

JUVENILE CASE LAW UPDATE

Survey of Colorado Case Law

2017-2018

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TABLE OF CONTENTS

I. The ICWA Division

II. Tips for ICWA Compliance

III. Indian Child Welfare Act (ICWA)

- a. 2018 COA 75, No. 17CA1534. **People in Interest of I.B.-R.**, May 17, 2018, __ P.3d __. 2018 WL 2252940.
ICWA - Notice
- b. 2017 COA 135. No. 17CA0182. **People in Interest of C.A.**, October 19, 2017, __P.3d__, 2017 WL 4684217.
Court Inquiry Requirements — Documentation of Efforts
- c. 2017 COA 139. No. 16CA1916. **People in Interest of D.B.**, November 2, 2017, __P.3d__, 2017 WL 4993456.
Expert Testimony Requirements
- d. 2017 COA 153. No. 17CA0070. **People in Interest of K.G.**, November 30, 2017, __P.3d__, 2017 WL 5907340.
ICWA in Allocation of Parental Responsibilities
- e. 2018 COA 11. No. 17CA0339. **People in Interest of J.L.**, January 25, 2018, __P.3d__, 2018 WL 549509.
ICWA Notice Requirements
- f. 2018 COA 27. No. 17CA0608. **People in Interest of L.H.**, February 22, 2018, __P.3d__, 2018 WL 1008140.
Required Notice to Affiliated Tribes
- g. 2018 COA 58. No. 17CA460. **People in the Interest of E.R.**, April 18, 2018, __ P.3d __, 2018 WL 1959477.
ICWA in Non-removal Cases

IV. Jurisdiction

- a. 2018 CO 31, No.16SC970, **People in Interest of G.S.**, April 30, 2018, 416 P.3d 905 (Colo. 2018).
No jurisdiction to appeal a dismissal order
- b. 2018 COA 10. No. 17CA0255. **People in Interest of M.R.M.**, January 25, 2018, __P.3d__, 2018 WL549503.
Appealable orders — Untimely Appeal
Cert Granted, judgment vacated, question whether only appeal after entry of APR order.
- c. 2017 CO 105, No. 16SC731. **People in the Interest of J.W.**, December 11, 2017, __P.3d__, 2017 WL 6329749.

Jurisdiction to terminate – Formal Written Advisement

- d. 2017 COA 119, **People in the Interest of C.L.T.**,
September 7, 2017, 405 P.3d 510, (Colo. App. 2017).
UCCJEA

V. Miscellaneous Issues

- a. 2017 CO 111. No. 16SC638. **C.K. v. People**,
December 18, 2017, 407 P.3d 566.
Sovereign immunity — Award of Attorney’s Fees
- b. 2018 COA 50, No. 17CA0952. **People in the Interest of C.Y.**,
April 5, 2018, ___ P.3d ___, 2018 WL 1633271.
Judges – Impartiality
- c. 2018 COA 2, No. 16CA2159. **Romero v. Colo. Dep’t of Human Servs.**,
January 11, 2018, 417 P.3d 914.

VI. Delinquency

- a. 2017 COA 22. No. 16CA1446. **People in Interest of J.C.**,
February 22, 2018, ___P.3d___, 2018 WL 1007922.
Sentencing — Indeterminate Sentence at DYC is Illegal
- b. 2017 COA 138. No. 16CA1382. **People in Interest of T.C.C.**,
November 2, 2017, 410 P.3d 805.
Victim Credibility — Fee Waiver Based on Indigence
- c. 2018 CO 16. No. 14SC190. **Ybanez v. People**,
March 12, 2018, ___P.3d___, 2018 WL 1247019.
Post-Conviction Relief — Appointment of a GAL

VII. Adjudication

- a. 2017 COA 144. No. 17CA0049. **People in Interest of M.M. and P.M. III**,
November 16, 2017, ___P.3d___, 2017 WL 5494041.
No-Fault Grounds of Adjudication — Summary Judgement and Disputed Facts
- b. 2018 CO 34, No. 16CA287, **People in the Interest of L.M.**,
April 30, 2018, 416 P.3d 875, (Colo. 2018).
*After adjudication of D&N, cannot seek to terminate parental rights through
relinquishment procedures.*

VIII. Termination of Parental Rights

- a. 2018 CO 8, No. 17SC412. **People in the Interest of C.W.B.**,
February 5, 2018, 410 P.3d 438, (Colo. 2018).
Standing to Appeal – Foster Parent Interveners
- b. 2017 CO 105, No. 16SC731, **People in the Interest of J.W.**,
December 11, 2017, ___P.3d___, 2017
*Contrasts personal vs subject matter jurisdiction in the absence of an
adjudicatory finding*

- c. 2018 COA 57, No. 17CA404, **People in the Interest of L.M.**,
April 19, 2018, __P.3d__ 2018 WL 1959546.
Treatment was based on sex offender management board and RF was found not guilty
- d. 2017 COA 160, No. 16CA2238. **People in the Interest of S.L.**,
December 28, 2017, __ P.3d ____ 2017, WL 6614235
In Camera Interview – Due Process
- e. 2017 COA 157, No. 16CA2072. **People in the Interest of C.J.**,
December 14, 2017, 410 P. 3d 839 (Colo. App. 2017).
Kinship Placement – Due Process
- f. 2018 COA 45, No. 17CA0652. **People in the Interest of B.C.**,
March 22, 2018, __ P.3d ____, 2018 WL 1427203.
Dependency and Neglect – Criteria for Termination appropriate treatment plan approved by the court.
- g. 2017CA1075. **People in the Interest of A.K.C. and D.L.C.**,
May 3, 2018, Not Reported in P.3d, 2018 WL 2066780.
In Camera Interviews – Parental Due Process

I. The ICWA “Remand” Division

- a. **We are remanding for compliance instead of reversing for noncompliance.**

II. Tips for Compliance with ICWA

- a. In the D&N petition/TPR motion, state what efforts were made to determine whether the child is an Indian child. That is, describe what inquiries were made, to whom, and the answers to these inquiries. Do not rely on boilerplate language or your own conclusion that this is not an ICWA case.
- b. State what efforts/inquiry was made **ON THE RECORD** at the next hearing. Let the relative/respondent parent/RPC respond.
- c. Make this inquiry at the person’s first appearance. Sometimes, folks don’t stay around for later proceedings so we cannot tell if a proper inquiry was made.
- d. If there is a “reason to know/believe,” but a specific Tribe is not identified, then notify all of the Tribes in the ancestry group. Beware of the list of Apache Tribes. I am not sure it is complete.
- e. If a Tribe was not notified and the case is on appeal, consider motioning the COA for a limited remand early in the briefing schedule.

- f. A parent's failure to complete an ICWA affidavit does not satisfy the inquiry provisions of state/federal law.
- g. If there is a reason to know/believe, then the potentially affected Tribes make the call as to whether the child is an Indian child.

III. Indian Child Welfare Act (ICWA)

- a. *What is the duty and content of notice to the Bureau of Indian Affairs (BIA) under ICWA?*

In *People in Interest of I.B.-R.*, 2018 COA 74, the Court concluded that where a parent reports a connection to an unknown Native America Tribe in a state with no designated tribal agents, the department of human services must notify the BIA of the parent's report, and the notice the department sends to the BIA must include the state that the parent identified. Although the Department notified some tribes and the BIA, the notice was inadequate. Further, the trial court did not make the required inquiry of the participants as to all of the children after the Department initiated the proceeding to terminate parental rights. Therefore, the division remanded the case to the trial court for the limited purpose of ensuring compliance with ICWA.

- b. *Must the court inquire as to whether there is a reason to know that a child is an Indian child at a termination hearing, even though it made this inquiry at a previous hearing?*
- c. *Must the Department document what efforts it made to determine whether a child is an Indian child in a termination motion?*

In *People in Interest of C.A.*, 2017 COA 1355, the Department initiated a dependency and neglect proceeding after it learned that C.A. tested positive to various drugs at birth. At the initial temporary custody proceeding, the court asked the parties generally if the child was a Native American child and if the child had any Native American or Indian heritage. Father said that he did not, and mother offered no response. Based on the parent's admissions, the court adjudicated C.A. dependent and neglected, and adopted treatment plans for mother and father.

Later, the Department moved to terminate both mother and father's parental rights. In its motion, the Department asserted that it had made "appropriate inquiries to determine that the child is not subject to [ICWA]," but it did not disclose "what efforts" it had made to determine whether the child was an Indian child required by C.R.S. § 19-1-126(1)(c)). After a contested hearing, the court terminated the parent-child legal relationship between C.A. and the parents. Mother then appealed and argued, among other issues, that the trial court did not comply with ICWA.

The Court of Appeals stated that 25 C.F.R. § 23.107(a) (2016)) requires that "state courts must ask each participant in . . . a child custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record."

The COA held that even though the trial court made an initial inquiry about whether the child "had Native American heritage," because it failed to make a proper inquiry of each participant during the termination proceeding, the record did not demonstrate compliance with ICWA.

The Court of Appeals stated a second reason why the record did not demonstrate ICWA compliance was the lack of documentation of "what efforts" the Department made to determine whether the child is an Indian child in the termination motion. *See* C.R.S. § 19-1-126(1)(c)).

Accordingly, the COA remanded the case with instructions to conduct a proper inquiry of each participant under ICWA.

- d. *Must a qualified expert expressly opine as to whether a child is likely to suffer serious emotional or physical damage in the parent's care to satisfy ICWA?*

In ***People in Interest of D.B.*, 2017 COA 139**, the Department initiated a dependency and neglect proceeding and assumed temporary custody of D.B. after he tested positive for marijuana at birth. Both mother and father indicated they were members of the Navajo Nation and believed the child was eligible for membership. The Department sent notice of the proceeding to the Navajo Nation. The Navajo Nation then verified D.B. was eligible for enrollment and began participating in the case.

The court adjudicated D.B. dependent and neglected, adopted a treatment plan for mother, and returned custody of the child to the parents. But two months later mother went to a casino and left D.B. with an acquaintance; after being taken to detox she could not remember where she had left D.B., so the court placed the child in the Department's custody. Later, the Department moved to terminate mother's parental rights.

At the termination hearing, the ongoing caseworker testified about mother's continual drug use, domestic violence issues, homelessness and her refusal to receive free housing, lack of understanding of D.B.'s needs, and missed visits with D.B. The Department also presented testimony from a qualified expert witness under ICWA, a social worker with Navajo Children and Family Services. The Navajo Services social worker testified that mother had not fulfilled her treatment plan requirements and that she was concerned about the parent's recent domestic violence issues.

Among other things, the juvenile court found that continued custody of the child by one of the parents would likely result in serious emotional or physical damage to the child due to the parents' extensive substance abuse, extensive domestic violence, lack of housing, and lack of income to meet the child's needs. Therefore, the court terminated mother's parental rights.

On appeal, mother argued that in order to comply with ICWA, a qualified expert witness must explicitly testify that the continued custody of the child by mother would likely result in serious emotional or physical damage to the child. After analyzing the BIA guidelines, the relevant statutory provision, Colorado case law, and other jurisdictions, the Court of Appeals ultimately rejected mother's argument and upheld the trial court's decision to terminate her parental rights.

The court of appeals reasoned that though 25 U.S.C. 1912(f) states that a court may not terminate parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, *including testimony of qualified expert witnesses*, that the continued custody of

the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” the statute does not mandate the expert to recite the specific statutory language. Rather, expert testimony must constitute some of the evidence that supports the court’s finding of the likelihood of serious emotional or physical damage to the child. *See Marcia V. v. State*, 201 P.3d 496, 508 (Alaska 2009)); *Stephen H. v. Ariz. Dep’t of Econ. Sec.*, 190 P.3d 180, 186 (Ariz. 2008)).

In turn, the COA held that the record, read as a whole, contained sufficient evidence, including the testimony of a qualified expert mentioned above, to support the trial court’s finding that D.B. would likely suffer serious emotional or physical damage if placed in mother’s care. The trial court’s judgment was affirmed.

e. Is an allocation of parental responsibilities subject to ICWA?

In *People in Interest of K.G.*, 2017 COA 153, the district court adjudicated the minor children K.G. and A.R. dependent and neglected, and placed them with their maternal aunt and uncle. Shortly thereafter the Department filed a Family Services Plan that stated (1) A.R.’s father did not report any Indian heritage, (2) K.G.’s father reported that his mother was one quarter Cherokee, and his maternal grandfather was one half Cherokee Choctaw, and (3) the Department planned to notify the Bureau of Indian Affairs and appropriate Indian tribes.

The following year the Department moved for an allocation of parental responsibilities to the aunt and uncle. The court granted the APR motion, and did not address the applicability of ICWA. Mother then appealed the APR order.

The COA explained that an allocation of parental responsibilities that removes an Indian child from the child’s parent or Indian custodian is subject to ICWA. See 25 U.S.C. 1903(1)(i) (2012)); 25 C.F.R. § 23.22. As applied to *K.G.*, the COA stated that because the proceeding was involuntary, it removed the children from mother for placement in the home of a guardian, and mother could not have her children returned to her upon demand, the APR was subject to ICWA.

Colorado’s ICWA-implementing legislation requires trial courts and child welfare agencies to inquire into children’s Indian heritage and send notice to appropriate tribes. *See* C.R.S. § 19-1-126(1)(2)). The statutory guidelines require that the ICWA inquiry, of whether each party knows or has reason to know that the child is an Indian child, occurs at the commencement of the child-custody proceeding with all responses on the record. 25 C.F.R. § 23.107(a) (2016)). If there is insufficient evidence to make a determination that a child is an Indian child, the court must confirm with the Department that used due diligence to identify and work with the tribes for which there is reason to know that the child may be a member or eligible for membership. Further, the court must ensure that the Department sends notice of the proceeding to any identified tribe. C.R.S. § 19-1-126(2)); 25 C.F.R. §§ 23.107(b)(1), 23.111(a)).

Since there was no indication in the record that (1) anyone asked mother whether she knew or had reason to know the children were Indian children, (2) the court made the required inquiry as to any of the three parents, the GAL, and the Department, and (3) the Department sent the required notices to the Cherokee tribes on behalf of K.G., the APR proceeding clearly did not comply with ICWA's inquiry or notice requirements.

Therefore, the court remanded the case to conduct a proper inquiry and provide notice to the appropriate tribes under ICWA.

f. When must the Department send notice to a tribe in order to comply with ICWA?

In ***People in the Interest of J.L.*, 2018 COA 11**, mother appealed the trial court's order terminating her parent-child legal relationship with her children, J.L. and S.M. Mother's parental rights were previously terminated in regards to her third child, J.A. The Court of Appeals ultimately remanded the case because the Department did not comply with the inquiry or notice requirements of ICWA.

In child custody proceedings, both the petitioning party and the court have specific duties in order to honor tribes and comply with ICWA.

In order to fulfill its duties under ICWA, the petitioning party must make one of two disclosures in the petition or at the commencement of the proceeding: (1) that the child who is the subject of the proceeding is an Indian child and the identity of the Indian child's tribe or (2) what efforts the petitioning party has made in determining whether the child is an Indian child. C.R.S. § 19-1-126(1)(c)). Further, the Department must promptly notify *each* tribe in which the child may be a member or eligible for membership, because only the tribe itself may determine its membership. *People in Interest of L.L.*, 2017 COA 38, ¶¶ 20, 344. Departments must directly notify each concerned tribe by registered mail with return receipt requested of the pending child-custody proceedings and its right to intervene. *Id.* at ¶¶ 34-355; *see also* 25 C.F.R. 23.111(d)(1)(4)) (stating what information the notice must include).

At the termination hearing regarding J.A., mother indicated that both she and the father of J.A. and J.L. had Native American blood. The trial court then ordered her to file a relative affidavit identifying her tribal connections. At a later hearing, mother, who is an adoptee, indicated that she had Indian heritage either in "Sangre de Cristo de Pueblo in Taos, Aztec, or Kiowa" through her biological family. The Court of Appeals stated that mother's disclosures gave the court a reason to believe the children were Indian children. Even though mother did not submit her relative affidavit, the Department was not relieved of its duty to send notice.

The COA explained that a number of statements by the parties throughout the case gave the Department a "reason to believe" the children were Indian children, and triggered the Department to send notice to multiple Indian tribes. But the Department failed to do so, and in

turn did not fulfill the notice requirements mandated by ICWA, federal statute, and Colorado statute.

Further, the Department argued that since mother's counsel said "the ICWA relationship that mother had brought to the courts attention is not viable," it was relieved of its duties to inform the tribes. The Court explained that assertion was plainly wrong because it is for the tribes to decide whether the children were members or eligible for membership, not mother, counsel, or mother's biological family.

Since the record did not contain evidence that the Department sent notice to any tribes, the court remanded the case so the Department may comply with the notice requirements of ICWA.¹

- g. *When a parent's statement regarding possible Indian heritage encompasses a general reference to a tribe, must the Department also provide notice to tribes historically affiliated with that tribe?*

In ***People in the Interest of L.H.*, 2018 COA 27**, mother initially denied having Native American heritage, but later informed the Department that her brother is registered with "Navajo-Deni [sic]." Mother was unable to provide any further information about with whom her brother was enrolled. The Division then sent six separate notices to the Navajo Nation at six different addresses. The Navajo Office of Vital Records responded that there was no record of the family with the Navajo Nation, and therefore the child was not eligible for enrollment.

In turn, at the termination hearing, the court found that ICWA did not apply to the case. but on appeal the COA determined that the BIA's list of Tribal Agents by Affiliation shows that the Colorado River Indian Tribes were also tribes historically affiliated with the Navajo. Since mother's statement regarding her possible Indian heritage encompassed a general reference to the Navajo, not just the Navajo Nation, the Department was required to also notify the Colorado River Indian Tribes.

The Court of Appeals remanded the case for the limited purpose of directing the Department to send appropriate notice to the Colorado River Indian Tribes.

- h. *Whether a child, who is the subject of a child custody or emergency proceeding, but who is not placed out of the home, is subject to ICWA.*

In ***People in the Interest of E.R.*, 18COA58**, Mesa County Department of Human Services (Department) was granted emergency custody of a baby born premature. The child had been

¹ The COA also explained that the standard written advisement form (stating that the parent must advise the court if the child is an Indian child) provided by the Department, and signed by mother after the Shelter Hearing, "falls far short" of the 2015 Guidelines requirement to inquire and certify on record whether there is any information to suggest the child is an Indian child. See *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Fed. Reg. 10,152; 25 C.F.R. § 23.107(a). However the holding of J.L. did not rely on this assertion by the Court of Appeals since the 2015 Guidelines were not binding on the trial court.

born in a hospital without an ICU and was transferred to a second hospital for treatment immediately after birth. When the hospital could not locate the parents to pick the child up, it contacted the Department. The Department later filed a petition in dependency and neglect and requested at the shelter hearing that the child be returned to his parents' care under the Department's supervision. The court granted the Department's request. Three months later, at an adjudicatory trial, the court adjudicated the child as to the mother based upon the testimony of the child's physician, who testified that the child had tested positive for methamphetamine at birth.

On appeal, the mother raised two issues. First, she argued that the physician's testimony as to the drug test results was inadmissible hearsay under CRE 703. The mother predicated her argument on the fact that the physician had received the drug test results secondhand from the hospital at which the child was born and argued that the test results could not be admitted for the truth of the matter. Second, the mother argued that the trial court erred in finding that ICWA does not apply to this case because the child had been returned to the mother's home. The court of appeals found that the drug test results were admissible under CRE 803(4), and further determined that once the trial court reached that conclusion as to admissibility, it was permitted to rely on them as substantive evidence.

Next, the court of appeals addressed the issue of ICWA applicability. Whether ICWA applies in a given proceeding is determined by answering two threshold questions: (1) Does ICWA apply to the proceeding? (2) Does ICWA apply to this child? In response to the first question, the court of appeals unequivocally stated that ICWA applies to any action that *may* result in a foster placement, whether or not a foster placement actually occurs. This includes child-custody proceedings, which the court defined as "any action, other than an emergency proceeding, that could result in a foster placement," as well as emergency proceedings or any other proceeding in which the child may be involuntarily removed or involuntarily placed. The court of appeals held that, notwithstanding the trial court's order to return the child home at the shelter hearing, ICWA still applied to the proceeding as it would have been within the court's power to order a foster placement. The trial court, therefore, had a statutory duty to answer the second question by inquiring of the participants whether any of them knows or has reason to know that the child is an Indian child. Rather than ask those questions, however, the trial court checked a box on a prepared order form stating, "The Indian Child Welfare Act of 1978 is not applicable because the child[] is not placed out of home." Four months later, the Department filed a family services plan that indicated that the mother had Native American heritage but did not know her tribe, and there is no record of any further inquiry being made. In light of this deficiency, the court of appeals reversed the disposition order and remanded the case to the trial court with instructions to make a proper inquiry under ICWA on the record.

IV. Jurisdiction

a. May the Department appeal a dismissal of a D&N?

In *People in Interest of G.S.*, 2018 CO 311, the juvenile court found the child was dependent and neglected as to mother, but a jury found the child was not dependent and neglected as to father. The juvenile court dismissed father from the petition. The Department appealed this dismissal. Citing 19-1-109(2), the COA dismissed the Department's appeal for lack of jurisdiction.

The supreme court affirmed, but based its holding on lack of finality under 19-1-109(1), which the court determined codified the general rule of finality whereas (2) provides certain exceptions to the general rule.

b. *When is an allocation of parental rights order final and appealable?*

In *People in Interest of M.R.M.*, 2018 COA 100, the Department removed the three minor children, M.R.M., M.M.M., and M.A.M. from their home with mother due to drugs, violence, and an injurious environment. The Department then filed a dependency and neglect petition, naming mother and M.M. (father to M.R.M. and M.M.M., and stepfather to M.A.M.) as respondents. The suspected biological father of M.A.M., J.H., lived in Florida and was contacted, but was never determined to be M.A.M.'s father, a party to the case, or even the presumed father.

Father M.M. moved from Florida to Colorado and sought custody of all three children shortly after the case began. The court placed the three children with him under the supervision of the Department. Two months later, father M.M. entered into a stipulated agreement and the court adjudicated the children dependent and neglected with respect to mother, and it adopted treatment plans for both mother and father M.M.

Shortly thereafter, father M.M. moved to modify the existing shared custody order with mother for M.R.M. and M.M.M., and to dismiss the dependency and neglect case. Father M.M. also requested custody of M.A.M., asserting he was her psychological parent. Six months later the juvenile court entered an order allocating parental responsibilities for all three children between mother and father M.M. Two weeks after the APR order, the court entered an order terminating its jurisdiction and closing the case. Mother then appealed from the last order.

The Court of Appeals dismissed mother's appeal for lack of jurisdiction because the appealable order was the APR order, and mother did not timely file. The COA explained that ordinarily a final order or judgement for purposes of appeal is one that ends the action, *People in Interest of O.C.*, 2012 COA 161, ¶ 88, however C.R.S. § 19-1-104(6)) authorizes a juvenile court to end the dependency and neglect proceeding and transfer jurisdiction over the child to the district court by: (1) entering an APR order for a child who is subject to a dependency and neglect proceeding if requested to do so by a party to the case, and if no child custody action concerning that child is pending in district court, and (2) filing a certified copy of the order in the county where the child will permanently reside.

Thus, when the court entered the APR order and filed a certified copy of the order in the district court, the APR order was final and appealable under C.R.S. § 19-1-104(6)). Mother then had twenty-one days to file a notice of appeal, but she failed to do so. Mother had a number of other contentions regarding paternity, ICWA, and subject matter jurisdiction, but none of them were properly before the court.

The supreme court vacated the COA's judgment, citing *G.S.*

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- c. *Does the UCCJEA require a trial court to make further inquiries to establish jurisdiction, although the court has received only limited information about the child welfare proceedings in other states?*

In *People in the Interest of C.L.T.*, 2017 COA 119, the Department placed C.L.T. in foster care after they received reports that the child was the subject of a sex abuse investigation by police in another jurisdiction, that the child had not been enrolled in school that year, the parents often used the child as an active participant in panhandling, and the family had a history of substance abuse, domestic violence, mental health problems, and involvement with child welfare authorities in other states. Shortly after the child was adjudicated dependent and neglected, mother moved out of state and stopped participating in her treatment plan. The Department moved to terminate the parental rights of both parents. The trial court found parents had failed to comply with the treatment, were unfit, and were not likely to become fit within a reasonable period of time. Mother appealed.

In the appeal, mother contends the trial court lacked jurisdiction to terminate her parental rights because a child welfare case remained open in Texas when the Colorado case was filed and the Colorado court could only exercise emergency jurisdiction unless and until it acquired ongoing jurisdiction under the UCCJEA. In the petition, the Department alleged the family had a previous child welfare case in Texas as well as a child welfare history in Tennessee, Alabama, North Carolina, Mississippi, and Oklahoma.

In Colorado, a court has temporary emergency jurisdiction to make a child custody determination under the UCCJEA if the child is present in Colorado and if either the child has been abandoned or the child is in need of protection. See C.R.S. § 14-13-204(1)). A court must then promptly investigate to determine whether it or a court in another state has ongoing-nonemergency jurisdiction by ascertaining whether a child custody proceeding has been commenced in another state, and, if so, whether a previous child custody determination has been made. If another state has an ongoing proceeding regarding the custody of the child or has entered a child custody order, the courts must communicate before continuing. See C.R.S. § 14-13-206(2)); *Brandt v. Brandt*, 2012 CO 33; C.R.S. § 14-13-1100.

A court has initial jurisdiction if it is the home state of the child, has a significant connection to the child, is determined to be the more appropriate forum, or is the last resort jurisdiction. *See* C.R.S. § 14-13-201(1)). Colorado has home state jurisdiction if it is the home state of the child at the commencement of the proceedings or was the child’s home state within the previous 182 days (6 months). C.R.S. § 14-13-201(1)(a)). A court has significant connection jurisdiction if the child has no home state and the child and at least one parent has a significant connection with Colorado, other than mere physical presence, and substantial evidence is available in Colorado concerning the child’s care, protection, training, and personal relationships. C.R.S. § 14-13-201(1)(b)). A Colorado court can be determined to be the more appropriate forum if the home state declines to exercise their jurisdiction. C.R.S. § 14-13-201(1)(c)). If none of the aforementioned jurisdictions apply, the Colorado court can take jurisdiction as a last resort. C.R.S. § 14-13-201(1)(d)). A Colorado court can modify a child custody determination only if the court has jurisdiction and the court of the other state has determined it no longer has exclusive continuing jurisdiction and that Colorado would be a more convenient forum. C.R.S. § 14-13-2033.

The Court of Appeals held that the trial court did not have sufficient information to determine whether it had jurisdiction to enter permanent orders. When a court has insufficient information to make a determination as to jurisdiction under UCCJEA, the court may stay the proceeding until the necessary information is furnished and may require a party to provide additional information under oath. C.R.S. §§ 14-13-209(2)); (3). Since the trial court was made aware of other possible proceedings at the onset of the case and did not take any steps to remedy jurisdictional questions under UCCJEA, the COA does not have sufficient information to determine whether the court had jurisdiction to enter orders terminating mother’s parental rights. The court vacated the trial court judgment and remanded for further proceedings to determine jurisdiction.

V. Miscellaneous Issues

a. Does sovereign immunity bar an award of attorney’s fees against a public entity?

In [C.K. v. People, 2017 CO 111](#), the Department removed C.K.’s child from his home and filed a dependency and neglect petition. Throughout the case, without court intervention, C.K. and the Department engaged in discovery. In one instance, the Department answered C.K.’s request for production of documents, but C.K. alleged it was deficient. C.K. then filed a motion to compel, which included a request for sanctions in the form of attorney’s fees under [C.R.C.P. Rule 37](#).

After a hearing, the trial court granted a partial award of attorney’s fees. Over time, the dependency and neglect case continued, and the court terminated C.K.’s parental rights. C.K. appealed the termination and the Department cross-appealed the prior award of attorney’s fees.

The Court of Appeals affirmed the termination of C.K.’s parental rights, but it reversed the award of attorney’s fees and held that sovereign immunity barred such an award against a public

entity. The Colorado Supreme Court then granted certiorari to consider the sovereign immunity issue.

The Supreme Court ultimately held that under Colorado law, sovereign immunity does not apply unless statutorily created, and since no such statute exists, sovereign immunity does not bar an award against a public entity for attorney's fees. See [C.R.S. § 24-10-102](#); [Medina v. State, 35 P.3d 443, 453 \(Colo. 2001\)](#); [Evans v. Bd. of Cty. Comm'rs, 482 P.2d 968, 972 \(Colo. 1971\)](#).

However, one issue that still remains on remand is whether the statute governing attorney's fees, [C.R.S. § 13-17-102](#), applies to proceedings governed by the Children's Code.

- b. Does a judge abuse her discretion when she does not recuse herself from a termination proceeding if she previously served as a guardian ad litem on a different case involving a parent's other child?*

In [People in the Interest of C.Y. and J.O., 2018 COA 50](#), the Department assumed custody of six-year old C.Y. after she witnessed domestic violence between mother and her boyfriend. J.O. was later added to the petition after he was born. Eventually, the Department moved to terminate mother's parent-child legal relationship.

On day two of the termination hearing, mother testified about her involvement in a prior dependency and neglect case in another county involving an older child. Based on mother's references, the juvenile judge alerted parties that she reviewed the file and realized that she had served as the GAL for mother's older child in the previous case and asked parties to make a record concerning whether she needed to recuse herself. Mother asked the judge to recuse herself while the GAL and the Department objected. The judge denied mother's request on the basis that she (1) had no specific memory of mother or the previous case; (2) had stopped serving as the GAL when the venue was changed; and (3) there was no conflict.

On day three of the termination hearing, the Department asked the court to take judicial notice of the findings and orders in the previous dependency and neglect case involving the older child. Mother renewed her request for the judge to recuse herself from the termination proceeding based on the appearance of impropriety. The court declined to take judicial notice of the case stating it erroneously listed her as the GAL in the minute orders up to the time of termination and again denied mother's request for recusal.

The Court of Appeals determined that the judge did abuse her discretion in determining that there was no appearance of impropriety that necessitated recusal based on these facts. A judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. See *C.J.C. 22.11(A)*. While a judge might be able to act impartially in a particular case, he or she must nevertheless recuse himself or herself when a reasonable observer might have doubts about the judge's impartiality. [People in the Interest of A.G., 262 P.3d 646, 650 \(Colo. 2011\)](#). Although the judge did not represent a party to this

particular case, the previous dependency and neglect case was highly relevant to this proceeding. Under these circumstances, the judge presiding over the termination proceeding created the appearance of impropriety. The COA reversed and remanded for a new hearing.

In **Romero v. Colo. Dep't of Human Services**, 2018 COA 2, during the discovery process for the administrative appeal of a finding that Romero had sexually abused his grandchildren, Romero invoked his Fifth Amendment right to remain silent on the advice of his attorney. During closing arguments at a hearing before an administrative law judge, Larimer County requested that the ALJ make an adverse inference regarding the questions that Romero declined to answer based on his invocation of the Fifth Amendment. The ALJ declined to do so, and reversed the conclusion that Romero was responsible for sexual abuse of his grandchildren.

Larimer County appealed the ALJ's order to the Department, which reversed the ALJ and made its own determination to apply the adverse inference analysis to the facts found by the ALJ. A division of the Court of Appeals affirmed, holding that the Department correctly applied an adverse inference from Romero's invocation of his Fifth Amendment rights to its analysis of whether the evidence supported Larimer County's finding of sexual abuse.

VI. Delinquency

- a. May a juvenile court sentence a juvenile to an indeterminate term of DHS commitment?*
- b. When is a mandatory minimum term of DHS commitment permitted?*

In [People in the Interest of J.C., 2018 COA 22](#), pursuant to a global plea agreement, the juvenile, J.C., pleaded guilty to charges in three separate cases during a singular hearing that addressed the three cases on the same day. The charges were (1) third degree assault, (2) second degree trespass, and (3) second degree assault. The court accepted the pleas and adjudicated J.C. delinquent in all three cases.

At the sentencing hearing for the three cases, the prosecutor requested that the court sentence J.C. to DYC custody for two years, and that J.C. be sentenced as a "mandatory offender," since two of the three adjudications were violent offenses. The court then sentenced J.C. to a mandatory minimum of one year, but up to two years, commitment to DYC. Corresponding orders to DHS also stated that J.C. was found to be a "mandatory sentence (third time) offender pursuant to [C.R.S. § 19-2-908](#)."

J.C. then filed a motion to correct an illegal sentence under [Crim P. 35\(a\)](#), and argued that the court lacked authority to sentence her as a mandatory sentence offender because all three adjudications required for the statute to apply occurred at the same hearing. The court denied her motion, and stated that nothing in the record indicated that J.C. was sentenced as a mandatory sentence offender, but rather that the court had imposed the mandatory one year, and maximum two years, in DYC based on the totality of the circumstances.

J.C. then filed a motion for post-conviction relief alleging ineffective assistance of plea counsel, and that she had not knowingly, voluntarily, or intentionally pleaded guilty. The court denied her motion, and J.C. appealed.

After asking the parties to submit supplemental briefs about J.C.'s sentence and status as a mandatory sentence offender, the Court of Appeals held that J.C.'s sentence was illegal because courts are not permitted to sentence juveniles to indeterminate sentences, and J.C. did not qualify for mandatory minimum sentencing.

First, the COA explained that a court must sentence juveniles to determinate sentences due to the sentencing limitations imposed by the Children's Code, *see* [C.R.S. § 19-1-103\(40.5\)](#) (explaining a "determinate period" as a period of commitment imposed by the court that a juvenile is to complete). Section 19-2-921(3)(a) plainly states that a juvenile sentenced to DHS commitment must be for a "determinate period." Further, section 19-2-601(5)(a)(1) (same as section 19-2-921(3)(b)) states that a sentence to DHS commitment imposed on an aggravated juvenile offender to DHS shall be for a "determinate period." *See also* §§ 19-2-909(1)(a), 19-2-921(3)(c) (stating a juvenile adjudicated for an offense that would constitute a felony or misdemeanor if committed by an adult, and sentenced to DHS commitment, must be for a determinate period). Since juvenile sentences are required to be for fixed, definite periods of time, J.C.'s sentence of one to two years in DYC was illegal.

Second, the COA analyzed whether J.C. qualified for a mandatory minimum term of DHS commitment as a mandatory sentence offender, and ultimately determined that she did not qualify because the three adjudications occurred at the same hearing. Section 19-2-516(1) defines a mandatory sentence offender as a juvenile who "[h]as been adjudicated a juvenile delinquent twice . . . and . . . [i]s subsequently adjudicated a juvenile delinquent." Read with the mind's eye toward the purpose of the Children's Code, that is, to provide guidance and the rehabilitation of a delinquent child, the COA held that the General Assembly intended to provide juvenile offenders with an opportunity to learn from prior sentencing before facing enhanced sentencing for a third adjudication. *See* [People v. J.J.H., 17 P.3d 159, 163 \(Colo. 2001\)](#). The COA reasoned that since J.C.'s three adjudications occurred on the same day, she was not "subsequently adjudicated," and therefore she was not subject to a mandatory minimum term of commitment as a mandatory sentence offender.

The COA also evaluated whether J.C. qualified for a mandatory minimum term of DHS commitment as a repeat juvenile offender, and held she did not qualify for similar reasons as to why she did not qualify as a mandatory sentence offender. Section 19-2-516(2) defines a repeat offender as one who "has been previously adjudicated a juvenile delinquent and is adjudicated a juvenile delinquent for a delinquent act that constitutes a felony." Since, like section 19-2-516(1), the plain language of the statute implies a passage of time between the first adjudication and the latter, J.C. could not be sentenced to a mandatory minimum as a repeat juvenile offender because the three adjudications occurred at the same hearing.

In turn, the Court of Appeals vacated J.C.’s sentence and remanded the case for resentencing.

- c. Is it prosecutorial misconduct to make a statement about the victim’s credibility when it is based on evidence?*
- d. Must the court rule on fee waiver decisions based on indigence, or may it delegate this decision to probation based on the good behavior of a juvenile?*

In **People in Interest of T.C.C., 2017 COA 138**, the juvenile, T.C.C., removed a package from the front steps of Ronald Ipson’s neighbor’s house. Upon telling T.C.C. to return the package, T.C.C. slapped, punched, and swore at Ipson. A woman witnessed the incident, called the police, and followed T.C.C. to a nearby alleyway. Ipson then arrived in the alleyway, and T.C.C. slapped Ipson again and ran away. Shortly thereafter, the police arrived and located T.C.C.

T.C.C. was adjudicated delinquent of an act that would constitute robbery and third degree assault if committed by an adult. T.C.C. appealed the trial court’s judgement and alleged that the prosecutor improperly vouched for the witness’s credibility by saying, “Certainly Mr. Ipson has no reason to make up that he got struck numerous times from T.C.C.” The Court of Appeals reviewed this unpreserved claim for plain error, and found no error because the prosecutor’s statement was a reasonable inference from the record, and even video evidence.

T.C.C.’s second contention on appeal was that at sentencing, the court should have ruled on his motion to waive all mandatory fees based on indigence. T.C.C. argued that the court erred in delegating his fee waiver decision to probation and permitting a waiver of fees based on “good behavior.”

The statute that governs juvenile probation, C.R.S. § 19-2-925, plainly authorizes the court, not probation, to order the payment of fees and surcharges, but it is silent as to waivers. However, read together with section 24-4.1-119(1.5) and section 24-4.2-104(1)(c) the plain statutory language permits a court to waive fees and surcharges based solely on a finding of indigence, not based on a juvenile’s good behavior on probation. Therefore, the court remanded the case for a ruling on T.C.C.’s request for waiver based on indigence.

- e. Is a juvenile defendant entitled to postconviction relief when there is not an actual conflict of interest that adversely affected counsel’s representation of the defendant?*
- f. When does a juvenile have a constitutional or statutory right to the appointment of a guardian ad litem?*

In **Ybanez v. People, 2018 CO 16**, Ybanez, one month before his eighteenth birthday, was convicted as an adult of first degree murder for the beating and strangulation death of his mother in 1998, and sentenced to life without parole. Ybanez did not appeal his conviction or sentence until 2007 when he filed a motion for post-conviction relief, challenging the effectiveness of his counsel, the constitutionality of his sentence, and that the trial court erred in not sua sponte appointing a GAL to protect his interests.

Ybanez contended that his counsel was ineffective at trial both because (1) counsel failed to assert an objectively reasonable defense to deliberation murder, namely, that prior abuse from his father which was instigated by his mother caused Ybanez to snap on the night of the murder, and (2) that counsel failed to present such a defense because it would have been embarrassing to the father, who had engaged with defense counsel to represent Ybanez.

After a series of hearings, the Court of Appeals affirmed the lower court's denial of the defendant's motion for post-conviction relief, but in light of *People v. Tate*, 2015 CO 42, the court remanded to the trial court for a resentencing to life with the possibility of parole after forty years. The COA also rejected defendant's argument that he was statutorily entitled a GAL. Ybanez then petitioned the Colorado Supreme Court for a writ of certiorari.

On certiorari review, the Court first analyzed whether Ybanez was deprived of effective assistance of counsel due to an actual conflict of interest that adversely affected counsel's representation through the test set forth in *West v. People*, 2015 CO 5, ¶57. To prove an adverse effect, a defendant must (1) identify a plausible alternative defense strategy that counsel could have pursued, (2) show that the alternative strategy was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue that strategy was linked to the conflict.

Through a discussion on the factual and legal findings of the post-conviction court, the Supreme Court concluded that the alternative theory that prior abuse from the father led to Ybanez killing his mother under a "catathymic crisis" was not objectively reasonable under the circumstances; therefore Ybanez failed to prove an adverse effect under the *West* test. Similarly, the Court rejected the defendant's argument that counsel's performance fell below that of reasonable competence under the *Strickland* standard because the post-conviction court credited counsel's reasons for rejecting certain theories and making the strategic choice not to pursue the prior abuse matter.

The Supreme Court then addressed defendant's assertion that he had a constitutional and statutory right to the appointment of a GAL, even though one was not requested. The Court reasoned that despite a juvenile's Fourteenth, Sixth, and Eighth Amendment rights during criminal proceedings, there is no separate and broader due process right to the appointment of a GAL. Ybanez never alleged that he was incompetent to proceed with trial, so his due process right not to be subjected to a prosecution at which he lacked capacity to appreciate the nature of the proceedings and assist his counsel in his defense, was not violated. *See Dusky v. United States*, 362 U.S. 402, 402 (1960). Also, Ybanez did not have a statutory right to the appointment of a GAL, because it remains within the discretion of the court whether or not to appoint a GAL for a juvenile charged as an adult. *See* C.R.S. § 19-2-517(8).

Even further, the court is only permitted to appoint a GAL for a juvenile in a delinquency proceeding where (1) no parent or enumerated person functioning in the role of parent appears in

the case; (2) the court finds a conflict of interest between the child and parent or person functioning as parent; or (3) the court makes specific findings that the appointment of a GAL is necessary to serve the best interest of the child and such findings are in the court's order of appointment. C.R.S. §19-1-111(2)(a)(I)-(III). The Supreme Court held that none of the three possible triggering events prompted, or even permitted the court to exercise its discretion and appoint a GAL in Ybanez's case because (1) father was present and active in supporting Ybanez; (2) no party made the court aware of a conflict of interest between Ybanez and his father; and (3) there was no motion prompting the court to make specific findings about the appointment of a GAL.

The Supreme Court affirmed the Court of Appeal's decision, and remanded to the trial court for resentencing of either life without possibility of parole, or life with the possibility of parole after forty years.

VII. Adjudication

- a. *When there are partially disputed facts in an adjudicatory hearing, may the court grant summary judgement on fault or no-fault grounds of dependency and neglect?*

In [*People in the Interest of M.M. and P.M. III, 2017 COA 144*](#), the Department filed a dependency and neglect petition after a preliminary investigation associated with a domestic relations proceeding between father and mother of M.M. and P.M. III. Mother admitted that the children were dependent and neglected, but father denied the allegations in the petition and requested an adjudicatory trial before a jury.

The Department then moved to adjudicate the children dependent and neglected by summary judgement. Father responded to the motion and included an affidavit that disputed the allegations concerning his drug use, domestic violence, and the violation of his protection order. But, father admitted that: the children were in danger in mothers care, mother had emotionally and psychologically abused the children, M.M. had suffered under mother's care and the children needed protection from mother, and mother had used M.M.'s illnesses as a means of control and alienation.

The trial court granted summary judgement and adjudicated M.M. and P.M. III dependent and neglected on four statutory grounds, two of which were "no-fault" grounds. Father then appealed, arguing that the trial court should not have granted summary judgement because the facts concerning him were disputed, and the remaining undisputed facts concerned only mother.

The Court of Appeals held that the undisputed facts established that the children were properly adjudicated dependent and neglected on the two "no-fault" grounds [C.R.S. § 19-3-102\(c\); \(e\)](#), but since there were disputed facts in regards to the other two statutory grounds that require a showing of fault as to each parent, the court should not have granted summary judgement on the two fault-based grounds. See [C.R.S. § 19-3-102\(1\)\(a\)-\(b\)](#).

In *People in Interest of J.G.*, the Supreme Court concluded that the Department did not have to prove parental fault in order to adjudicate a child dependent and neglected under [C.R.S. § 19-3-102\(1\)\(c\)](#), the injurious environment provision. [2016 CO 39, ¶ 322](#). The focus of the injurious environment provision is simply on the existence of an injurious environment, not who caused it; thus, it is a “no-fault” grounds. See [Id. at ¶¶ 34, 388](#). The same is true of the “lack of proper parental care provision,” the court looks at whether the child is without proper care, not at who caused the lack of care. See [C.R.S. § 19-3-102\(1\)\(e\)](#).

The COA held that since father did not dispute the children were subject to an injurious environment and that they lacked proper parental care, regardless of whether it was his or mother’s fault, the trial court properly adjudicated the children dependent and neglected as to the two “no-fault” provisions. See [C.R.S. §§ 19-3-102\(1\)\(c\); \(e\)](#).

However, the COA held that the trial court erred in adjudicating the children dependent and neglected on the fault grounds of abuse and lack of proper parental care through the parent’s actions or omission, because father disputed material facts; thus summary judgement was not appropriate. See [C.R.S. §§ 19-3-102\(1\)\(a\)-\(b\)](#).

b. After an adjudication, may a court circumvent the article 3 dependency and neglect proceedings and terminate parental rights through a paternity proceeding?

In *People in the Interest of L.M.*, [2018 CO 34](#), the supreme court held that when a dependency and neglect proceeding is pending, the State can terminate parental rights only through the procedures set forth in Article 3 of the Code and cannot use the more limited processes provided in Article 5. After adjudication of D&N, cannot seek to terminate parental rights through relinquishment procedures.

VIII. Termination of Parental Rights

a. Do foster parents have standing to appeal the denial of a motion to terminate parental rights?

In [People in the Interest of C.W.B. JR., 2018 CO 8](#), the Department took custody of the child after doctors discovered fractures to his femur and skull, injuries consistent with child abuse. Both parents entered admissions that the child was dependent or neglected due to an injurious environment. Father was later convicted of child abuse and his parental rights were terminated.

The Department eventually placed the child with the foster parents who later intervened as a matter of right under [C.R.S. § 19-3-507\(5\)\(a\)](#). Initially mother did not comply with her treatment plan and the court adopted a concurrent goal of adoption. However, mother began to improve and comply with her plan to the point where the Department reported mother had successfully completed her treatment plan and the court granted her request to change the permanency goal back to reunification. At the same time, the GAL moved to terminate

mother's parent-child legal relationship. After a two day hearing, the court denied the motion and found the GAL failed to prove mother was unfit. The foster parents in their role as interveners filed an appeal.

The foster parents argued they had standing to file a petition with the Court of Appeals under [*A.M. v. A.C.*, 2013 CO 16, 296 P.3d 1026, 1038](#), which states "foster parents who meet the required statutory criteria to intervene may participate fully in the termination hearing without limitation." Additionally, they argued they had standing because no other party currently represented the child's best interest, as the GAL had not filed an appeal. The COA affirmed the trial court's order denying the motion however; found the foster parents did have standing.

The GAL appealed the issue of standing. The Colorado Supreme Court held the foster parents did not have standing because they did not suffer an injury in fact to a legally protected interest as a result of the trial court's order. They found although the foster parents had the right to intervene under [C.R.S. § 19-3-507\(5\)\(a\)](#), they did not have a legally protected interest in the outcome of the termination proceedings and the statute does not automatically confer on them standing to appeal. Additionally, they found that the Children's Code expressly charges the GAL with asserting the child's best interest.

Chief Justice Rice dissents. She argues [C.R.S. § 19-3-507\(5\)\(a\)](#) and the Court's ruling in [*A.M. v. A.C.* 2013 CO 16, 296 P.3d 1026, 1038](#), includes the right to appeal.

- b. *Does the court have jurisdiction to terminate a mother's parent-child legal relationship without first entering a formal written order adjudicating her children dependent or neglected?*

In ***People in the Interest of J.W.*, 2017 CO 1055**, the Department removed J.W. and N.W. from mother's care, alleging the children "lacked proper parental care" and that their "environment was injurious to their welfare." Mother denied the allegations in the petition and parties proceeded to a jury trial. The trial did not result in an adjudication of the children's status, however, instead of requesting a retrial, mother entered an admission that her children were dependent and neglected due to an injurious environment. Father entered a no fault admission. The trial court accepted mother's admission on the record and moved on to the treatment phase of the case. The Court did not specifically state that it was entering an order adjudicating the children dependent and neglected at that time. The Department circulated a proposed written order adjudicating the children as to mother to all of the parties for approval however, the order never made it to the court for signature.

One year later, after a hearing, the court entered an order terminating mother's parent-child legal relationship finding, among other things, that the children have been adjudicated dependent and neglected as to mother. At the time mother filed an appeal, the Department realized the court never signed the written order of adjudication and submitted it to the court at that time. The court signed the order, back dating it to the date of mother's oral admission.

In a split decision, the Court of Appeals vacated the trial court's order terminating mother's parental rights finding that because no adjudication order had been entered prior to the termination proceedings, the trial court lacked jurisdiction to enter the order terminating mother's rights. Additionally, the COA held the trial court lacked jurisdiction to enter the adjudication order signed at the time of appeal because by that time jurisdiction had already been transferred to the Court of Appeals.

The Colorado Supreme Court reversed the decision of the Court of Appeals relying on *People in the Interest of A.M.D.*, 648 P.2d 625, 639 (Colo. 1982) and *N.D.V.*, 224 P.3d at 414-155 to hold that a juvenile court's jurisdiction over a child in a dependency or neglect proceeding rests on the status of the child as neglected or dependent. Since mother entered an admission to the allegations in the petition and the trial court on the record properly accepted the admission, the children's status as dependent or neglected was established. The lack of a written order did not divest the court of jurisdiction over the children nor did it impair the fundamental fairness of the proceedings. The case was remanded to the Court of Appeals to consider mother's remaining contentions on appeal.

c. *What is the legal standard for determining whether there is a less drastic alternative to termination?*

In *People in the Interest of L.M. and M.M.*, 2018 COA 57, the juvenile court adjudicated the children dependent and neglected, finding by a preponderance of the evidence that father had sexually abused L.M. and that M.M. suffered secondary trauma as a result. Father was later acquitted in the companion criminal case and following the termination hearing, the juvenile court could not find that the assault allegations had been established by clear and convincing evidence. Regardless, the juvenile court terminated father's parental rights finding no less drastic alternatives. Father appealed.

The Court of Appeals reviews legal conclusions de novo when deciding mixed questions of law and fact. The COA will not set aside a juvenile's court factual findings when they have support in the record. *People in the Interest of A.J.L.*, 243 P.3d 244, 250 (Colo. 2010). The Colorado Children's Code sets three separate bases under which the court may terminate the parent-child legal relationship following adjudication: (1) when the parent has abandoned the child as defined by section C.R.S. § 19-3-604(1)(a); (2) when no appropriate treatment plan can be devised to address the parent's fitness under C.R.S. § 19-3-604(1)(b); (3) or if parent has not complied with an appropriate, court approved treatment plan or the plan has been unsuccessful in rehabilitating the parent, the parent is unfit, and the parent's conduct or condition is unlikely to change in a reasonable time under C.R.S. § 19-3-604(1)(c). When considering termination, the court must also consider and eliminate less drastic alternatives. *People in the Interest of M.M.*, 726 P.2d 1108, 1122 (Colo. 1986).

The COA first addressed the juvenile's court conclusion that father had failed to address the children's perception of sexual abuse. The Court recognizes the difficulty in crafting a treatment plan to address an allegation of sexual abuse by a parent when the child believes the abuse happened but the parent maintains that they did not commit the abuse. However, the COA finds a single incident of sexual abuse is not one of the circumstances in which the court is authorized to terminate parental rights. Father's treatment plan was designed around the Sex Offender Management Board (SOMB) guidelines even after father was acquitted of the criminal charges and continued to deny the allegations. The COA finds this requirement for treatment placed father in a no-win situation and was not reasonably calculated to rend him a fit parent who could meet the children's needs. Faulting father for not completing treatment that required him to acknowledge the alleged abuse is incompatible with the juvenile court's finding that it could not discount the possibility that no sexual abuse had occurred.

Furthermore, there is no indication that father was offered a treatment plan or a path to becoming a fit parent other than to acknowledge the abuse. Although father was adjudicated on that basis, it only needed to be established by a preponderance of the evidence while it needed to be established by clear and convincing evidence for purposes of termination.

The COA next addressed the juvenile's court conclusion that father was unwilling to take responsibility for any portion of the children's trauma. The COA finds that the record does not show, apart from the sexual abuse allegation, father was asked about or otherwise unwilling to acknowledge any parental deficiencies that might have contributed to the children's trauma. The COA finds that the juvenile court erred in concluding that father's failure to address other possible issues, and the children's corresponding trauma, demonstrated that he was an unfit parent, and thus granting custody of the children to mother was not a viable less drastic alternative to termination.

Additionally, the COA addresses ICWA compliance and finds the record does not demonstrate full compliance with ICWA.

Judgment is reversed and case is remanded. Juvenile court is to adopt an appropriate treatment plan that relates to children's trauma and is reasonably calculated to render father a fit parent before considering termination.

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- d. *Is a respondent parent entitled to have his or her counsel present when a trial court conducts an in camera interview of children in a dependency and neglect proceeding?*

In ***People in the Interest of S.L.***, 2017 COA160, filed a petition for dependency and neglect as to the children alleging the parents had used illegal drugs which affect their ability to appropriately parent the children and had failed to provide the children with appropriate and safe housing. Parents entered an admission that the children lacked proper parental care.

Eventually, the Department moved to terminate parent's parental rights. The parents separately appealed the termination decision.

The Court of Appeals first addressed both parents contention that the Department did not make reasonable efforts to reunify the family. The COA analyzed the parent's treatment plans and the services offered to the family to find the parents had sufficient time to complete their treatment plans, the Department worked to provide the parents with necessary and needed services, and that the trial court's findings were supported by the record.

The COA then moved to father's separate appellate issues. First, father contended that the trial court's decision to conduct an in camera interview with the child fundamentally and seriously affected the fairness of the proceedings and violated his due process. The GAL filed a motion for an in camera interview with the minor child prior to termination pursuant to C.R.S. § 19-3-702(3.7)). Father objected to the GAL's motion and argued that if the court was to proceed with the interviews, the children should be interviewed separately, in the presence of counsel, and recorded. The court granted the motion and interviewed the children together, on the record, and without the presence of counsel but also ordered that each party shall be provided a copy of the transcript if they request it.

Although the Children's Code does not specifically provide for a trial court to conduct an in camera interview with a child, it does allow for a child to be "heard separately when deemed necessary." See *People in the Interest of H.K.W.*, 2017 COA 700. The UDMA requires a trial court to create a record of the interview and provides that it "shall be made a part of the record in the case." *Id.* (quoting § 14-10-126(1)). A record of the in camera interview must be made available, upon request, to parents when a parent needs (1) to determine whether the trial court's findings are supported by the record and (2) contest information supplied by the child during the interview. *Id.*

The COA relied on the reasoning in *H.K.W.* and cases from other jurisdictions to conclude that the determination of whether counsel must be present during an in camera interview of a minor child during a dependency and neglect proceeding is up to the discretion of the court on a case by case basis. In making that determination, the trial court should consider: age and maturity of the child; nature of the information to be obtained from the child; the relationship between the parents; child's relationship with the parents; any potential harm to the child; and ultimately any impact on the court's ability to obtain information from the child. Additionally, the trial court should allow the parents or counsel to submit questions, which the court may ask in its discretion. See *In re: James A.*, 505 A.2d 1386, 1391 n.2 (R.I. 1986)). Further, the interview must be on the record, regardless of whether counsel is present, and if timely requested by a party and the court anticipates relying on the information in ruling on a termination motion, a transcript of the interview must be made available to parties in advance of the termination hearing. See *H.K.W.*, 2017 COA 700. Finally, in considering the weight to

accord the information obtained from a child during the interview, the court should be mindful the information did not through the crucible of cross-examination.

The COA found in this case that the trial court did not abuse its discretion when it denied father's request to have counsel present at the in camera interview of the minor children. Moreover, even if the court erred in its failure to make any factual findings, the error was harmless in light of the limited weight the court gave the information obtained from the interview in the termination order.

Additionally, father contended the court erred by not interviewing the children separately. The COA found nothing to indicate that the trial court abused its discretion by not conducting separate interviews of the children, particularly given the age of the twins. Finally, father contended that certain answers the judge gave to the children's questions were improper. The COA found no evidence that the judge's responses influenced the answers given by the children.

The COA addressed father's ineffective assistance of counsel claim and found that the record fails to demonstrate the necessary prejudice required to establish a claim of ineffective assistance of counsel. Termination order is affirmed.

- e. *Does a county Department of Human Services internal procedure that resulted in a recommendation against kinship placement violate a respondent mother's right to due process or right to counsel?*

In [*People in the Interest of C.J.*, 2017 COA 157](#), the Department filed a petition for dependency and neglect after the child was born addicted to methadone and opiates. The child was released from the hospital and placed into foster care at 3 months old. 6 months later, a paternal aunt came forward and requested placement only after the child's paternity was established. The paternity test took 9 months to complete due to mother and grandparent's lack of cooperation. Paternal aunt began visitation when the child was 18 months old. Meanwhile, the Department conducted a home study that raised concerns and eventually led to the Department's decision not to recommend aunt for placement. At the time the Department filed for termination and to decrease visitation with paternal aunt, mother filed a motion to increase visitation and to have child placed with paternal aunt.

At a hearing on mother's motion, the court denied the motion citing the child's emotional needs, attachment to foster parents, and lack of attachment with aunt. Mother filed an appeal of the termination order alleging the court violated her fundamental liberty interest in the care, custody, and management of her child when she nor her counsel were able to participate in the department's meeting. Mother argued that if she or her attorney had been present at the department's administrative review hearing, she would have been able to provide evidence or alternatives to refute the Department's reasons for disapproving the aunt's home study.

The Court of Appeals found mother's due process rights were protected by her opportunity to challenge the Department's recommendation at both the motions and termination hearings. A parent has a right to the assistance of counsel at every stage of the proceedings, however, proceedings does not apply to the Department's internal administrative review. [C.R.S. § 19-3-202\(1\)](#). Mother's liberty interests were protected because she was provided timely notice of the Department's administrative review and its outcome when the GAL notified the court and the parties at a review hearing less than one week later. Furthermore, mother could have requested a copy of the home study earlier in the proceedings and procedures existed by which mother could have timely challenged the Department's recommendation.

f. *Can a trial court terminate a parent's parental rights without conducting a dispositional hearing or adopting an appropriate, formal treatment plan?*

In [People in the Interest of B.C., 2018 COA 45](#), the Department filed a petition in dependency and neglect after the child and mother tested positive for methamphetamine after the birth of the child. At a Family Voice Conference, mother admitted that the child's environment was injurious to his welfare and stipulated to a preliminary treatment plan. No dispositional hearing was held. Instead, the Department filed a special report containing the treatment plan for mother. The court adjudicated mother by written order based on mother's admission and ordered the Department to submit a formal treatment plan to the court and, if no objections were filed, the court would adopt the plan. Mother did not object. The Department filed for termination of mother's parental rights. After a contested termination hearing, the court entered a final order granting the Department's motion to terminate.

Mother appealed. A trial court is required to approve an appropriate treatment plan for each parent. See [C.R.S. 19-3-508\(1\)](#). Additionally, a court is required to find that an appropriate treatment plan approved by the court has not been reasonably complied with before deciding to terminate parental rights. [C.R.S. § 19-3-604\(1\)\(c\)\(I\)](#). The Court of Appeals found the court in this case did not hold a dispositional hearing nor did it find the treatment plan to be appropriate. [C.R.S. § 19-3-507\(1\)\(a\)](#) specifies that at a dispositional hearing the court shall hear evidence on the question of the proper disposition best serving the interests of the child and the public. [C.R.S. § 19-1-103\(10\)](#) defines an appropriate treatment plan to be one that is "reasonably calculated to render the parent fit to provide adequate parenting to the child within a reasonable time and that relates to the child's needs." A court may terminate a parent-child relationship only if "an appropriate treatment plan approved by the court has not been reasonably complied with by the parent. [C.R.S. § 19-3-604\(1\)\(c\)](#)."

On the grounds that the trial court missed these important steps in the proceedings, the COA reserved the trial court's order terminating mother's parental rights remanded for further proceedings.

The COA declined to resolve the split among the divisions regarding waiver of objections to a treatment plan prior to termination.²

Additionally, the COA distinguished this case from the Colorado Supreme Court's ruling in [People in the Interest of J.W., 2017 CO 1055](#)³, holding that that case analyzed whether the court had jurisdiction to terminate parental rights, which was not at issue in this case. Judge Furman writes separately to further distinguish *J.W.* from this case.

g. *Whether the trial court erred when it held an in camera interview with the children without providing procedures to protect the parents' due process rights?*

In ***People in the Interest of A.K.C., 2017CA1075***, Weld County Department of Human Services filed a petition for dependency and neglect as to two children after their father was arrested for choking the children's older half-sister. The petition alleged physical abuse and alcohol abuse by father. When mother allowed father to return home upon release from jail, the children were removed. Ultimately, the trial court granted the Department's Motion to Terminate Parental Rights. The parents jointly appealed the decision on two grounds. They first alleged that the trial court erred in holding an in camera interview with two children without taking steps to protect their due process rights. They next alleged the trial court erred in finding that neither parent had successfully completed their treatment plans.

The court of appeals (COA) first addressed the parents' contentions that the trial court erred in conducting an in camera interview with two children. At the time the motion was made, neither parent objected to the interview, and the court granted the motion and outlined procedures for the interview. The procedures outlined by the court included that (1) only the GAL would be permitted to attend the interview; (2) no one was to prepare the children for the interview; and (3) the interview would be recorded, placed under seal, and only released by order of the COA. The interview then took place at least four months later, and neither parent objected to the procedures outlined by the court at any time.

Based on the parents' failure to object, the COA found that the parents had waived any alleged procedural error implicating their due process rights. Although mother contended that the issue had been preserved when her counsel objected to the suppression of the children's statements "if [the court] [was] going to rely on any information from the interview with the kids for th[e] termination ruling," the COA found that there was no evidence to suggest any such reliance in the trial court's ruling. As a result, the COA found that the trial court had no duty to release the transcript of the interview. The COA thus found that the trial court did not abuse its discretion.

² One division of the court held that an objection to a treatment plan may be raised on appeal even if not objected to at the termination proceeding. See *People in the Interest of S.N. V.*, 300 P.3d 911, 914-18 (Colo. App. 2011). Two other divisions of the court have held that a parent's right to object to the elements of a treatment plan is waived if not raised before termination. See *People in the Interest of D.P.*, 160 P.3d 351, 354 (Colo. App. 2007); *People in the Interest of M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005).

³ See § II(c) of this Case Law Update.

The COA next reviewed the parents' contentions that the trial court erred when it found that they had not complied with their respective treatment plans. The COA specifically noted that the record indicated that the domestic violence, instability, and substance abuse problems addressed in the treatment plans were ongoing, and that neither parent had made adequate improvement such that they could provide nurturing and safe parenting sufficiently adequate to meet the children's needs. Concluding that the record supported the trial court's findings, the COA found no error and affirmed the termination order as to both parents.
