JUVENILE LAW UPDATE[i][ii]

Survey of Legislation and Case Law

Judge Dave Furman
Colorado Court of Appeals
2 East 14th Avenue
Denver, Colorado 80203
david.furman@judicial.state.co.us
(303) 867-6198

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III. Legislative Update Pertaining to Juvenile Law (2008)

A. Trends in the Legislature

- **Twenty Seven Bills Were Enacted Specific to Juvenile Law**
  - *Judicial Improvement (Page 2)*
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- **Provide General Information Only**
  - *Bill Number*
  - *Statute Reference*
  - *Status as of June 4, 2008*

B. Specific Bills Enacted:

1. Judicial Improvement

a. HB 08-1264; concerns access to information maintained by the judicial department

- Adds a new section 13-1-119.5
- ICON
- Provides who has access to court name index and register of actions
- Includes county departments, the state public defender, guardians ad litem, alternate defense counsel, respondent parent counsel, and criminal justice agencies
- *Pending governor's signature*

b. HB 08-054; concerns judicial performance evaluations

- Amends section 13-5.5-101
- State and local commissions evaluate performance of justices and judges
- Provides a summary of the evaluation to the voters
- *Pending governor signature*

c. SB 08-206; creates the State Justice Center

- Amends section 13-32-101
- Provides funding through docket fees for the creation of the State Justice Center
- Relocates the Colorado History Museum
- *Signed by the governor on June 4, 2008*

2. Domestic Relations (Parenting Time)

a. SB 08-106; concerns perpetrators who are involved in child custody cases

- Amends 14-10-129(3)
- If a party was convicted in another state or in a military court of an offense enumerated in subsection (b), then that party shall be ordered to submit to a sex-offense-specific evaluation and a parental risk assessment
- The court shall consider the recommendations of the evaluation and assessment before entering an order relating to parenting time or parental contact
- *Pending governor signature*

3. Paternity (Procedural Matters)

a. HB 08-1342; concerns measures to improve child support enforcement

- Amends 14-10-115
- Social security numbers removed from court order
- Adding a child to an existing case
- Once court has acquired jurisdiction, such jurisdiction shall be retained regardless of child's residence
- *Signed by the governor on May 27, 2008*

b. SB 08-183; concerns the effect of DNA evidence of nonparentage on child-related orders, including support

- Adds section 19-4-107.3
- An order determining parentage shall be modified or set aside if DNA tests exclude the father
- Must be filed within two years from the date of entry of the order
- *Pending governor signature*

4. Foster Care Sibling Visits

a. HB 08-1006; concerns visits by children in foster care with their siblings

- Adds section 19-1-128
- If a child in foster care and his or her sibling(s) mutually request an opportunity to visit each other, the county department shall arrange a visit
- Not required if county determines visit not in best interests of the child; if sibling is a victim or witness in a criminal case; or if a visit would violate an existing protection order
- If criminal case is pending, county department must contact the prosecutor before arranging any visits
- Termination of parental rights does not terminate a sibling relationship
- *Signed by the governor on February 7, 2008*

5. C.A.S.A.

a. HB 08-1018; allows expansion of CASA programs

- Amends section 19-1-202
- *Signed by the governor on March 13, 2008*

6. General Criminal Matters

a. SB 08-238; prohibits reproduction of sexually exploitative material in a criminal case

- Adds section 16-9-601
- *Pending governor signature*

b. HB 08-1397; concerns the disposition of DNA evidence

- Adds section 18-1-1101
- Provides that DNA evidence collected in relation to a class 1 felony or a sex offense that carries the possibility of an indeterminate sentence shall be preserved
- *Signed by the governor on May 14, 2008*

c. HB 08-1115; concerns retaliation against a judge

- Includes threats, acts of harassment, and acts of harm or injury on a person or property
- Class 4 felony
- *Signed by the governor on May 21, 2008*

d. HB 08-1076; concerns fees for copies of criminal justice records

- Adds section 24-72-306
- Fees may not exceed $.25
- *Signed by the governor on April 14, 2008*

7. Delinquency Matters

a. HB 08-1132; concerns treatment for offenders in the youthful offender system

- Amends section 18-1.3-407(4.3) and (4.5)
- *Signed by the governor on March 13, 2008*

b. HB 08-1117; concerns the inclusion of restorative justice in the children's code

- Adds section 19-1-103(44)
- Restorative justice includes apologies, community service, restoration and counseling
- *Signed by the governor on March 31, 2008*

c. HB 08-1156; concerns juvenile parole

- Amends section 19-2-209
- Committed juveniles must be evaluated using an objective risk assessment to identify the juvenile's risk to the community and treatment services during the commitment and parole
- *Signed by the governor on May 22, 2008*

d. HB 08-1016; concerns procedures for juveniles who may benefit from mental health services

- Juvenile who could benefit from mental health services means juveniles who exhibit one or more of the following characteristics: a chronic or significant lack of impulse control or of judgment; significant abnormal behaviors under normal circumstances; a history of suspensions, expulsions, or repeated truancy; severe or frequent changes in sleeping or eating patterns or in levels of activity; a pervasive mood of unhappiness or depression; or a history of involvement with or treatment in two or more state or local governmental agencies, including child welfare
- Allows creation of local implementation plan
- *Signed by the governor on May 10, 2008*

8. Education

a. SB 08-208; concerns background investigations of school employees

- Adds a new section 22-2-119
- Background investigation includes whether applicant has been convicted for a crime involving unlawful sexual behavior or unlawful behavior involving children; and whether applicant has been dismissed because of unlawful sexual behavior
- *Pending governor signature*

b. SB 08-1019; concerns provision of educational services for children in out-of-home placements

- Adds section 22-32-138
- Includes children in foster care
- School districts must designate a person to serve as a child welfare education liaison for the district
- The sending district or school must transfer the student's education information and records to the receiving school within five days after receiving a transfer request from the county
- Student must be enrolled within five days
- *Signed by the governor on April 17, 2008*

9. Provision of Services

a. HB 08-1157; concerns creation of a youth advisory council

- Adds section 2-2-1301
- *Signed by the governor on May 29, 2008*

b. HB 08-1391; concerns creation of a pilot program to provide mental health services for children who have been abused or neglected

- Amends section 19-3-208
- *Signed by the governor on May 14, 2008*

c. SB 08-006; concerns suspension of Medicaid benefits for inmates and confined juveniles

- Adds section 25.5-4-205.5
- Suspends Medicaid for confined persons
- *Signed by the governor on May 20, 2008*

d. SB 08-099; concerns extending Medicaid eligibility for youth in foster care who are being emancipated

- Amends section 25.5-5-201
- The court or the youth's guardian ad litem shall notify the youth that he or she shall lose the right to receive Medicaid until the youth's twenty-first birthday if the case is closed prior to the youth's eighteenth birthday
- *Pending governor signature*

e. SB 08-216; concerns county contribution for the cost of placing children in residential child care facilities

- Amends section 25.5-5-306(3)
- Next fiscal year, limits county match to ten percent of the cost of the placement
- *Pending governor signature*

f. SB 08-160; concerns CHP

- Amends section 25.5-8-103(4)
- *Pending governor signature*

g. HB 08-1404; concerns comprehensive review of the child welfare system

- Adds section 26-1-135
- *Signed by the governor on May 28, 2008*

h. HB 08-1051; concerns core services for families

- Amends section 26-5-101
- *Signed by the governor on February 21. 2008*

i. HB 08-1366; concerns early intervention services

- Amends section 27-10.5-101
- *Signed by the governor on May 28, 2008*

IV. Case Law Update Pertaining to Juvenile Law (2007-2008)

A. Statistics

1. Court of Appeals: Processing of Cases (we are improving!)

a. <u>From notice of appeal to mandate</u>

- **In 2004, a case took an average of 324 days**
- **In 2007, a case took an average of 195 days**

b. <u>From date assigned to division to issuance of opinion</u>

- **In 2005, a case took an average of 24 days**
- **In 2007, a case took an average of 13 days**

c. <u>Number of D&N case filings</u>

- **In 2005, 139**
- **In 2006, 135**
- **In 2007, 122**

2. District Court to Supreme Court

a. D&N Petitions: 3793

b. Court of Appeals Cases: 122

c. Petitions for Writ of Certiorari: 20

d. Supreme court cases accepted: 1

B. Trends in the Case Law

1. Dependency and Neglect

Shelter Hearing

Adjudication

Termination of Parental Rights

2. Adoption

C. Specific Cases

1. Dependency and Neglect

Shelter Hearing

Finality:

Is a shelter hearing a final appealable order?

In *People in the Interest of A.E.L. and K.C.-M.*, 181 P.3d 1186 (Colo. App. 2008), mother appealed a jury verdict adjudicating her children dependent and neglected, arguing various procedural errors in the magistrate's orders awarding temporary legal custody to the department. The division concluded that orders entered during a shelter hearing are interim orders subject to review only pursuant to C.A.R. 21.

Adjudication

Evidence and the exclusionary rule:

Is evidence found by police conducting a welfare check subject to the exclusionary rule under the 4th amendment of the Constitution?

In *People in the Interest of A.E.L. and K.C.-M.*, 181 P.3d 1186 (Colo. App. 2008), mother appealed a jury verdict adjudicating her children dependent and neglected, arguing that the juvenile court erred in denying her motion to suppress evidence found by police during a welfare check. Mother's live-in boyfriend was arrested on an outstanding warrant, and his probation officer requested that the police perform a welfare check of the home because of concerns that drugs were present. During the welfare check, the police discovered pipes and a powdery substance which were taken to the police station and eventually destroyed. The powdery substance was never tested and could not be positively identified as an illegal substance.

The division concluded that the exclusionary does not apply in D&N cases, and held that the court did not err in denying mother's motion to suppress the evidence.

Due process and amending the petition:

Is a respondent denied due process because the department filed an amended petition two days before the adjudicatory trial, based on information obtained after the initial filing?

In *People in the Interest of A.E.L. and K.C.-M.*, 181 P.3d 1186 (Colo. App. 2008), mother appealed a jury verdict adjudicating her children dependent and neglected, arguing that she was denied due process because the department filed an amended petition two days before the adjudicatory trial, based on information obtained after the initial filing. Mother's objection to the amended petition requested that it be denied and/ or stricken.

The division concluded that mother was not denied due process because she did not request a continuance, nor show how the amended petition resulted in "a substantial departure from the original allegations in the petition." *See* § 19-3-504(4)(c).

Privilege and self-incrimination:

Is a parent's 5th amendment privilege against self-incrimination implicated by treatment plan provisions requiring the parent to participate in a sex offender evaluation and a domestic violence evaluation?

In *People in the Interest of I.L.*, 176 P.3d 878 (Colo. App. 2007), father appealed a dispositional order requiring him to participate in a sex offender evaluation and a domestic violence evaluation, arguing that the treatment plan violated his 5th amendment privilege against self-incrimination. At the time, he was facing criminal charges for the allegations that gave rise to the dependency and neglect case-his sexual abuse of his sixteen-year-old stepdaughter.

The division concluded that statements father made during the evaluation or treatment were privileged under § 19-3-207 and therefore the father's participation in the treatment plan did not implicate his 5th amendment privilege against self-incrimination. What

about § 19-1-307(2)(a) and § 19-3-308(5.5), allowing law enforcement access to D&N records?

Summary judgment:

Is it proper to consider a department's summary judgment motion only twenty-one days before the adjudicatory trial?

In *People in the Interest of A.C.*, 170 P.3d 844 (Colo. App. 2007), the department filed a motion for summary judgment twenty-one days before the adjudicatory trial.

The division addressed the conflict between C.R.C.P. 56(c) (any motion for summary judgment must be filed no later than eighty-five days prior to trial) and § 19-3-505(3) (requiring adjudicatory hearings to be held no later than sixty days after service of the petition for children under six) and concluded that the statute controlled. *See* C.R.C.P. 81(a) (rules do not govern when there is a conflict between a statute and a rule).

Disposition after revoking the continued adjudication:

Is a dispositional hearing required after revocation of a continued adjudication?

In *In the Interest of T.E.H.*, 168 P.3d 5 (Colo. App. 2007), mother appealed the order terminating her parental rights, arguing that the trial court did not conduct a dispositional hearing after revoking the continued adjudication and entering an order adjudicating the children dependent or neglected. However, after continuing the adjudication, the trial court conducted a dispositional hearing and approved the treatment plan for mother. Thereafter, the continued adjudication was revoked because of mother's failure to maintain contact with the department and to comply with the therapy provisions of the treatment plan.

The division held that, although the adjudicatory order did not expressly continue the plan and a second dispositional hearing was not conducted, the record revealed that the department continued to provide services to facilitate the original plan and that mother continued to make some efforts to engage those services. Therefore, the

proceeding was conducted in substantial compliance with the statute, and reversal was not required.

Termination of Parental Rights

Service by publication:

Is the single publication rule constitutional?

In *People in the Interest of J.C.S.*, 169 P.3d 240 (Colo. App. 2007), mother appealed the order terminating her parental rights, arguing the statute authorizing service by single publication was unconstitutional on its face and as applied. The court authorized service by publication after finding her whereabouts were unknown and she had deliberately concealed herself from law enforcement and the court for fear of further incarceration on an outstanding probation violation.

The division majority dismissed the appeal, holding that mother lacked standing to challenge the publication statute. Because standing requires injury in terms of notice of legal rights, and such lack of notice resulted from mother's actions in concealing herself from law enforcement, the court, and the department, the division concluded mother did not satisfy the injury in fact requirement.

Subject matter jurisdiction: the 120 day rule

Is the 120 day deadline for bringing a termination action jurisdictional?

In *In the Interest of T.E.H.*, 168 P.3d 5 (Colo. App. 2007), mother appealed the order terminating her parental rights, arguing that the trial court erred in failing to conduct the termination hearing within 120 days after the motion to terminate was filed. The termination hearing was continued several times due to: (1) the parents being in partial compliance with the treatment plan; (2) father wanting to meet with new counsel that had been appointed to represent him; and (3) inclement weather and the unavailability of witnesses.

The division held that the statutory time to conduct a termination hearing is not jurisdictional, the record showed the parent's did not

object to the continuances, and the basis for the continuances was apparent from the record. Thus, the trial court's failure to make express findings that there was delay and that the delay was in the children's best interests, did not require reversal.

In *People in the Interest of D.M.*, ___ P.3d ___ (Colo. App. April 17, 2008), the division affirmed the order terminating parental rights, concluding that although the juvenile court did not adequately find good cause for the delay, the record shows the basis for the continuances – because two paternity tests were required for possible fathers - and mother did not object to any delay or lack of findings.

Does a court still need to make good cause and best interests findings?

Waive objection to treatment plan:

Does a parent have to contest a dispositional hearing to preserve his or her rights to later challenge an order terminating parental rights?

In *People in the Interest of D.P.*, 160 P.3d 351 (Colo. App. 2007), parents appealed an order terminating their parental rights, arguing that the evidence did not support the finding that their treatment plan was appropriate.

The division concluded that, because the parents stipulated that the treatment plans were appropriate and were reasonably calculated to render each of them fit to provide adequate parenting within a reasonable time, they were precluded from arguing that the plans were inappropriate.

In *In the Interest of T.E.H.*, 168 P.3d 5 (Colo. App. 2007), the division concluded that mother's failure to bring to the trial court's attention the perceived deficiencies in the department's efforts to rehabilitate the parent constitutes a waiver of the right to raise the issue on appeal.

Evidence of criminal history report:

Is it reversible error to admit into evidence a respondent parent's Colorado Bureau of Investigation (CBI) criminal history report?

In *People in the Interest of J.A.S.*, 160 P.3d 257 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that the juvenile court erred in admitting into evidence his CBI report. When the D&N proceeding was initiated, father was incarcerated. In overruling father's objection to the report, the juvenile court found that the report was self-authenticating and stated that the report's weight would be determined in light of any contradictory evidence. Thereafter, father's parole officer testified about the conviction on which father was incarcerated when the D&N proceeding was initiated and his compliance with the conditions of parole.

The division concluded that, under these circumstances, the admission of the CBI report did not affect father's substantial rights and thus reversal was not required.

Parental unfitness based on emotional illness:

When does emotional illness justify dispensing with a treatment plan?

In *People in the Interest of K.D.*, 155 P.3d 634 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that the trial court erred in finding he had an emotional illness because the experts who testified about his emotional illness did not interview him. The trial court found that father had an emotional illness, and that no appropriate treatment plan could be devised based on his emotional illness. At the termination hearing, a therapist testified that father had a personality disorder, but she could not determine the precise diagnosis without further information. She testified that he suffered a broad range of emotional impairments, including substance abuse.

The division determined that among the bases for a finding of unfitness under §§ 19-3-508(1)(e)(I) and 19-3-604(1)(b), are "emotional illness, mental illness, or mental deficiency of the parent of such duration or nature as to render the parent unlikely with a reasonable time to care

for the ongoing physical, mental, and emotional needs and conditions of the child." The division held that "emotional illness" and "mental illness" have different meanings, and that "emotional illness" requires evidence of longstanding emotional conditions that render the respondent unable to provide the needs of the child.

Parental unfitness and reasonable time:

What factors should a court consider in determining whether a parent can become fit within a reasonable time?

In *People in the Interest of D.P.*, 160 P.3d 351 (Colo. App. 2007), parents appealed an order terminating their parental rights, arguing that the evidence did not support the finding that they were not fit or could not become fit within a reasonable time. The child came to the attention of the department when mother was found wandering the streets with the child on a hot day. They had been wandering for several hours, during which time the child had not been changed or fed. The department learned mother was developmentally delayed and father was low functioning.

The division held that an unfit parent is one whose condition or conduct renders him or her unable to give a child reasonable parent care. In determining whether a parent can become fit within a reasonable time, the division concluded that the trial court may consider (1) whether any changes occurred during the dependency and neglect proceeding; (2) the parent's social history; and (3) the chronic or long-term nature of the parent's conduct or condition.

In *People in the Interest of D.Y.*, 176 P.3d 874 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that he was not given reasonable time to comply with the treatment plan. The treatment plan required father, among other things, to actively participate in and complete the Nurturing Parenting class, visit the child a minimum of four hours weekly, commit no criminal violations, obtain appropriate stable housing, and not abuse alcohol, illegal drugs, or prescription drugs.

The division agreed with father and reversed, concluding that filing a motion to terminate only twenty-three days after adoption of father's treatment plan did not constitute a reasonable period of time to comply with his treatment plan.

No less drastic alternatives:

What factors should a reviewing court consider in determining if there are no less drastic alternative to termination of parental rights?

In *In the Interest of Z.P.*, 167 P.3d 211 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that the trial court erred in failing to consider placement of the children with their paternal grandmother or their paternal grandfather and his wife as less drastic alternatives.

The division disagreed, holding that the trial court found that no alternative short of termination would provide the permanency and flexibility needed in making appropriate placements for the children, and that record evidence supported this finding because the children had severe emotional and behavioral problems, as well as developmental delays, which precluded a sibling group placement and required that they have the permanency of adoptive homes. Moreover, the paternal relatives supported foster care placement of the children, which ruled out their being considered as a placement option.

In *People in the Interest of J.A.S.*, 160 P.3d 257 (Colo. App. 2007), mother appealed an order terminating her parental rights, arguing that the juvenile court erred in refusing to place the children with father as a less drastic alternative to termination. The division deferred to the trial court's findings that father was unfit because there was record support.

See also People in the Interest of D.P., 160 P.3d 351 (Colo. App. 2007)(record supported trial court's findings that long-term or permanent placement may not be appropriate when it does not provide adequate permanence or otherwise meet the child's needs)

ICWA tribal notice:

When is tribal notice required?

In *People in the Interest of J.A.S.*, 160 P.3d 257 (Colo. App. 2007), mother appealed an order terminating her parental rights, arguing that she was not given sufficient notice of the tribe's determinations to permit her to independently ascertain their status as Indian children.

The division concluded that ICWA did not apply because, although mother was not advised of the tribes' determinations until the termination hearing, additional time in which to ascertain the children's tribal membership would not have been availing because the tribes' determinations were conclusive.

In *People in the Interest of J.O.*, 170 P.3d 840 (Colo. App. 2007), mother appealed an order terminating her parental rights, arguing that the notice requirements of the ICWA were not met. At the temporary shelter hearing, father claimed to be one-quarter Apache, although he was not registered with a tribe. The trial court informed him that he needed to verify his alleged Indian heritage within two weeks, that the parents were to fill out an assessment form, and that the tribes would be provided notice if, and when, sufficient notice was provided.

An ICWA notice was sent to the Bureau of Indian Affairs (BIA) in Washington, D.C., indicating that the parents "may be members of an Indian tribe" and that "[n]o further information has been provided," listing only the child's birthdate, and indicating the tribe's right to intervene.

Father confessed the motion to terminate, and mother did not attend the hearing. The trial court determined that ICWA did not apply; that father indicated he had some native heritage, that a notice was sent to the BIA, but the agency did not respond, and that father provided no information regarding membership in a tribe or about any relatives who might be enrolled in a tribe.

The division agreed with mother, and reversed the termination order.

First, the division held that mother had standing to challenge the notice requirements of ICWA. Under ICWA, "parent" means "any biological parent of an Indian child" and "any parent . . . may petition the court to invalidate such [involuntary] action upon a showing that such action violated any provision of [the ICWA]."

Second, the division held that the notice provided the BIA was insufficient. The division concluded that the standard is whether "the state know[s], or has reason to know or believe, that an Indian child is involved," and that standard may be based on such considerations as "enrollment, blood quantum, lineage, or residence on a reservation." If the state knows or has reason to believe that an Indian child is involved, it must: (1) provide notice to the Indian child's tribe by registered mail, with return receipt requested, of the tribe's right to intervene; (2) if the identity or location of the tribe cannot be determined, such notice shall be given to the BIA; and (3) the notice must contain enough information to be meaningful and thus include "the Indian child's name, birthdate, and birthplace; the tribal affiliation; a statement of the tribe's right to intervene; all known names, birthdates, places of birth and death; current and former addresses; and other identifying information of lineal relatives; and a copy of the petition.

What if father provides thirty potential tribes?

Third, the division concluded that father's advisement to the court that he was one-quarter Apache was sufficiently reliable to require further inquiry regarding the father's tribal heritage. Father's failure timely to return the assessment form did not eliminate the duty of notice and further inquiry.

ICWA active efforts:

What satisfies ICWA's "active efforts" requirements?

In *People in the Interest of K.D.*, 155 P.3d 634 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that the trial court erred in finding that "active efforts" were made to prevent the breakup of the Indian family and that these efforts had proved to be unsuccessful. The child had been removed from the parent's home because the parents had neglected him, had used drugs, and had engaged in domestic violence. Later, the child was removed again because both parents were incarcerated. The Citizen Potawatomi Nation intervened and requested that the court not offer father another treatment plan, because he continued to place the child at risk.

The division held that "active efforts" are the equivalent to "reasonable efforts" to provide or offer a treatment plan in a non-ICWA case, concluding that a court may terminate parental rights without offering additional services when a department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination. The record revealed (1) that extensive services were provided to father by the department during the previous two dependency cases; and (2) that previous treatment plans had required father to treat his drug problem, have his mental health assessed and treated, and address his domestic violence.

ICWA expert testimony:

Who is a qualified expert under ICWA?

In *People in the Interest of K.D.*, 155 P.3d 634 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that there was no expert testimony that stated continued custody of the child by him would likely result in serious emotional damage to the child. A parenting program therapist testified at trial that she had a bachelor's and master's degree in counseling psychology and was a licensed professional counselor. The trial court found she was qualified to testify as an expert in child development and individual and family therapy.

The division affirmed the termination order, holding that a qualified expert witness should posses special knowledge of Indian culture and society, but that specialized knowledge is not required where, as here, termination is based on parental unfitness unrelated to the Indian culture or society. Father's termination was based on his emotional illness – which the division concluded was a culturally neutral reason – and the likely serious emotional and physical damage that would befall the child if placed with father.

Effective assistance of respondent parent counsel:

When is a parent deprived of effective assistance of counsel?

In *People in the Interest of C.H.*, 166 P.3d 288 (Colo. App. 2007), mother appealed an order terminating her parental rights, arguing on appeal that she was denied effective assistance of counsel because her attorney did not call her therapist as a witness in the termination hearing, that this was not an informed strategic decision, and that the trial court would have reached a different decision has the therapist been called to testify. The mother's appellate counsel submitted an offer of proof that asserts the therapist is a well-respected psychotherapist who has extensive expertise in the area of child development; and that the therapist would have testified that mother has made great strides in her parenting deficiencies.

The division concluded that the standards for effective assistance of counsel applicable to criminal defense attorneys applies to respondent parent counsel and that, based on the offer of proof submitted by mother's appellate counsel, she made a prima facie showing (1) that her trial counsel's conduct was deficient; and (2) that she was prejudiced by counsel's deficient performance. The division remanded for a hearing on mother's claims.

In *In the Interest of Z.P.*, 167 P.3d 211 (Colo. App. 2007), father appealed an order terminating his parental rights, arguing that he did not receive effective assistance of counsel because two of his court-appointed attorneys were allowed to withdraw, leaving him without counsel at the termination hearing.

The division held that, because father did not object to counsels' motions to withdraw, and did not request substitute counsel, he waived his right to counsel. Thus, he was not deprived of the effective assistance of counsel.

In *People in the Interest of D.M.*, __ P.3d __ (Colo. App., April 17, 2007), mother's appellate counsel filed a motion to withdraw, asserting that there were no viable appellate issues. This motion was denied, but the court of appeals directed counsel to file a petition, if appropriate, under *Anders v. California*, 386 U.S. 738 (1967). Counsel did not do so, and instead filed a petition on appeal, asserting "there are no legal or factual issues that might support the appeal." Because this did not comply with C.A.R. 3.4(g), the division permitted mother to file an amended petition, which she did, that complied with the appellate rule. The division stated that, generally, failure to comply with the mandatory language "shall" in C.A.R. 3.4 will result in dismissal of the petition.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA):

Does non-compliance with the UCCJEA implicate an order terminating parental rights?

In *People in the Interest of D.P.*, 181 P.3d 403 (Colo. App. 2008), father appealed an order terminating his parental rights, arguing that the trial court failed to comply with the UCCJEA. A Rhode Island court had awarded mother and father joint legal custody stemming from a dissolution of marriage action. Several years later, Colorado authorities became involved based on a report that mother and stepfather were using methamphetamine in the home. The child's biological father lived in Rhode Island. The child was adjudicated dependent or neglected, and a treatment plan was adopted for the child's biological father. Because he did not comply with the treatment plan, the department moved to terminate his parental rights.

The father then filed a motion, in the Rhode Island court, seeking to modify custody. During a telephone conference between the courts, the Rhode Island court indicated it would defer jurisdiction to the Colorado court.

First, the division held that a record was made of the telephone conferences between the courts, based on the fact that the Rhode Island court had made a transcript of its hearing on the telephone conference the following day.

Second, the division held that the Colorado court's use of the law clerk to speak with the Rhode Island court was error, but not reversible error, because father did not show how he was prejudiced.

Appeals:

If an order terminating parental rights is placed in an attorney's courthouse mailbox, when does the time to file notice of appeal start?

In *People in the Interest of S.M.A.M.A.*, 172 P.3d 958 (Colo. App. 2007), mother appealed an order terminating her parental rights. The division discussed whether mother's notice of appeal, filed twenty-two days after the order was entered, was timely filed, and concluded it was because of the three-day mailing rule. The trial court mailed the order, and deposited it in the attorney's courthouse mailbox located in the juvenile court clerk's office, thereby implicating the three-day mailing rule under C.R.C.P. 6(e).

Access to records of child abuse and neglect:

Is a defendant in a criminal case entitled to records held by social services agencies?

In *People v. Jowell*, __ P.3d __ (Colo. App., January 24, 2008), the defendant appealed his conviction of two counts of sexual assault on a child by one in a position of trust, arguing that the trial court committed reversible error in failing to disclose social services records.

The division held that, because records and reports of child abuse or neglect are protected by the rule of nondisclosure set forth in 19-1-307(1)(a), the defendant cannot expect automatic disclosure. Thus, the defendant must request an in camera review, identify the type of information sought, and explain why disclosure of that information is

necessary by explaining the relevance and materiality of the information sought.

2. Adoption

Standing to Petition for adoption:

Does a guardian or custodian have standing to adopt?

In *In re the Adoption of K.L.L.*, 160 P.3d 383 (Colo. App. 2007), parents appealed from an order granting a petition for adoption of a child by the temporary guardians, arguing that the temporary guardians did not have standing to file a petition for adoption.

The division held that, because the temporary guardians were not the child's legal guardians (the guardianship was limited in duration) and were not the child's legal custodians (there had been no court action divesting the parents of legal custody), the petitioners did not have standing to seek custodial adoption of the child. The division also concluded that the UCCJEA does not apply to adoption proceedings.

ICWA applied to stepparent adoptions:

Does ICWA apply to stepparent adoptions?

In *In the Matter of the Petition of N.B.*, __ P.3d __ (Colo. App., September 6, 2007), stepmother appealed from the order of the district court dismissing her petition to terminate mother's parental rights and to adopt a child, who was an Indian child. The child's status as an Indian child was undisputed. Both parents were Native American. Mother moved out of state, saw the child a few times over the next three years, and provided no child support. The child believed that stepmother was his biological mother.

First, the division held that ICWA applies to stepparent adoptions, even though the Indian child will remain with one biological parent.

Second, the division held that the "existing Indian family exception," created by Kansas Supreme Court, should not be adopted in Colorado.

The existing Indian family exception states that ICWA should apply only to the removal of Indian children who were members of an Indian home and participated in Indian culture. The division reasoned that this exception should not apply because that would defeat the tribal interest recognized by ICWA.

Third, the division held that a private petitioning party must show that "active efforts" were made to prevent the breakup of the Indian family. The trial court's finding that stepmother could have engaged in active efforts to provide remedial services and rehabilitative programs, but did not do so, is supported by the record.

Request for nonrecurring adoption expenses and adoption assistance payments:

What must be shown for an adoptive parent to be entitled to adoption subsidies for the children?

In *Sapp v. El Paso County Dep't of Human Services*, 181 P.3d 1179 (Colo. App. 2008), adoptive parents appealed an order affirming the department's decision to deny their request for nonrecurring adoption expenses and adoption assistance payments. The department concluded the Sapps were not entitled to adoption subsidies for their children because the children did not have "special needs" that acted as a serious barrier to adoption.

The division held that an adoptive parent may only receive adoption subsidies after it has been determined that all of the conditions defined under § 26-7-103(1) were present at the time the child was placed for adoption. Because the Sapps did not satisfy these conditions, and the children did not have "special needs" which acted as a barrier to their adoption, the department did not err in denying their request for nonrecurring adoption expenses and adoption assistance payments.

Duty to pay support based on award of parental responsibility in anticipation of adoption:

Are parents who are ordered to provide parental responsibility in anticipation of an adoption, but who divorce before the adoption is final, required to pay child support?

In *In re the Marriage of Rodrick*, 176 P.3d 806 (Colo. App. 2007), husband appealed the trial court's order requiring him to pay child support for another couple's child for whom he and wife had been awarded parental responsibility. The parental responsibility order was designed to be a step toward husband and wife adopting the child. However, that adoption never happened.

The division held that the APR order was not a guardianship order, as husband contended on appeal, but was in the nature of a "custodial adoption" because he had been providing support for the child for over one year. Thus, husband had a duty to provide support for the child because of the terms of the APR order and the duties it imposed on them.

3. Paternity

Stepparent standing to request parenting time:

Does a stepparent have standing to request parenting time?

In *In the Interest of C.T.G.*, 179 Colo. 213 (Colo. App. 2007), parents appealed an order denying their request to terminate the parenting time awarded to stepfather for their minor child. While mother and stepfather were married, she had intimate relations with father and became pregnant. A Minnesota court decreed that father was the biological father, awarded joint legal custody of the child to father and mother, and awarded stepfather visitation "on an interim basis." The marriage between mother and stepfather was dissolved in Minnesota, and mother and father relocated to Colorado. Stepfather traveled to Colorado one weekend per month to visit the child.

After an altercation arose during one of stepfather's visits to Colorado, the parents filed an emergency motion to suspend stepfather's visitation, and jurisdiction was transferred from Minnesota to Colorado. The parents filed a motion to terminate stepfather's visitation rights. The trial court found that stepfather is a psychological parent to the child; that the child was not in danger when she was with him; and that the parents' attempts to eliminate stepfather's contact with the child endangered the child's development.

The division reversed, holding that stepfather did not have standing to seek parenting time because he has not had physical care of the child for several years and he had not filed his motion within six months of the termination of his physical care of the child. The division also rejected stepfather's contention that he was the child's psychological parent for the same reasons.

The division also held that the Minnesota order was a temporary order, and that the parents were deprived of their due process rights because the trial court did not presume they were acting in the child's best interests.

4. Probate

Jurisdiction to consider adoption:

Does a probate court have jurisdiction to direct a child's guardian ad litem to find a permanent guardian for a child or to consider the potential for a child's eventual adoption?

In *In re the Matter of J.C.T. v. Three Affiliated Tribes*, 176 P.3d 726 (Colo. 2007), a child's guardian appealed a probate court's order denying his petition for guardianship. J.C.T. was born in Colorado. His mother placed him in the care of C.A.H., and subsequently consented to the probate court awarding guardianship to C.A.H. The probate court appointed a GAL to investigate the guardianship. Meanwhile, C.A.H. married and moved to Georgia.

In 2002, J.C.T. and guardian's daughter visited guardian's mother and stepfather in Colorado. Because of the visit, the guardian's mother and

stepfather brought proceedings in Georgia to obtain custody of the children, alleging that both children had been sexually and physically abused. The GAL was reappointed and entered an appearance in the Georgia court. That court ultimately entered a directed verdict in the guardian's favor, and returned custody of her daughter to mother. That court refused jurisdiction over J.C.T., however, and deferred to the probate court in Colorado. The probate court then appointed a second guardian for the J.C.T., who lived in Colorado. A therapist, who evaluated J.C.T., recommended that the child stay with this guardian, but cautioned that other resources should be considered because this guardian was sixty nine years old.

The court appointed a third guardian for the child. This guardian was a foster mother and experienced child advocate.

Meanwhile, the GAL began working with adoption agencies with the hope of finding a family that could serve as permanent successor guardians. At that time, the first guardian, who was acquainted with the child's third guardian, petitioned for permanent guardianship. The probate court held a hearing on the petition and determined that J.C.T. was a ward of the court. The court also awarded the GAL temporary custody of the ward, and denied the first guardian's petition.

The Court of Appeals vacated the probate court's order and remanded the case, holding that the probate court exceeded its jurisdiction. The court of appeals determined that the juvenile court had exclusive jurisdiction in the case. The supreme court reversed, holding that the probate court's attempt to find a permanent guardian for J.C.T. was a proper exercise of its jurisdiction.

5. Other

Appointment of the department as guardian:

Is it proper for a court to appoint the department as permanent guardian of an incapacitated person?

In *In re Estate of Morgan*, 160 P.3d 356 (Colo. App. 2007), the department appealed a trial court order appointing it as permanent

guardian for the ward. When the ward was twenty years old, but still under the jurisdiction of the court pursuant to a dependency and neglect action, the guardian ad litem petitioned the trial court for appointment of a guardian for her. The ward had been born with fetal alcohol syndrome and had an IQ of 65. She also had been diagnosed with oppositional defiant disorder, and a neurological processing disorder. The trial court found it necessary to appoint a permanent guardian for the ward because her ability to make appropriate decisions concerning her personal safety was impaired, she had difficulty with abstract reasoning, language comprehension, and the arithmetic necessary for managing her finances; and she was likely to be overwhelmed with the tasks of everyday life. The court determined there was no person willing to act as the ward's guardian, and appointed the local department to serve in that capacity.

The division held that Colorado's statutory guardianship scheme contemplates the possibility that a court can appoint DHS as guardian for an incapacitated person. However, because DHS objected to the appointment, and was thus unwilling to serve as the ward's guardian, the order of appointment was reversed.

Waiver of parental notification:

What facts may a trial court rely on when deciding a minor's petition for waiver of parental notification?

In *Upon Petition of Jane DOE 2*, 166 P.3d 293 (Colo. App. 2007), an unemancipated minor appealed an order of the trial court denying her petition for waiver of parental notification requirements concerning abortion. Petitioner stated in her petition that she was approximately ten weeks pregnant and wanted to terminate her pregnancy by abortion without telling her parents. After a hearing, at which petitioner appeared pro se, the court entered an order denying the petition, finding by clear and convincing evidence that petitioner was not sufficiently mature to decide whether to have an abortion.

The division affirmed, holding that § 12-37.5-104 provides that the trial court may enter an order dispensing with the parental notification requirements if it either (1) determines that the giving of such notice

will not be in the best interests of the minor; or (2) finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to have an abortion. The division concluded that the facts relied on by the trial court were generally appropriate considerations in assessing petitioner's maturity, including (1) petitioner's unwillingness to communicate with her mother or consult with other adults; (2) her focus on her own needs; and (3) her failure to discuss the matter with a doctor.

The division also concluded that, although the trial court did not make findings that it would not be in her best interest to tell her mother of the abortion, in such a case, the trial court should weigh the advantages and disadvantages of parental notification in the minor's specific situation, considering such factors as: (1) the minor's emotional or physical needs; (2) the possibility of intimidation, other emotional injury, or physical danger to the minor; (3) the stability of the minor's home and the possibility that notification would cause serious and lasting harm to the family structure; (4) the relationship between the parents and the minor and the effect of notification on that relationship; and (5) the possibility that notification may the lead parents to withdraw emotional and financial support from the minor.

Review of magistrate

Does a juvenile appeal a magistrate's judgment adjudicating him delinquent to the court of appeals?

In *People in the Interest of M.A.M.*, 167 P.3d 169 (Colo. App. 2007), the juvenile appealed the district court order denying his untimely request for review of a magistrate's judgment adjudicating him delinquent. Juvenile's counsel did not file a petition for review of the magistrate's judgment in the district court within fifteen days, a necessary prerequisite for appellate review in the court of appeals. *See* § 19-1-108(5)(a). Instead, juvenile's counsel filed a notice of appeal in the court of appeals. However, his appeal was dismissed without prejudice because he had not first sought judicial review. Soon thereafter, juvenile's counsel filed a petition in the district court seeking review of the magistrate's judgment. His response to the show cause order that asked why the petition should not be dismissed with prejudice as

untimely was that he believed that, under C.R.M. 7(b), such a petition was not a prerequisite to appellate review.

The division held that a remand for further findings and reconsideration is required to determine whether counsel's neglect is excusable, considering factors such as (1) the potential prejudice the appellee may suffer form a late filing; (2) the interests of judicial economy; and (3)the propriety of requiring the juvenile to pursue other remedies to redress his counsel's neglect.

Contempt

In *In re Marriage of Cyr*, 186 P.3d 88 (Colo. App. 2008), husband appealed from a district court order finding him in remedial contempt for violating the parties' separation agreement. The trial court did not impose punitive sanctions based on evidence of husband's debilitating medical condition during the period of noncompliance. However, the court concluded that a remedial sanction was appropriate because husband "presently has the ability to comply with the order."

The division affirmed, holding that proof of willfulness is not required before a court may impose remedial contempt sanctions.

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