

# **STANDARDS OF REVIEW IN DEPENDENCY AND NEGLECT APPEALS**

Hon. Jerry N. Jones  
Colorado Court of Appeals

## **I. The Importance of the Standard of Review**

- The applicable standard of review is critical to the appellate court. It determines how much deference the appellate court will give to the decision-maker's challenged decision. And it determines what must be shown to obtain reversal. It's often called the "lens" through which the appellate court examines the issues presented.
- An advocate must know what standard of review the appellate court will apply to argue effectively his or her client's position.
- An appellate court must know what standard of review applies to correctly analyze a party's claim of error.
- C.A.R. 28(a)(7)(A) and 28(b) (formerly C.A.R. 28(k)) reflect the importance of the standard of review.

## **II. Frequently Encountered Problems**

- The parties and the court don't recognize that the standard of review for an issue has two levels, or, perhaps more precisely, that there are two standards of review for any issue. There is one standard for determining *whether there was an error*. There is another for determining *whether any error requires reversal*. See *People v. Kadell*, 2017 COA 124, ¶¶ 46-51 (J. Jones, J., specially concurring).
  - The parties may present false choices to the appellate court. For example, the appellant argues that the contention of error is reviewed for harmless error, while the appellee argues that, because the decision at issue is

one that was within the juvenile court's discretion, the contention should instead be reviewed for an abuse of discretion. Both may be correct because they address different questions (or both may be incorrect).

- And this in turn results in one or both parties possibly failing to argue an issue in terms of the correct standard.
- The appellate court may buy into this false choice and may thereby (1) fail to articulate and apply the correct standard of review and (2) perpetuate the parties' misconceptions of standards of review.
- A party sets forth a standard it wants to apply. But sometimes that standard doesn't apply, and the party doesn't acknowledge the case law setting forth the correct standard.

### **III. Three Questions**

1. Will the appellate court review the contention of error?
2. Did the decision-maker err?
3. If the decision-maker erred, does the error require reversal?

### **IV. Question 1: Will the appellate court review the contention of error?**

- Invited error
  - “[A] party may not complain on appeal of an error that he has invited or injected into the case . . . .” *Horton v Suthers*, 43 P.3d 611, 618 (Colo. 2002) (quoting *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989)); accord *People in Interest of M.H-K.*, 2018 COA 178, ¶ 19; *People in Interest of S.N-V.*, 300 P.3d 911, 916 (Colo. App. 2011). Such an error isn't reviewable under any standard.

- An error that was the result of inadvertence or incompetence of counsel, rather than a strategic decision, won't be regarded as invited. *People v. Stewart*, 55 P.3d 107, 119-20 (Colo. 2002); see *People in Interest of S.N-V.*, 300 P.3d at 916.
- But the attorney incompetence exception doesn't apply to deliberate, strategic acts by counsel. *People v. Gross*, 2012 CO 60M, ¶ 11; *People v. Becker*, 2014 COA 36, ¶ 20 (drawing a distinction between counsel's inaction and affirmative conduct).
- Waived error
  - Waiver is the intentional relinquishment of a known right or privilege. *People v. Rediger*, 2018 CO 32, ¶ 39 (citing *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). A waiver may be express or implied. *Id.* at ¶ 42.
  - A waived contention of error isn't reviewable at all in civil cases. See, e.g., *People in Interest of A.R.*, 2018 COA 176, ¶ 31 (challenge to personal jurisdiction); *People in Interest of A.D.*, 2017 COA 61, ¶ 36 (venue); *People in Interest of N.A.T.*, 134 P.3d 535, 537 (Colo. App. 2006) (allocation of parental responsibilities).

## V. Question 2: Did the decision-maker err?

- Three standards of review
  - Clear error
    - Applies to findings of fact. See *People in Interest of A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).
    - A factual finding is clearly erroneous only if it has “no support in the record.” *Id.* (quoting *People in Interest of C.A.K.*, 652 P.2d 603, 613 (Colo. 1982)).

- Examples:
  - Whether the Department made reasonable efforts to prevent out-of-home placement and reunite the child with his or her parents. *People in Interest of S.L.*, 2017 COA 160, ¶¶ 7-12.
  - Success of a treatment plan. *E.S.V. v. People*, 2016 CO 40, ¶¶ 16-30.
  - Compliance with a treatment plan. *Id.*
  - Whether a parent is unfit and unlikely to become fit within a reasonable time. *People in Interest of A.J.L.*, 243 P.3d at 249-50; *People in Interest of S.N-V.*, 300 P.3d at 912.
  - Whether there is a less drastic alternative to termination. *People in Interest of D.B-J.*, 89 P.3d 530, 532 (Colo. 2006); *People in Interest of S.N-V.*, 300 P.3d at 912.
- Abuse of discretion
  - The juvenile court has the power to choose between two or more courses of action; applies to decisions as to which there isn't any settled legal standard that controls the decision. *See Gibbons v. People*, 2014 CO 67, ¶ 42 (Coats, J., concurring); *People v. Riggs*, 87 P.3d 109, 114 (Colo. 2004).
  - A juvenile court abuses its discretion only where its decision is manifestly arbitrary, unreasonable, or unfair, or is based on an erroneous understanding or application of the law. *People in Interest of M.V.*, 2018 COA 163, ¶ 52 (evidentiary rulings); *see also People v. Kendrick*, 2017 CO 82, ¶ 36.

- Examples:
  - Fashioning an appropriate treatment plan. *People in Interest of C.L.S.*, 934 P.2d 851, 855 (Colo. App. 1996).
  - A motion to intervene. *People in Interest of S.R.M.*, 153 P.3d 438, 443 (Colo. App. 2006).
  - A motion for a continuance. *C.S. v. People*, 83 P.3d 627, 638 (Colo. 2004); *People in Interest of A.W.*, 2015 COA 144M, ¶ 15.
  - Recusal (disqualification) of a judge. *People in Interest of C.Y.*, 2018 COA 50, ¶ 13.
  - Admission of evidence. *People in Interest of M.H-K.*, ¶ 60; *People in Interest of E.R.*, 2018 COA 58, ¶ 6.
  - Whether to give a particular jury instruction. *People in Interest of J.G.*, 2016 CO 39, ¶ 33; *People in Interest of S.X.M.*, 271 P.3d 1124, 1129 (Colo. App. 2011).
- Beware the occasional decision mistakenly applying the abuse of discretion standard to factual determinations. *E.g.*, *People in Interest of C.Z.*, 262 P.3d 895, 905 (Colo. App. 2010) (applying abuse of discretion standard to the issue of whether the Department made adequate active efforts to rehabilitate an ICWA child's parents; citing *Neal M. v. State*, 214 P.3d 284, 290 (Alaska 2009) (actually applying the clear error test)); *People in Interest of Z.P.*, 167 P.3d 211, 215 (Colo. App. 2007) (finding no abuse of discretion in juvenile court's

determination that there were no less drastic alternatives to termination).

- De novo

- Applies to questions of law. *A.M. v. A.C.*, 2013 CO 16, ¶ 8; *People in Interest of A.J.L.*, 243 P.3d at 249 (whether court applied the correct legal standard).
- The appellate court doesn't defer at all to a lower court's ruling on a question of law. *People v. Webb*, 2014 CO 36, ¶ 15.
- Examples:
  - Statutory interpretation. *People in Interest of L.M.*, 2018 CO 34, ¶ 13; *A.M.*, ¶ 8; *People in the Interest of D.C.C.*, 2018 COA 98, ¶ 12.
  - Whether a jury instruction accurately states the law. *People in Interest of M.H-K.*, ¶ 17.
  - Whether ICWA applies. *People in Interest of M.V.*, ¶ 32.
  - A party's standing to raise issues. *People in Interest of C.N.*, 2018 COA 165, ¶¶ 7-9.

- The hybrid: mixed question of fact and law

- Underlying factual determinations are reviewed for clear error, but ultimate legal conclusions based on those facts are reviewed de novo. *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 21; *People in Interest of E.R.*, ¶ 5.
- Examples:
  - Whether a child is dependent and neglected. *People in Interest of E.R.*, ¶ 5.

- Application of a dependency and neglect statute to evidentiary facts. *People in Interest of S.N.*, ¶ 21.

## VI. Question 3: Does the error require reversal?

- Probably only two standards potentially apply in dependency and neglect cases.
  - Harmless error
    - Applies if the party made a clear, timely objection. *Hagos v. People*, 2012 CO 63, ¶ 12; see *People in Interest of M.H-K.*, ¶ 21 (jury instruction); *People in Interest of M.V.*, ¶¶ 66-67 (evidence).
    - The appellate court will disregard the error unless it “affect[ed] the substantial rights of the parties.” C.R.C.P. 61. An error affects a substantial right “if it can be said with fair assurance that it substantially influenced the outcome of the case or impaired the basic fairness of the trial itself.” *People in Interest of M.V.*, ¶ 66. (But, to be clear, this test also applies to alleged errors that occurred outside of an actual trial.)
    - Who has the burden? In criminal cases, the People have the burden of showing that the error was harmless. *James v. People*, 2018 CO 72, ¶¶ 18-19.
  - Plain error
    - Plain error may apply in civil cases, but it has been applied in such cases *very* rarely. See *Vittitoe v. Rocky Mountain Pavement Maintenance, Inc.*, 2015 COA 82, ¶ 80 (refusing to apply it); *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo. App. 2009) (same); *Robinson v. City & Cty. of Denver*, 30 P.3d 677, 684-85 (Colo. App. 2000) (apparently applying

the test but concluding it wasn't met). It applies "only when necessary to avert unequivocal and manifest injustice." *Harris Grp.*, 209 P.3d at 1195; *accord Robinson*, 30 P.3d at 685.

- If the party failed to timely and specifically raise an issue in the juvenile court, this is the only possible standard. *Hagos*, ¶ 14. And, as noted, it's a long shot that the appellate court will apply it.
  - In a criminal case, in arguing plain error, the defendant must show (1) an error, (2) that was obvious, and (3) which so undermined the fundamental fairness of the proceeding as to cast serious doubt on the validity of the judgment of conviction. *Id.* Query: Does this test apply in civil cases?
- What about other standards, such as structural error, constitutional harmless error, and cumulative error?
    - Structural error doesn't apply in civil cases, including dependency and neglect cases. *People in Interest of R.D.*, 2012 COA 35, ¶¶ 29-31.
    - Constitutional harmless error
      - It's an open question whether this standard applies in dependency and neglect cases. See *People in Interest of A.M.*, 310 P.3d 89, 103 (Colo. App. 2010), *rev'd*, 2013 CO 16.
      - Applies to errors of constitutional dimension *that were preserved by objection*. *Hagos*, ¶ 11; *Krutsinger v. People*, 219 P.3d 1054, 1058 (Colo. 2009).

- “Only those errors ‘that specifically and directly offend a defendant’s constitutional rights are “constitutional” in nature.’” *People v. Flockhart*, 2013 CO 42, ¶ 20 (quoting *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010)).
- The appellee must show that the error was harmless beyond a reasonable doubt. *Hagos*, ¶ 11. Reversal is required unless there is no reasonable possibility that the error might have contributed to the conviction. *Id.*
- Cumulative error doesn’t apply in civil cases. See *Neher v. Neher*, 2015 COA 103, ¶ 66.

## **VII. Preservation of Error Claims**

- Whether a claim of error is preserved for appellate review directly affects reviewability and the applicable standard of reversal (e.g., whether harmless or plain error review applies).
  - For that reason, you should determine first in looking at every potential claim of error whether that claim was preserved.
    - First look for waiver or invited error, if potentially in play.
  - The general rule is that the issue sought to be raised on appeal must have been raised (in a timely, specific way) in the juvenile court, and the raising of and ruling on the issue must be in the record. See *People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998); *People v. Rollins*, 892 P.2d 866, 873 n.13 (Colo. 1995).
  - As previously indicated, a party’s failure to properly preserve an issue for appellate review almost always means that the appellate court won’t consider it. See,

*e.g.*, *In re Petition of J.M.A.*, 240 P.3d 547, 549 (Colo. App. 2010); *People v. Interest of T.T.*, 128 P.3d 328, 331 (Colo. App. 2005); *People in Interest of V.W.*, 958 P.2d 1132, 1134 (Colo. App. 1998).

- Preservation in common contexts

- A ruling excluding evidence at trial

- The party must offer it.
    - The party must state the grounds for offering it if there is an objection.
    - If the court refuses to allow the evidence, the party must make an offer of proof. CRE 103(a)(2); *In re L.F.*, 121 P.3d 267, 271-72 (Colo. App. 2005).
    - The offer of proof must make known the substance of the evidence (if it wasn't apparent to the court) and its purpose. *People v. Saiz*, 32 P.3d 441, 446-47 (Colo. 2001); see *People in Interest of M.S.H.*, 656 P.2d 1294, 1297 (Colo. 1983); *People in Interest of N.F.*, 820 P.2d 1128, 1133 (Colo. App. 1991).

- A ruling admitting evidence at trial

- The party must object at trial. (A motion in limine may be sufficient. See *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330 (Colo. 1986).)
    - The objection must be contemporaneous with the other party's request to introduce the evidence.

- The objection must be precise; a general “I object” won’t cut it.
- The objection must have been precisely the same one the party seeks to raise on appeal. CRE 103(a)(1); *see, e.g., Hancock v. State*, 758 P.2d 1372, 1377 (Colo. 1988).
- Jury instructions
  - If claiming a failure to give an instruction:
    - The party must object, on the record, before the instruction is given to the jury. C.R.C.P. 51.
    - The objection must be specific, and only the grounds so specified can be raised on appeal. *Id.*
  - If claiming an instruction shouldn’t have been given:
    - Again, the party must object, on the record, before the instruction is given to the jury. *Id.*