findings that the recommended services in the evaluation are not justified. §19-2-1303(2).
- 6. “Restoration hearing”: A hearing to determine whether a juvenile who has previously been determined to be incompetent to proceed has become competent to proceed. §§16-8.5-101(13); 19-2-1304.
- 7. “Management plan”: Once the court determines that the juvenile is incompetent to proceed and cannot be restored to competency, the court may consider a management plan for the juvenile taking into account the

public safety and the best interests of the juvenile. The management plan, at a minimum, addresses treatment for the juvenile, identifies the parties responsible for the juvenile, and specific appropriate management tools. The management plan may include placement options included in article 10 (now article 65) or 10.5 of title 27, C.R.S.; a treatment plan developed by a licensed mental health professional; an informed supervision model; institution of a guardianship petition; or any other remedy deemed appropriate by the court. §19-2-1304(3).

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

1. 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.).

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

1. 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.

2. 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.

3. 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 court.

F. Competency Evaluations

1. Standard: “If the court feels that the information available to it is inadequate for making such a finding (preliminary finding of competency/incompetency) it shall order a competency evaluation.” §19-2-1302(1)
2. Requirements:
 - a. Must be done by a licensed psychiatrist or licensed psychologist who is experienced in the clinical evaluation of juveniles and trained in forensic competency assessments or a psychologist/psychiatrist in forensic training and under supervision. §19-2-1302(4)(b)
 - b. Must at a minimum include an opinion as to whether the juvenile is competent to proceed and if the evaluator opines that he is incompetent to proceed, the evaluation must include a recommendation as to whether the juvenile may be restored to competency and identify appropriate restoration services. §19-2-1302(4)(c)
 - c. Must be done in the “least-restrictive environment” taking into account public safety and the best interests of the juvenile. §19-2-1302(4)(a).
3. Additional competency evaluations
 - a. Unlike adults in criminal proceedings, juveniles in delinquency proceedings have neither a statutory or constitutional right to a second evaluation at state expense. See: People in Interest of W.P., 295 P.3d 514 (Colo. 2013).
 - b. The Juvenile also has the right to refuse to participate in any competency evaluations. The Fifth Amendment privilege against self-incrimination is not limited in scope to inculpatory statements or confined to a particular proceeding. See: Estelle v. Smith, 451 U.S. 454 (1981); Minnesota v. Murphy, 465 U.S. 420 (1984); People v. Branch, 805 P.2d 1075 (Colo. 1991). The Juvenile also cannot be penalized for asserting his Fifth Amendment privilege and refusing to

participate in any evaluations. People in Interest of A.D.G., 895 P.2d 1067 (Colo. App. 1984).

4. Protective orders:

- a. 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. §19-2-1305(3)

G. Competency Hearing

1. Who can request a competency hearing:

- a. Only the defense counsel or the prosecuting attorney: The prosecuting attorney or the defense counsel may request a hearing on the preliminary finding by filing a written request within ten (10) days. . . Upon the timely written request of either the prosecuting attorney or defense counsel, the court shall hold a competency hearing. §19-2-1302(2).

2. Participation at a competency hearing:

- a. GAL has no party status, therefore, no right to ask questions or raise objections as that is the function of the defense counsel or prosecuting attorney. §19-1-111(2.5) and (3)
- b. GAL may be called as a witness. §16-8.5-110: In any hearing at which competency is an issue, witnesses not specially trained in psychiatry or psychology and not testifying as expert witnesses may testify as to their observations of the juvenile's actions and conduct or conversations that they have had with the juvenile bearing upon his mental condition. Any such witness shall be permitted to give their opinions or conclusions concerning the juvenile's competency.

H. Restoration services:

- 1. Whose responsibility is it to obtain these services?
- 2. Who provides the services and what is the "service" being provided?

- a. While only a licensed psychologist or psychiatrist or one in forensic training and under the supervision of such a licensed professional can conduct evaluations and render opinions on the competency of the juvenile, the statute fails to specify the qualifications of the individuals who can perform restoration services, the training of such providers as well as any standards for the curriculum that can be used. See: §19-2-1302(4) which permits a mental health professional to certify that the juvenile has been restored and is “mentally competent to proceed.”
 - b. There are no standards for the curriculum or the “Competency Workbook”: Are there inaccuracies/inadequacies, for example, in the descriptions of the possible pleas/what those pleas mean, trial decision/verdicts, explanation of certain rights like the Fifth Amendment, the nature of the relationship between the Juvenile and his attorney, the decisions that are made by the Juvenile and the attorney and how the Juvenile can assist the attorney. Is there a component in the curriculum that appears to help the Juvenile in reasoning and making important decisions about waiver of rights and for example, whether to accept a plea bargain or proceed to trial.
 3. These services must be provided in the “least restrictive environment taking into account the public safety and the best interests of the juvenile.” §19-2-1303(2). See also: S.B. 17-012 which requires that the provision of these services and the juvenile’s participation in the services occur in a timely manner.
 4. What will be the impact of S.B. 17-012 on restoration services for juveniles?
- I. Management Plans when the Juvenile is determined to be incompetent and not restorable. §19-2-1303(3)
1. Court must determine whether a management plan for the juvenile is necessary, taking into account the public safety and the best interests of the juvenile.
 2. If a management plan is unnecessary, the court may continue any treatment or plan already in place for the juvenile.

3. If a management plan is necessary:
 - a. Juvenile must be placed in least restrictive environment taking into account the public safety and the best interests of the juvenile.
 - b. Management plan must include:
 - 1) Treatment for the juvenile;
 - 2) Identification of the party responsible for the juvenile; and
 - 3) Specification of appropriate behavior management tools.
 - c. Management plan may include:
 - 1) Placement options included in article 10 or 10.5 of title 27;
 - 2) A treatment plan developed by a licensed mental health professional;
 - 3) An informed supervision model;
 - 4) Institution of a guardianship petition;
 - 5) Any other remedy deemed appropriate by the court. People in Interest of C.Y., 275 P.3d 762 (2012): Psychosexual evaluation may be part of the management plan. Juvenile, **who was found incompetent and not restorable**, had immunity under §19-2-1305(3) that is coextensive with the immunity provided by the Fifth Amendment's privilege against compelled self-incrimination.