

# Preserving Issues in Dependency and Neglect Cases

Justice Brian Boatright and Judge Rebecca Freyre  
March 8, 2019

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## Preservation Generally

- ▶ Know the appellate issues that are likely to arise in your case before the hearing begins.
- ▶ Remember: Issues not preserved in the juvenile court will likely not be reviewed in the appellate court.
- ▶ There is NO PLAIN ERROR in dependency and neglect proceedings.

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## Anticipating Appellate Issues

- ▶ Is there a witness on the opposing party's witness list you would like to keep from testifying?
- ▶ Is there a potential expert witness who you believe cannot be properly qualified? Do you have everything from the opposing party to which you are entitled that will enable you to challenge qualification?
- ▶ Is there physical evidence without a corresponding authenticating witness endorsement?
- ▶ Are there hearsay statements within discovery that opposing counsel will likely elicit? Decide your strategic position in advance. (Judicial Notice)

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## Anticipating Appellate Issues

- ▶ If sexual assault allegations are involved, determine the witnesses through whom improper bolstering might be elicited and move *in limine* for exclusion of those opinions.
- ▶ Anticipate objections to your evidence/witnesses and prepare responses.
- ▶ If the court conditionally ruled on pretrial motions, make sure you receive rulings before the trial/hearing begins.
- ▶ Pay attention to findings, not whether you won or lost the motion.

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## Properly Preserving Your Appellate Issues Requires You To:

- ▶ Make a Timely Objection - Clearly state the basis for your objection because failing to do so limits appellate review. Be Specific!
- ▶ Request specific relief and state why you are entitled to it. For example, move to strike the testimony/exhibit; request a limiting instruction if before a jury; request a mistrial, request a continuance, etc.
- ▶ Make sure the juvenile court has ruled on your objection and/or request for relief. If a ruling was deferred, bring it to the court's attention and request a definitive ruling.

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## Proper Preservation

- ▶ Always make sure that the record reflects how you believe the error has impacted your client - clearly articulate prejudice, and help the court correct the error.
- ▶ Ensure that bench conferences and any other off-record discussions are properly transcribed and/or recorded.
- ▶ Jury Instruction conferences are often conducted informally. Try to record or make a record of the discussions immediately following the conference, clearly identifying the parties' positions. Ask that rejected jury instructions be marked and included in the appellate record.
- ▶ Make specific objections to instructions by identifying language you feel is erroneous and tendering language you feel is proper.

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## Proper Preservation

- ▶ Keep track of potential appellate issues as they arise during the hearing/trial to share with appellate counsel.
- ▶ Note the hearing dates where issues arise so the proper record can be designated.
- ▶ Special circumstances: A party seeking review of a magistrate's decision must seek review in the district court to preserve the issue for review in the court of appeals. *People in Interest of K.L.P.*, 148 P.3d 402, 403 (Colo. App. 2006).
- ▶ An appellate court will not consider issues raised for the first time in the reply brief or in oral argument. *People in Interest of M.V.*, 2018 COA 163, ¶ 20; *People in Interest of E.I.C.*, 958 P.2d 511, 524 (Colo. App. 1998); *People v. Becker*, 2014 COA 36, ¶ 23.

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## Proper Preservation

- ▶ A contention is not properly preserved for appellate review (and will not be considered) if the appellant does not identify supporting facts, make specific arguments, or set forth specific authorities. *People in Interest of D.B.-J.*, 89 P.3d 530, 531 (Colo. App. 2004); see also *People in Interest of C.Z.*, 2015 COA 87, ¶¶ 45-46 (declining to address father's argument that the termination of his parental rights also violates Section 504 of the Rehabilitation Act when he did not provide any explanation or discussion of the Rehabilitation Act's applicability to the termination proceedings.)

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## Consequences of Not Preserving Issues

- ▶ Generally, issues not raised in the trial court will not be considered on appeal. *People in Interest of T.E.R.*, 2013 COA 73, ¶ 30; *People in Interest of D.P.*, 160 P.3d 351, 355-56 (Colo. App. 2007); *People in Interest of V.W.*, 958 P.2d 1132, 1134 (Colo. App. 1998).
- ▶ An appellate court will not consider mother's argument that APR to father was not in the child's best interests when mother agreed to it at trial. *People in Interest of N.A.T.*, 134 P.3d 535, 527 (Colo. App. 2006).
- ▶ A parent may "waive proof of facts and admit the petition" and a failure to raise problems with the admission may preclude their review on appeal. *People v. C.O.*, 2017 CO 105, ¶¶ 28, 34 (noting in dicta that mother never challenged the adjudication order and proceeded as if it were properly entered until supplemental briefing was requested in the court of appeals).
- ▶ A parent seeking review of a magistrate's decision must raise a particular issue in the petition for district court review, and failure to do so will preclude the appellate court from reviewing an issue not presented to the district court. *People in Interest of K.L.P.*, 148 P.3d 402, 403 (Colo. App. 2006) (father's failure to assert that the denial of his motion to continue was error in his petition for district court review precluded appellate review of this issue).
- ▶ A parent waived argument regarding right to evidentiary hearing on motion to transfer when she did not request a hearing. *People in Interest of T.E.R.*, 2013 COA, ¶ 26.

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## Consequences of Not Preserving

- ▶ There is a split in the court of appeals on whether a parent's failure to object to or acquiescence in a treatment plan precludes review.
- ▶ *People in Interest of M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005) held that respondent parent's failure to object to the adequacy of the treatment plan and acquiescence to its inadequacies precluded challenging the adequacy of the treatment plan on appeal. See also *People in Interest of D.P.*, 160 P.3d 351, 354 (Colo. App. 2007) (same).
- ▶ BUT the division in *People in Interest of S.N.-V.*, 300 P.3d 911, 916-17 (Colo. App. 2011) considered father's challenge to the adequacy of his treatment plan, even though he acquiesced to it, based on its conclusion that the procedures of a termination hearing, mandated by the Due Process Clause and Colorado's Parent-Child Termination Act of 1987, required the juvenile court to determine whether the petitioner established "by clear and convincing evidence that an appropriate treatment plan approved by the court has not been successful in rehabilitating the parent, the parent is unfit, and the conduct or condition of the parent is unlikely to change within a reasonable time."

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## Consequences of Not Preserving

- ▶ Another case following *S.N.-V.* . . .
- ▶ *People in Interest of K.B.*, 2016 COA 21, ¶ 19 (following *S.N.-V.* and remanding for the juvenile court to make the required factual findings).
- ▶ In all cases, help the juvenile court order the proper services.

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## Some Exceptions To Traditional Preservation

- ▶ A challenge to a court's subject matter jurisdiction is not waivable and may be raised for the first time on appeal. *People in Interest of M.D.V.*, 224 P.3d 410, 414 (Colo. App. 2009); *People in Interest of C.N.*, 2018 COA 165, ¶ 15.
- ▶ A lack of jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act may be noticed by the appellate court sua sponte and raised for the first time on appeal because it concerns the court's subject matter jurisdiction. *People in Interest of M.S.*, 2017 COA 60, ¶ 13; *People in Interest of C.L.T.*, 2017 COA 119, ¶ 13.
- ▶ An appellate court may consider otherwise waived issues if necessary to avoid a miscarriage of justice. *People in Interest of A.E.*, 914 P.2d 534, 539 (1996).
- ▶ Failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA) may be raised for the first time on appeal. *People in Interest of J.C.R.*, 259 P.3d 1279, 1282 (Colo. App. 2011).
- ▶ A challenge to the substantive requirements of ICWA (qualified expert witness testimony) can be raised for the first time on appeal because ICWA allows a party to petition to challenge compliance in a court of competent jurisdiction, which includes an appellate court. *People in Interest of D.B.*, 2017 COA 139, ¶¶ 8-9.
- ▶ Generally, constitutional issues must be raised in the trial court to be raised on appeal. *Catholic Charities in Interest of C.C.G.*, 942 P.2d 1380, 1384 (Colo. App. 1997).
- ▶ BUT, an appellate court may elect to address alleged violations of fundamental constitutional rights when they are fully briefed by the parties. *People in Interest of C.E.*, 923 P.2d 383, 384 (Colo. App. 1996).

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## Some Exceptions To Traditional Preservation

- ▶ Ineffective Assistance of Trial Counsel may be raised for the first time on appeal. *People in Interest of A.R.*, 2018 CO 176, ¶ 57. “[A] parent asserting ineffective assistance of trial counsel must allege on appeal sufficient facts to demonstrate that (1) counsel’s performance was outside the range of professionally competent assistance and (2) counsel’s deficient performance prejudiced the parent by rendering the proceeding fundamentally unfair or unreliable.” *Id.*
- ▶ CERTIORARI GRANTED ON MARCH 4, 2019
- ▶ Whether the court of appeals, in departing from the decisions of other divisions of the court of appeals, correctly designated “fundamental fairness” as the best means to apply the second prong of the analysis described in *Strickland v. Washington*, 466 U.S. 668 (1984), when assessing whether a parent’s trial court counsel was ineffective in an appeal from a termination order in a dependency and neglect case.

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## Some Exceptions To Traditional Preservation

- ▶ Whether an appellate court may vacate a trial court’s decision in a dependency and neglect case without remanding the case to the trial court to make findings under *Strickland*’s two-part test.
- ▶ Whether an appellate court, in a direct appeal from a judgment terminating parental rights, may consider a claim of ineffective assistance of counsel based on counsel’s performance at an adjudicatory hearing.
- ▶ Sufficiency of the evidence of termination may be raised for the first time on appeal. *People in Interest of S.N.V.*, 300 P.3d 911, 918 (Colo. App. 2011) (“[I]t would be fundamentally unfair to bar a respondent parent from challenging the sufficiency of the evidence underlying the juvenile court’s findings at the termination hearing, because the parent cooperated with the Department at a time when he or she was encouraged to do so, yet neglected to assert errors that, under constitutional and statutory standards of due process, he or she had not duty to assert.”).

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