GUIDED REFERENCE IN DEPENDENCY

An Advocacy Guide for Attorneys in Dependency Proceedings

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Office of the Child's Representative

Office of the State Court Administrator
Court Improvement Program

Designed and typeset by Pratt Brothers Composition

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We are especially grateful to the Judicial Council of California/Administrative Office of the Courts for its example in publishing the *Dependency Quick Guide: A Dogbook for Attorneys Representing Children and Parents* (2d ed., 2011) and for permission to use that publication extensively in the development of the GRID.

How to Use the *Guided Reference in Dependency*

The *Guided Reference in Dependency* (GRID) is intended to be used as a reference manual for attorneys representing parents and the best interests of children in juvenile dependency proceedings. Its goal is to provide guidance and short answers to common problems that attorneys face. The book is designed for use in the trial courts; it is not meant to serve as a treatise or definitive work on juvenile dependency law. Juvenile law is constantly evolving, and practitioners should always check for changes in statutes, regulations, and case law.

The book is divided into two major parts: "Hearings" and "Fact Sheets." The hearings section is organized by statutory hearing in procedural order. Each statutory hearing chapter contains checklists, discussion of black letter law, and practice tips. The checklists outline the primary tasks that must be completed and factors that must be considered before, during, and after each statutory dependency hearing. The black letter sections provide a basic overview of the hearings and tips on how to effectively advocate for parents and children.

The fact sheets are organized topically rather than procedurally. They give additional information on complex areas of dependency practice. Their purpose is to give the practitioner a sufficient understanding of specific complex topics so that he or she will have, at a minimum, a foundation to provide effective advocacy in cases that require specialized knowledge. Some

fact sheets also summarize the relevant law regarding issues that come up in various statutory hearings.

The GRID is paginated by major sections: *H* for "Hearings" and *F* for "Fact Sheets." The indexes (paginated beginning with *I*) are designed to assist practitioners in navigating the GRID.

For ease of reading and use, short citation formats and acronyms are used throughout the GRID. All references to the Colorado Revised Statutes appear in the following format: § 19-1-101. References to Rule Manual Volume 7, Child Welfare Services, of the Colorado Code of Regulations (12 Colo. Code Regs. § 2509) are referred to simply by regulation number (e.g., 7.311). Additionally, the following acronyms are used throughout the GRID:

APR	allocation of parental responsibilities
CASA	court-appointed special advocate
CJD	Chief Justice Directive
D&N	dependency and neglect
EPP	Expedited Permanent Placement
GAL	guardian *ad litem*
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
OCR	Office of the Child's Representative
RPC	counsel representing the respondent parent or other respondent
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act

In this publication, the term "child" is used to refer to a child, youth, or young adult who is subject to the dependency court's jurisdiction. "Department" refers to the city or county department of social services.

We welcome your comments and suggestions on ways we can improve this publication to better meet your needs.

GUIDED REFERENCE IN DEPENDENCY

An Advocacy Guide for Attorneys in Dependency Proceedings

Contents: Hearings

I

Preliminary Protective Proceeding

PRELIMINARY PROTECTIVE PROCEEDING CHECKLIST—GAL

BEFORE

- ❑ Review petition, affidavit, and court report or other supporting documents to assess legal sufficiency of the allegations, basis for removal of child (if removed), jurisdiction, placement options, venue, timeliness of filing, and notice.
- ❑ Analyze for existing and potential conflicts of interest.
- ❑ Obtain information about the child and the child's educational, medical, and special needs from caseworker, counsel, respondents (with RPC's permission if represented), and other persons present.
- ❑ Speak with child if present or available by phone, if appropriate, in a developmentally appropriate manner. Explain your role, the purpose of the D&N proceeding, and what will happen at the preliminary protective hearing.
  - ❍ Ask child about relatives and kin who may appropriately serve as a placement or provide support.
  - ❍ Consult with child to obtain child's position concerning placement and determine whether child would like to speak to the judge at the hearing.
- ❑ Speak with caseworker regarding:
  - ❍ Whether safety/risk assessment has been completed.

- Placement; ensure consideration of joint sibling placement and educational stability in placement decision.
- Visits and phone contact with respondents, siblings, relatives, and other appropriate persons.
- Need for immediate evaluations, physicals, and forensic interviews of the child.
- Need for immediate evaluations of or interim treatment for respondents.
- Whether child is an Indian child.

- ❑ Meet with respondent/respondent's counsel.
  - Determine whether hearing will be contested.
  - Request any information counsel or unrepresented respondent would like you to consider in formulating your position, including placement options that support child's connections to family, school, and community.
  - If respondent is represented, request RPC's permission to speak with respondent.
  - Obtain basic information (e.g., contact addresses and numbers, parentage, relatives, siblings, Indian heritage).
  - Discuss needs of the child. Determine whether child has any allergies, is taking any medication, and is involved in extracurricular activities. For infants, discuss feeding schedule and needs.
  - Obtain names of child's current pediatrician, dentist, optometrist, and counselor, and determine whether there are any appointments currently scheduled.
  - Obtain information regarding whether child is an Indian child and, if so, the identity of the child's tribe.
  - Determine whether another state or county is involved with the family and whether an order has previously been issued regarding the care, custody, and control of the child.
  - Ask for signatures on release of information forms for any current service providers.
- ❑ Interview relatives and interested persons present regarding allegations, noncustodial parents, fathers, ICWA, visits, and placement options. For placement options, get relevant information on home environment, criminal background, and need for funding. Discuss needs of the child.
- ❑ Determine whether child may remain or return home as preferred by the Children's Code. Consider whether a safety

plan, protective orders, and/or in-home services are appropriate or necessary to maintain/place the child in the home.

- ❑ Determine whether the child should be removed from the home. Analyze information provided regarding whether:
  - ❍ Removal is necessary because the child's welfare and safety or the protection of the public would be endangered if the child remained in respondent's custody.
  - ❍ The department made reasonable efforts to prevent/eliminate need for removal or, if not, emergency circumstances existed.
  - ❍ The department made diligent efforts to place the child with relatives, kin, or any other appropriate person.
- ❑ Formulate position regarding other issues presented, including:
  - ❍ Need for initial services and/or evaluations.
  - ❍ Need for protective orders.
  - ❍ Joint sibling placement.
  - ❍ Whether the community should be excluded from the proceeding.
- ❑ Evaluate need to proffer evidence. Determine whether a continuance is necessary to represent the best interests of the child.

DURING

- ❑ Request appointment as GAL and written appointment order if appropriate.
- ❑ Inform the court of the child's position, if ascertainable (unless child does not want position presented).
- ❑ Ensure the court fully advises respondent(s) of legal rights and responsibilities, critical timelines, and possible consequences of a finding that the child is determined to be dependent or neglected, as follows:
  - ❍ The right to a jury trial on the issue of adjudication.
  - ❍ The right to be represented by counsel at every stage of the proceeding and to seek appointment of counsel if financially eligible.
  - ❍ The right to object to the magistrate's jurisdiction.
  - ❍ The minimum and maximum time frames for the D&N process.

- The obligation to complete and file the relative/kin affidavit.
- That termination of the parent-child legal relationship is a possible remedy if the petition is sustained.
- To appeal any final decision made by the court.

- If removal is ordered, ensure the court finds, based on a preponderance of the evidence, that:
  - The child's welfare and safety or the protection of the public would be endangered if the child were not removed from the home.
  - Leaving the child in the home would be contrary to the child's best interests.
  - The department has made reasonable efforts to prevent out-of-home placement, and these efforts have failed or one of the following exists:
    - An emergency situation requiring the immediate removal of the child from the home.
    - The parent has subjected the child to aggravated circumstances found in §§ 19-3-604(1) & (2).
    - The parental rights with respect to a sibling of the child have been involuntarily terminated.
    - The parent has been convicted of a specifically enumerated felony. §§ 19-1-115(6)(b) & (7).
  - The department made or will make reasonable efforts to reunite the child and family, that efforts to reunite the child and the family have failed, or that reasonable efforts to reunite the child and the family are not required pursuant to specific statutory exemptions.
  - Procedural safeguards with respect to parental rights have been applied in connection to the removal of the child from the home, a change in the child's placement out of the home, and any determination affecting parental visitation.
  - NOTE: if the child is an Indian child, additional findings must be made pursuant to ICWA, the burden of proof is by clear and convincing evidence, and the findings must be supported by qualified expert testimony.
- Appropriate orders have been or will be requested, such as those needed to facilitate placement with respondents or other appropriate persons; joint sibling placement; visits with respondent, sibling, or relatives; services for entire family; and protective orders.

- ❑ Ensure that court addresses:
  - ❍ Placement.
    - ■ If the child is an Indian child, placement must be according to ICWA priority: (1) extended family members; (2) a home licensed by the Indian child's tribe; (3) an Indian foster home; (4) or a tribal-approved or tribal-run institution.
  - ❍ Services for family.
  - ❍ Parentage.
  - ❍ Indian heritage (ICWA).
  - ❍ Visits with respondents, siblings, and, if appropriate, relatives and other important persons.
  - ❍ School placement and transportation, if needed.
  - ❍ Any other necessary orders.
  - ❍ Setting next hearing(s).

AFTER

- ❑ Provide your contact information to caseworker, counsel, parent, and relatives.
- ❑ Schedule home visit with the child as soon as is reasonable but no later than 30 days following appointment. When meeting with the child, discuss D&N process and court rulings in a developmentally appropriate manner and obtain the child's position regarding pending issues.
- ❑ Determine steps necessary to conduct independent investigation. Construct timeline to ensure initial investigation is completed within 45 days of appointment.
- ❑ Confirm visit schedule.
- ❑ Obtain copy of relative/kin affidavit. Communicate with caseworker to ensure diligent search is taking place and conduct independent diligent search if necessary.
- ❑ Determine if any motions should be filed.

PRELIMINARY PROTECTIVE PROCEEDING CHECKLIST—RPC

BEFORE

- ❑ Review petition, affidavit, and court report or other supporting documents to assess legal sufficiency of the allegations, basis of removal of child (if removed), jurisdiction, placement options, venue, timeliness of filing, and notice.
- ❑ Analyze for existing and potential conflicts of interest.
- ❑ Meet with client in private. Explain the purpose of the D&N proceeding in general and the preliminary protective hearing in particular.
  - ❍ Assist client in completing written advisement forms and JDF 208, as appropriate.
  - ❍ Advise client of rights, responsibilities, and D&N time frames and potential consequences. Impress upon client significance of the proceedings.
  - ❍ Encourage system "buy-in" when appropriate and address client's concerns.
  - ❍ Discuss client's initial service needs and the need for any protective orders. Discuss whether a safety plan can be implemented to allow the child to remain or return home.
  - ❍ Counsel and advise client. Obtain client's position on whether the child should remain/return home or remain placed out of the home. Discuss client's position concerning the current placement and obtain alternatives to the current placement.
  - ❍ Determine whether the child has any special needs (e.g., allergies, medications, feeding needs of infants).
  - ❍ Determine whether GAL may speak with client outside of your presence and advise client of any restrictions on the contact.
- ❑ Begin discussion/negotiation with opposing counsel and GAL. Discuss issues with caseworker as appropriate.
- ❑ Review safety/risk assessment, if completed.
- ❑ Interview relatives and interested persons regarding allegations, child's needs, visits, placement options, and Indian heritage.
- ❑ Analyze whether reasonable efforts were made or whether a true emergency existed to prevent the need for such efforts.

- ❑ Evaluate need to proffer testimony and/or documentary evidence. Determine whether a continuance is necessary to preserve the client's due process rights.
- ❑ Determine whether to object to the magistrate's jurisdiction for next hearing, as appropriate.

DURING

- ❑ Call for witness testimony and further evidence, if necessary.
- ❑ Ensure that the court fully advises client of his or her legal rights and responsibilities, critical timelines, and possible consequences of a finding that the child is dependent or neglected as follows:
  - ❍ The right to a jury trial on the issue of adjudication.
  - ❍ The right to be represented by counsel at every stage of the proceeding and to seek appointment of counsel if the respondent financially qualifies.
  - ❍ The right to object to the magistrate's jurisdiction.
  - ❍ The minimum and maximum time frames for the D&N process.
  - ❍ The obligation to complete and file the relative/kin affidavit.
  - ❍ That termination of the parent-child legal relationship is a possible remedy if the petition is sustained.
  - ❍ To appeal any final decision made by the court.
- ❑ If removal is ordered, ensure the court finds, based on a preponderance of the evidence, that:
  - ❍ The child's welfare and safety or the protection of the public would be endangered if the child were not removed from the home.
  - ❍ Leaving the child in the home would be contrary to the child's best interests.
  - ❍ The department has made reasonable efforts to prevent out-of-home placement, and these efforts have failed or one of the following exists:
    - ■ An emergency situation requiring the immediate removal of the child from the home.
    - ■ The parent has subjected the child to aggravated circumstances found in §§ 19-3-604(1) & (2).

- The parental rights with respect to a sibling of the child have been involuntarily terminated.
- The parent has been convicted of a specifically enumerated felony. §§ 19-1-115(6)(b) & (7).

- The department made or will make reasonable efforts to reunite the child and family, efforts to reunite the child and the family have failed, or reasonable efforts to reunite the child and the family are not required pursuant to specific statutory exemptions.
- Procedural safeguards with respect to parental rights have been applied in connection to the removal of the child from the home, a change in the child's placement out of the home, and any determination affecting parental visitation.
- NOTE: if the child is an Indian child, additional findings must be made pursuant to ICWA, the burden of proof is by clear and convincing evidence, and the findings must be supported by qualified expert testimony.

- Request appropriate orders, such as those needed to facilitate the following:
  - Placement of the child with a relative.
  - Visits between child and client or relatives.
  - Services for the entire family.
  - Protective orders (C.R.S. §§ 19-3-207(2), 19-1-113, 19-1-114).
  - Discretion granted to caseworker and GAL to expand visitation or return child to the home without further court order.
  - That visits not be reduced without a court order.
- Ensure that court addresses:
  - Placement.
    - If the child is an Indian child, placement must be according to ICWA priority: (1) extended family members; (2) a home licensed by the Indian child's tribe; (3) an Indian foster home; (4) or a tribal-approved or tribbal-run institution.
  - Services for the family.
  - Parentage.
  - Indian heritage (ICWA).
  - Visits with client, relatives, siblings, and other appropriate persons.

- Education and medical decision making and involvement.
- Any other specifically requested orders.
- Setting next hearing(s).

AFTER

- ❑ Explain to the client the court's rulings and reinforce client's ability to address issues resulting in state involvement.
- ❑ Establish an action plan for the client (e.g., engage in services, obtain restraining order, and clean up house). Consider need to follow up with written action plan.
- ❑ Explain roles of caseworker and GAL.
- ❑ Schedule first client interview.
- ❑ Discuss with client how to keep track of important dates.
- ❑ Provide client with a written explanation of the nature of the representation. Include information about what will happen if the client does not come to court or communicate with the attorney.
- ❑ Provide client with next court date.

BLACK LETTER DISCUSSION AND TIPS

The preliminary protective hearing is the first hearing in a D&N case. If the child has been removed from the child's home, the hearing is called a "temporary custody hearing" and governed by § 19-3-403. The temporary custody hearing is sometimes referred to as a "shelter hearing" or "detention hearing." If the child has been taken into custody, the court will determine whether the child should be released to the parent or remain in temporary custody while the issue of dependency or neglect is pending. If the child is not removed from the child's home, the first appearance is often called an "initial hearing" or "return on summons."

The preliminary protective hearing is the court's first opportunity to review and assess the evidence proffered by the department and any additional evidence presented by the parties relevant to the child's care and custody. At this hearing, a GAL will be appointed for the child. Counsel and GAL for the respondents may be appointed if the respondents qualify. The court will advise the parent, guardian, or legal representative of rights and responsibilities, critical timelines, and possible outcomes of the proceedings.

TIMING OF HEARING

The timing of the hearing depends on whether the child has been removed from the child's home, the entity removing the child, and the child's current placement.

If the child has been removed from the child's home, the temporary custody hearing must be held 24 to 72 hours after removal, depending on the entity removing the child and the child's placement. If temporary custody is placed with the county department of social services pursuant to § 19-3-403 or § 19-3-405, the court must hold a hearing within 72 hours after placement, excluding Saturdays, Sundays, and court holidays. § 19-3-403(3.5). If the child has been removed from the custody of a parent, guardian, or legal custodian by a law enforcement officer and placed in a shelter facility or temporary holding facility not operated by the Department of Human Services, the court must hold a temporary custody hearing within 48 hours (excluding Saturdays, Sundays, and legal holidays). § 19-3-403(2).

If the child is in a juvenile detention facility, the court must hold a hearing within 24 hours of placement (excluding Saturdays, Sundays, and legal holidays). § 19-3-403(2).

The failure to hold a timely temporary custody hearing does not deprive the court of jurisdiction. *P.F.M. v. District Court in and for Adams County*, 520 P.2d 742, 745 (Colo. 1974).

If the child has not been removed from the child's home and a D&N petition has been filed, the court shall promptly issue a summons. § 19-3-503(1). The preliminary protective hearing will take place at the date and time set by the court.

If the child is an "Indian child" under the provisions of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, the temporary custody or initial hearing cannot be held until at least ten days after the parent or Indian custodian and the tribe or, if neither can be determined, the Secretary of the Interior receives notice. 25 U.S.C. § 1912(a). ICWA also provides for up to an additional 20 days to prepare for the hearing if requested by a parent, Indian custodian, or tribe.

NOTICE REQUIREMENTS

All parties must receive notice of the temporary custody proceeding or initial hearing. § 19-3-502(7). Foster parents, pre-adoptive parents, and relatives with whom a child is placed are also entitled to notice. *Id.* The caregiver is required to provide prior notice of the hearing to the child. *Id.*

The Children's Code sets forth additional notice requirements, as well as specific form and content requirements, applicable to the temporary custody / initial hearing. When a child is taken into temporary custody by a law enforcement officer, the parent, guardian, or legal custodian of the child must be informed of the right to a prompt hearing to determine whether the child is to remain out of the child's home for a further period of time. § 19-3-402(1). Department or law enforcement personnel effectuating the removal of a child must deliver a notice of rights and remedies pursuant to § 19-3-212(2). If the removal of the child is effectuated pursuant to a court order, a copy of the court order must be delivered along with that notice. *Id.*

If the child remains in the custody of a parent, the court, after a petition has been filed, shall promptly issue a summons that recites briefly the substance of the D&N petition and contains notice of the date, time, and location of the hearing as required by the Colorado Rules of Civil Procedure. § 19-3-503(1). The summons must be personally served five days before the time fixed in the summons for the appearance of the person served. § 19-3-503(7).

When the residence of the person to be served is outside Colorado, service shall be by certified mail with a return receipt request. § 19-3-503(8)(a). Service is deemed complete within five days after return of the requested receipt. *Id.* If the whereabouts of the parent are unknown after the department has exercised due diligence to locate the parent, service may be by publication pursuant to Rule 4(h) of the Colorado Rules of Civil Procedure. § 19-3-503(8)(b). Service may be by single publication and must be completed not less than five days prior to the time set for hearing. *Id.*

ICWA requires notice to the parent or Indian custodian and the Indian child's tribe ten days in advance of a foster care placement hearing. 25 U.S.C. § 1912(a). Such notice must be provided by registered mail with return receipt requested. *Id.* The notice must inform of the right of intervention. *Id.* If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary of the Interior, who shall have 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. *Id.*

> **TIP:** At the temporary custody / initial hearing, counsel should determine whether the parent, guardian, or legal custodian received notice and the manner in which the department or law enforcement provided notice. Counsel should consider requesting a continuance of the preliminary protective hearing if the inquiry raises concerns that notice was insufficient.

PROCEDURAL ISSUES/CONSIDERATIONS

1. Jurisdiction

The juvenile court has exclusive original jurisdiction over proceedings concerning any child who is the subject of D&N proceedings. § 19-1-104(1)(b). The Children's Code defines "child" as a person under 18 years of age. § 19-1-103(18). The juvenile court does not have jurisdiction over an unborn child in a D&N action. *People in the Interest of H.*, 74 P.3d 494 (Colo. App. 2003).

> **TIP:** Counsel should determine whether another state or county may be involved and make appropriate requests to the court regarding any such involvement. *See* **Jurisdictional Issues fact sheet**. Counsel should also determine whether custody orders exist and make appropriate requests regarding those orders. For example, if a domestic relations proceeding is pending, a party who becomes aware of any other proceeding in which the custody of a subject child is at issue must file a request that the other court certify the issue of legal custody to the juvenile court. C.R.J.P. 4.4.

2. Venue

Venue is in the county where the child resides or is present. § 19-3-201(1). An adjudication or continued adjudication must take place before a change in venue may be considered. § 19-3-201(2)(b). *See* **Adjudicatory Hearing chapter**.

3. Open Proceedings

The matter is open to the public unless the court determines that it is in the best interests of the child or of the community to exclude the general public. § 19-1-106(2).

4. Applicable Rules

The Colorado Rules of Juvenile Procedure apply. § 19-1-106(1). If a particular procedure is not addressed in the Colorado Children's Code or the Rules of Juvenile Procedure, the Colorado Rules of Civil Procedure generally apply. C.R.J.P. *People ex rel. of S.M.A.M.A.*, 172 P.3d 958, 960 (Colo. App. 2007).

5. Magistrates

The temporary custody hearing conducted pursuant to § 19-3-403 may be heard by a magistrate. § 19-1-108(3)(a.5). Parties do not have a right to object to the magistrate's jurisdiction over the temporary custody hearing. *Id.* A magistrate presiding over a temporary custody hearing must inform the parties of their right to have a judge preside over other hearings in the proceeding and must also inform parties that if they waive that right, they are bound by the findings and recommendations of the magistrate. § 19-1-108(3)(a.5). The magistrate's findings and recommendations are subject to judicial review under § 19-1-108(5.5). Request for judicial review must be filed within five days of the magistrate's order. *Id. See also* **Magistrates fact sheet**.

> **TIP:** Counsel must object to the magistrate's jurisdiction before the next hearing is set if counsel is present at the setting or the right is waived under § 19-1-108(3)(c). Counsel must consider the facts, circumstances, and issues of the case, as well as previous experiences with the judicial officers. The GAL's consideration is governed by the best interests of the child. In addition, counsel should consider the mechanism of review. Judicial review of a magistrate's decision is often faster than an appeal of the district court judge's decision.

6. Appointment of GAL

a. For the child: The court shall appoint a GAL for the child in all D&N cases. § 19-1-111(1). The GAL shall be an attorney licensed to practice law in Colorado and is appointed to act in the best interests of the child. § 19-1-103(59). The GAL in a D&N case is charged "in general with the representation of the child's interests" and has the right to participate in the proceedings as a party. §§ 19-1-111(3), 19-3-203(3). The GAL must be provided with all relevant reports, and the court and social workers assigned to a case must keep the GAL apprised of significant developments in the case. § 19-3-203(2). The GAL is bound by the Rules of Professional Conduct, and the "client" of the GAL is the best interests of the child. CJD 04-06 (V)(B). A GAL's determination of what is in a child's best interests must include developmentally appropriate consultation with the child. *Id.*

- **TIP:** Some jurisdictions have developed procedures for appointing the GAL immediately upon setting the preliminary protective proceeding. These procedures allow the GAL to begin an independent investigation of the child's safety and needs, as well as of any potential relative placements prior to the preliminary protective proceeding. In districts in which these procedures have not been developed, GALs may wish to work with the district's Best Practice Court Team to explore the possibility of implementing such procedures.

- **TIP:** The GAL must conduct a conflict analysis, guidelines for which are provided in the Colorado Rules of Professional Conduct. *See* C.R.P.C. 1.7, 1.8, 1.9, and 1.10. Ideally, conflicts should be determined prior to obtaining sensitive information that may require the appointment of a new GAL for all children in a case. The petition and any reports prepared by the department are useful sources of information for identifying any potential conflicts prior to beginning an independent investigation.

- **TIP:** The preliminary protective hearing is likely the first time the GAL and respondents meet and interact. The GAL must receive RPC's consent before interviewing the respondents. C.R.C.P. 4.2; CJD 04-06 (V)(D)(4)(d). The GAL should explain the GAL's role, emphasizing the GAL's independence from the court, department, caregiver, and respondents. The GAL must be aware that respondents are assessing the GAL's actions to determine whether the GAL is truly independent. The GAL must present a professional demeanor that clearly communicates the GAL's independence from the department.

- **TIP:** The GAL's appointment triggers the requirements of CJD 04-06, which requires a prompt and thorough investigation into the best interests of the child. *See* CJD 04-06 (V)(D)(4).

b. For the respondent: The court may appoint a GAL for a parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, stepparent, or spousal equivalent in the D&N proceedings who has been determined to have a mental illness or developmental disability by a court of competent jurisdiction. § 19-1-111(2)(c). If a conservator has been appointed, the conservator shall serve as the GAL. *Id.* The court's discretionary authority to appoint a GAL for a parent is not limited by statutory criteria defining mental illness or

developmental disability. *People in the Interest of M.M.*, 726 P.2d 1108, 1117–1121 (Colo. 1986). The court must also appoint a GAL for a respondent who is "mentally impaired so as to be incapable of understanding the nature and significance of the proceeding or incapable of making those critical decisions that are the parent's right to make." *Id.* at 1120. In addition, the court must appoint a GAL for a parent if the court determines "the parent lacks the intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in her own interest." *Id.*

- **TIP:** CJD 04-06 governs GALs appointed for minor respondent parents, whereas the payment procedures and standards governing GALs for adult respondents are set forth in CJD 04-05.

c. Length of appointment: The appointment of a GAL in a D&N proceeding continues until the court's jurisdiction is terminated. § 19-1-111(4)(a).

7. Appointment of Counsel for Respondent Parent, Guardian, or Legal Custodian

A parent, guardian, or legal custodian has a statutory right to counsel if unable financially to secure counsel. § 19-3-202; *People in the Interest of J.B.*, 702 P.2d 753, 755 (Colo. App. 1985).

- **TIP:** RPC must conduct a conflict analysis, guidelines for which are provided in the Colorado Rules of Professional Conduct. *See* C.R.P.C. 1.7, 1.8, 1.9, and 1.10. To the extent possible, RPC should engage in this analysis prior to obtaining confidential communication from the client. The petition, summons, and any reports prepared by the department may provide useful information for RPC's initial conflict analysis.

- **TIP:** The preliminary protective hearing is likely the first time the RPC meets and interacts with the client. RPC must be aware that the client is assessing the RPC's actions, both on the record and off the record, to determine whether to trust the RPC as an advocate. RPC must present a professional demeanor that clearly communicates the RPC's independence, professional competence, and loyalty to the client.

8. Notice of Legal Rights and Advisement of Parent, Guardian, or Legal Custodian

The court shall fully advise respondent parents, guardians, or legal custodians of their legal rights and the possible consequences of a finding that a child is dependent or neglected. § 19-3-202(1); C.R.J.P. 4.2. The court shall fully explain the informational notice of rights and remedies prepared pursuant to § 19-3-212, including the right to a jury trial on the issue of adjudication; the right to be represented by counsel at every stage of the proceedings; the right to seek the appointment of counsel if the party is unable to pay for counsel; that termination of the parent-child legal relationship is a possible remedy available if the petition is sustained; that any party has the right to appeal any final decision made by the court; and the minimum and maximum time frames for the D&N process. *Id.*

> **TIP:** Even though the court will go over the parent's rights at the temporary custody / initial hearing, RPC should be aware that the court is presenting a great deal of information to the parent under very stressful circumstances. It is unlikely that the parent will have understood and processed all information provided by the court, and RPC should readdress the parent's rights and possible outcomes of the proceeding in a less stressful setting at the earliest opportunity, making sure the parent fully understands the advisement.

9. Filing of Petition

The petition must be filed within ten working days from the day a child is taken into custody. C.R.J.P. 4. Frequently, the petition is filed by the date of the temporary custody hearing.

> **TIP:** Once filed, the petition may not be dismissed over the GAL's objection without a hearing. *People in the Interest of R.E.*, 729 P.2d 1032, 1034 (Colo. App. 1986). *See* **Adjudicatory Hearing chapter**.

10. Relative/Kin Affidavit

The parent must provide the names, addresses, and telephone numbers of every grandparent, aunt, uncle, brother, sister, half-sibling, and first cousin of the child in a form affidavit

available through the judicial district. § 19-3-403(3.6)(a)(I)(B) and (G). The parent must also disclose the same information regarding other relatives or kin who have a significant relationship with the child. § 19-3-403(3.6)(C). The original form affidavit shall be filed with the court no later than five business days after the date of the hearing. § 19-3-403(3.6)(a)(III).

The GAL and RPC shall receive a copy of the affidavit. § 19-3-403(3.6)(a)(III). The court must order the department to exercise due diligence to contact all grandparents and other adult relatives within 30 days following removal of the child and to inform the relatives about placement possibilities. § 19-3-403(3.6)(a)(IV). This notification requirement may be waived upon showing "good cause not to contact or good cause to delay contacting the child's relatives." *Id.* Each parent may suggest an adult relative or relatives whom he or she believes to be the most appropriate caretaker or caretakers for the child. § 19-3-403(3.6)(a)(III). The court shall order each parent to notify every relative who may be an appropriate caregiver to come forward in a timely manner. *Id.*

- **TIP:** Although parents are advised in court about the relative affidavit, RPC should ensure parents understand the importance of sharing the information requested by the form, answer any questions about the form, and assist parents in completing the form. Counsel should also speak to parents about placement possibilities with significant individuals in a child's life who may not technically meet the statutory definition of relative but who may be an appropriate placement option for the child. *See* 7.304.21(A) (defining kin as relatives, individuals ascribed by the family as having a family-like relationship, or individuals with a prior significant relationship with the child). Counsel must impress upon the respondents that the failure of a relative to come forward in a timely manner may result in the child being placed permanently outside of the home of the child's relatives. § 19-3-403(3.6)(a)(III).

- **TIP:** Children may have additional information about relatives and kin who may appropriately serve as a placement or support for them. The Children's Code requires that, when appropriate, children be consulted about suggested relative caretakers. § 19-3-403(3.6)(a)(III). GALs should be sure to talk to children about relatives and kin to make sure that all placement/support possibilities are explored, keeping in mind Volume 7's broader

definition of kin. *See* **Family Finding/Diligent Search fact sheet**. Ideally, this discussion should occur during the GAL's initial personal interview of the child, which is required by CJD 04-06 to occur as soon as reasonable after the GAL's appointment, but in no event later than 30 days following that appointment. GALs should make sure that all potential family lines are explored, even if only one parent appears at the hearing or participates in the proceedings. Although the department is required to promote parental involvement in the kinship placement decision, parental consent is not required to place a child with suitable kin. 7.304.21(D)(2). *See* **Relative and Kinship Placement fact sheet**.

11. Parental Reimbursement for Cost of Care

If a child is in placement for which public monies are expended, fee payments by parents to cover the costs of the child's care may be ordered based on the parent's ability to pay. § 19-1-115(4)(d).

12. Parties

The court should inquire as to the identity and whereabouts of any noncustodial parents, including any presumed, biological, or alleged fathers. The department must commence a diligent search for such parents within three working days. 7.304.52(B)(1).

BURDEN OF PROOF/REQUIRED FINDINGS

At the initial hearing/temporary custody hearing, the court must enter findings regarding the custody of the child and the department's efforts to prevent unnecessary out-of-home placement. The court may also issue protective orders. The temporary custody hearing statute does not specify a burden of proof for any of these findings. However, § 13-25-127 provides that the burden of proof in any civil action shall be by a preponderance of the evidence.

At the temporary custody hearing, the court must also inquire whether the child is an Indian child for purposes of the ICWA. § 19-1-126(2). If the child is an Indian child, the court shall inquire whether the parties have complied with the procedural requirements set forth in ICWA. *Id.* If ICWA applies, any

out-of-home placements must be supported by clear and convincing evidence and the testimony of a qualified expert witness that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and that the parents cannot be persuaded to change their behavior. 25 U.S.C. § 1912(e). The court must also find by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(d). *See also* **ICWA fact sheet**.

◆◆ **TIP:** Sometimes it is believed a child may be an Indian child at the preliminary protective proceeding but the child's status as an Indian child has not been confirmed. In such circumstances, counsel should advocate for the court to err on the side of caution and to apply the ICWA standards governing removal of a child from the Indian parents/custodian and the breakup of the Indian family.

1. Temporary Custody Findings

a. Maintaining Custody with Parent(s) / Returning Custody to Parent(s): One of the purposes of the Colorado Children's Code is to "secure for each child such care and guidance, preferably in the child's own home, as will best serve the child's welfare and the interests of society." § 19-1-102(1)(a). A neglected or dependent child's care and guidance should be preferably in the child's own home, so as to preserve and strengthen family ties. *People in the Interest of M.M.*, 520 P.2d 128, 131 (Colo. 1974).

If the court orders continued placement with or return of custody to the parent, guardian, or legal custodian, the court may order protective supervision by the court, department, or other agency designated by the court. §§ 19-1-103(87), 19-1-114. The court may order the department to provide supportive services. § 19-1-104(3)(A). Such services may include home-based family and crisis counseling, transportation, treatment, or evaluations. § 19-3-208.

◆◆ **TIP:** Both RPC and GALs should ensure that the possibility of in-home placement is fully explored and should advocate for

any protective orders or custody arrangements that will allow the child to stay with a parent or legal custodian. Such options include but are not limited to placement/custody with the noncustodial parent; assistance from relatives, kin, and others to maintain placement in the child's home; protective orders requiring specified individuals to stay away from the child's home or to provide specific services and supports to the family. It may be critical for counsel to proffer additional evidence to the court to ensure that the possibility of in-home placement is fully considered.

b. Temporary Custody to the Department of Social Services: The court must consider the best interests of the child in determining whether the child should be placed out of the home. § 19-3-213(1). The court should not remove a child from the custody of the child's parents except when the child's welfare and safety or the protection of the public would be endangered. § 19-3-503(5); *M.M.*, 520 P.2d at 131. The applicable test at the temporary custody hearing is whether the welfare of the child or the community requires that detention or shelter continue. *P.F.M.*, 520 P.2d at 744.

If the court orders legal or temporary legal custody to the department, the court must enter the following findings, if warranted by the evidence: (i) continuation of the child in the home would be contrary to the child's best interests; (ii) there has been compliance with reasonable efforts requirements regarding removal of the child from the home according to §19-1-115(6)(b); (iii) reasonable efforts have been made or will be made to reunite the child, efforts to reunite the child and the family have failed, or reasonable efforts to reunite the child and the family are not required pursuant to specific statutory exemptions; and (iv) procedural safeguards with respect to parental rights have been applied in connection with the removal of the child from the home, a change in the child's placement out of the home, and any determination affecting parental visitation. § 19-1-115(6).

Reasonable efforts are defined in § 19-1-103(89) to require the "exercise of diligence and care." This definition makes clear that the child's "health and safety shall be the paramount concern." *Id.* Services provided in accordance with § 19-3-208 are deemed to have met the reasonable efforts requirement. *Id.*

Reasonable efforts to prevent out-of-home placement and removal are not required when an emergency situation exists

that requires the immediate temporary removal of the child from the home and it is reasonable that preventative efforts not be made because of the emergency situation, or if the court finds one of the following: the parent has subjected the child to aggravated circumstances as described in §§ 19-3-604 (1) and (2); the parental rights of the parent with respect to a sibling of the child have been involuntarily terminated (safe haven surrenders excluded); or the parent has been convicted of a specifically enumerated felony. *See* §§ 19-1-115(6)(b) and (7). Similarly, the court may find that reasonable efforts are not required to reunite the child with the family if it finds one of the previously listed non-emergency exceptions applies. *Id.*

- **TIP:** Counsel should keep in mind that the focus of the temporary custody hearing is the child's welfare and safety. Counsel should ensure that reasonable efforts have been made to keep the child at home and, when appropriate, should argue for additional efforts to be made to keep the child safely at home. For example, if domestic violence directed against one parent is the basis for removal, counsel should assess whether the child can remain safely with the non-offending parent with, for example, the added safeguard of protective orders.

- **TIP:** For each child removed from the home, the department must conduct a safety assessment called the Colorado Safety Assessment. 7.202.531 *et seq.* The assessment evaluates the extent of maltreatment, surrounding circumstances of maltreatment, child functioning, adult functioning, general parenting practices, and disciplinary parenting practices. Review of the department's use of this assessment may provide important information about the department's investigation of safety concerns and efforts to maintain the child in the home.

- **TIP:** Sometimes little information is available regarding the need for a child to be removed from the home, but insufficient information exists regarding the safety of the child if returned home. In such circumstances, the GAL and/or RPC should consider requesting that they be allowed to reserve the right to challenge the custody of the child based on the limited amount of information available and the need to complete an independent investigation.

- **TIP:** GALs should advocate for educational stability for any school-aged child facing an out-of-home placement. Title 19

requires that the parties attempt both to promote educational stability for the child in placement decisions and to plan for educational stability prior to a change in placement. § 19-3-213(1)(d). A change in placement should enable the child to remain in the existing educational situation or to transfer to a new educational situation that is comparable to the existing situation. *Id.* The presumption is that remaining in the school the child attended prior to a placement change is in the child's best interests, and federal law requires documentation explaining why a change in schools is in the best interests of the child. 42 U.S.C. § 675(1)(G)(ii). *See also* 7.301.241(B)(2)(b). Foster parents may be reimbursed for reasonable transportation costs to transport children to the school they attended prior to placement, and GALs should make sure that this option is explored. 7.418.1(A), 7.406.1(MM). If a change in schools is necessary, immediate and appropriate enrollment in the new school, as well as the prompt transfer of educational records, should occur. 42 U.S.C. § 675(1)(G)(ii)(II); § 22-32-128; 7.301.241(B)(2)(b), (C). *See* **Education Law: Rights and Issues fact sheet**.

c. Relative Placement/Temporary Custody to Relatives: The court may consider and give preference to granting temporary custody to a child's relative who is appropriate, capable, willing, and available for care if in the best interests of the child and no suitable parent is available. §§ 19-1-115(1)(a), 19-3-403(3.6)(a)(III) and (V). Placement with a grandparent is preferred over foster care. § 19-3-402(2). The grandparent must be appropriate, capable, willing, and available to care for the child. The court shall consider "any credible evidence of the grandparent's past conduct of child abuse or neglect" when considering a request by a grandparent for placement. § 19-1-117.7. Such evidence may include, but shall not be limited to, medical records, school records, police reports, information contained in records and reports of child abuse or neglect, and court records received by the court pursuant to § 19-1-307(2)(f). *Id.* The court may order protective supervision by the court, department, or other agency designated by the court. § 19-1-103(87).

Placement with a relative can be accomplished through an order of temporary custody to the department (relative serves as placement) or an order of temporary custody to the relative. §§ 19-3-403(7), 19-1-115(1)(a). Both options are considered a removal of the child from the parents and require the same "contrary to the child's best interests," reasonable/active efforts, and

procedural safeguard findings set forth for temporary custody to the department in the previous section.

- **TIP:** GALs should engage in investigation and advocacy to ensure the child's best interests are significantly factored into the determination of whether to seek temporary custody with the department / placement with relatives or temporary custody being granted to the relatives. Factors to consider include the financial supports that may be available through either option, the monitoring requirements, and long-term support options that may be possible under either custody arrangement. *See* **Relative and Kinship Placement fact sheet**.

2. Protective Orders

Interim or temporary orders requiring evaluation, treatment, support, or protection may be entered prior to adjudication upon notice and a finding that such orders are in the best interests of the child. §§ 19-1-104(3)(a), 19-1-114. The department must provide a set of services as determined necessary by an assessment and a case plan. § 19-3-208.

- **TIP:** The GAL should request child-specific services if those services are believed to be in the child's best interests. However, the GAL may need to delay this request until meeting with the child and completing an independent investigation.

- **TIP:** To promote the respondent and/or child's participation in services without unintended consequences in a criminal proceeding, counsel must ensure the services are court-ordered. *See* **§ 19-3-207 fact sheet**.

- **TIP:** If the child is in out-of-home placement, RPC should move for protective orders promoting involvement of the parent in important day-to-day parenting activities regarding the child, such as haircuts, medical appointments, and afterschool activities.

At the temporary custody hearing, the court will also enter orders for visits between the child and other persons, including the respondents, siblings, and other relatives. The department must provide visiting services for parents with children in out-of-home placement. § 19-3-208(2)(b)(IV). *See* **Visits fact sheet**. The controlling standard is whether such services are

necessary and appropriate, and the health and safety of the child are the paramount concerns. *People ex rel. B.C.*, 122 P.3d 1067, 1070 (Colo. App. 2005). Section 19-1-128(1) and (2) require sibling visits if the siblings mutually request an opportunity to visit one another. The controlling standard is the best interests of the child. § 19-1-128(3). A grandparent may also request reasonable grandchild visits under § 19-1-117. The controlling standard is the best interests of the child. *Id.*

EVIDENTIARY ISSUES

At the temporary custody hearing, the court may consider any information having probative value, regardless of its admissibility under the Colorado Rules of Evidence. § 19-3-403(3.6)(a)(II). Information may be supplied to the court in the form of written or oral reports, affidavits, testimony, or other relevant information that the court may wish to receive. *Id.* A verbatim record shall be taken of all proceedings. § 19-1-106(3).

- **TIP:** Although it may not be common practice to present evidence at a temporary custody hearing, RPC and GALs should carefully consider doing so, keeping in mind that the issue is whether the welfare of the child or the community requires that detention or shelter continue—not the truth of the allegations in the petition. *W.H. v. Juvenile Court*, 735 P.2d 191, 193 (Colo. 1987). Counsel should consider presenting evidence concerning services or protective measures that would allow the child to remain in the parent's custody.

- **TIP:** Even though information presented to the court does not need to be admissible under the Rules of Evidence, it does need to have probative value. § 19-3-403(3.6)(a)(II). RPC and GALs should consider objecting to evidence lacking probative value or incapable of being sufficiently tested through cross-examination. Hearsay within hearsay is one example of the type of information that may warrant objection. Insisting on a sufficient opportunity to examine experts on the facts or data underlying their opinions is another example.

SPECIAL ISSUES/CONSIDERATIONS

1. Siblings

If the child is part of a sibling group being placed in foster care, the department shall make "thorough efforts" to locate a joint placement. §§ 19-3-213(1)(c)(I), 19-3-403(3.6)(b). There is a presumption that siblings be placed together if the department locates an appropriate, capable, willing, and available joint placement. § 19-3-403(3.6)(b). This presumption may be rebutted by a preponderance of the evidence that joint placement is not in the child's best interests. *Id.*

- **TIP:** The department may allow foster care homes to exceed capacity for the number of children and for square footage requirements to accommodate the joint placement of sibling groups in a single foster care home. § 19-3-215; 7.708(1)(A)(1).

- **TIP:** A thoughtful placement decision is critical to the health and well-being of the child. The initial placement decision sets the trajectory of the case for the child. Failure to place siblings together initially may unduly reduce the likelihood of ultimate joint placement. The GAL should ensure that thorough efforts are made to find an initial joint placement for siblings.

2. Special Respondents

A special respondent is any person who is not a parent, guardian, or legal custodian and who is involuntarily joined as party in a dependency and neglect proceeding for the limited purposes of protective orders or inclusion in a treatment plan. § 19-1-103(100). The court may join a person as a special respondent on its own motion or the motion of a party. § 19-3-503(4). A person may be named as a special respondent on the grounds that the person resides with, has assumed a parenting role toward, has participated in whole or in part in the neglect or abuse of, or maintains a significant relationship with the child. § 19-3-502(6). *See* **Special Respondents fact sheet**.

3. Developmentally Disabled or Mentally Ill Child Held in Shelter

A developmentally disabled or mentally ill child must be evaluated. The court must refer a child who appears to be devel-

opmentally disabled to the nearest community-centered board for a mental health prescreening within 24 hours of the request for the prescreening, excluding Saturdays, Sundays, and legal holidays. § 19-3-403(4).

4. Allegations of Emotional Abuse

If the allegation is based solely on emotional abuse, the court on its own motion or motion of a party shall order a report to be prepared by an independent mental health care provider. § 19-3-312(4).

5. Interim Status of Order

Orders entered during the temporary protective or shelter hearings are interim orders. *People ex rel. A.E.L.*, 181 P.3d 1186, 1191 (Colo. App. 2008) (citing *People in the Interest of M.W.*, 140 P.3d 231, 233 (Colo. App. 2006)). The magistrate's orders may be reviewed by the district court judge pursuant to § 19-1-108(5.5). *See* **Magistrates fact sheet**. Otherwise, review of such orders may be sought only pursuant to Colorado Appellate Rule 21.

NEXT STEPS/SETTING NEXT HEARING

1. Rehearing

Parties may request reconsideration of the court's determination of temporary custody. *See* C.R.C.P. 60. If the temporary custody hearing was held before a magistrate, the magistrate does not have authority to act on a motion for reconsideration. *See In re Marriage of Phelps*, 74 P.3d 506, 509–10 (Colo. App. 2003). Counsel should instead petition the district court for review of the magistrate's order pursuant to § 19-1-108(5.5) and C.R.M. 7(a).

2. Initial Hearing

If the parent, guardian, or legal representative was not present at the temporary custody hearing regardless of whether notice of the hearing was received, the court may set an initial hearing to effect service and obtain jurisdiction over the parent, guardian, or legal representative.

3. Settlement Conference

Several judicial districts have the ability to schedule a settlement conference, mediation, or case management conference to attempt a resolution of contested issues. *See* **Pretrial Hearing chapter**.

4. Pretrial Hearing

Several judicial districts schedule pretrial conferences or status conferences to complete case management certificates and endorsement of witnesses and to settle pretrial motions. *See* **Pretrial Hearing chapter**. If a party wants the pretrial hearing to be set before a judge (instead of a magistrate), the party must request a hearing before the judge (1) at the time the matter is set for hearing if counsel is present at the setting or (2) in writing within five days after receipt of notice of the hearing if the matter is set on notice outside the presence of counsel. § 19-1-108(3)(c). *See* **Magistrates fact sheet**.

5. Adjudication Hearing

In some instances, a case may be set for an adjudicatory hearing upon conclusion of the initial hearing/temporary custody hearing. Section 19-3-505(3) sets forth the time frames for scheduling an adjudication hearing. The adjudicatory hearing may be held before a magistrate, judge, or jury. Section 19-3-202 provides that the petitioner, any respondent, or the GAL may demand a trial by jury of six persons at the adjudicatory hearing. Adjudicatory jury trials must be set before a judge. § 13-5-201(3). If a party is not requesting a jury trial but wants the adjudicatory hearing to be set before a judge (instead of a magistrate), the party must request a hearing before the judge (1) at the time the matter is set for hearing if counsel is present at the setting or (2) in writing within five days after receipt of notice of the hearing if the matter is set on notice outside the presence of counsel. § 19-1-108(3)(c). *See* **Adjudicatory Hearing chapter**.

❖ **TIP:** The GAL for the child should consider whether a trial by jury will best serve the interests of the child. The GAL should consider requesting the matter be set for a jury trial rather than forgo the right at this early stage in the proceeding, because

the request can later be withdrawn if a jury trial is determined not to be in the child's best interests. The determination of whether a jury trial is in a child's best interests should include consideration of whether it is likely that the child will be called to testify. The GAL should consult with the child in an age-appropriate manner regarding the right to a jury trial.

- **TIP:** Respondent counsel must discuss the client's right to a jury trial with the client. After fully informing the client of the benefits and risks associated with requesting a jury trial, respondent counsel must request or waive a jury trial as directed by the client.

II
Pretrial Hearing

PRETRIAL HEARING CHECKLIST—GAL

BEFORE

- ❑ Review petition, affidavit, and court report or other supporting documents to assess legal sufficiency of the allegations, jurisdiction, placement options, venue, timeliness of filing, and notice.
- ❑ Review case management orders and/or local district plans, if any.
- ❑ Request and review discovery, including the department's file (e.g., the Colorado Safety Assessment Instrument).
- ❑ Review relative affidavit.
- ❑ Investigate potential placements or visit hosts.
- ❑ Meet and observe child in placement.
  - ❍ Identify if child needs any evaluations for developmental, physical, mental health, or educational needs.
  - ❍ Assess placement for safety and child's well-being.
  - ❍ Investigate child's educational setting or day care. Investigate attendance, special needs, placement, transportation, extracurricular activities, and social opportunities.
  - ❍ Ensure the child's needs are being met.
  - ❍ If siblings are not placed together, determine whether visits are taking place.

- Consult with child in developmentally appropriate manner. Ensure child has notice of the next hearing. Explain court orders, obtain child's input, and ascertain child's position. Determine whether child wants you to report his or her position.

- ❑ Interview caregiver(s). Inquire about medical and dental care, school enrollment, academic needs and attendance, behavior, and special needs.
- ❑ Observe visits or interaction between child and respondent(s). Ensure regular visits with respondent(s), siblings, relatives, and other important people are scheduled if child is placed out of home. Consider phone contact.
- ❑ If possible/authorized, meet with respondent(s) and discuss treatment and support needs, if any.
- ❑ Communicate with RPC or parent (if unrepresented) regarding the positions on treatment, adjudication, placement, and so forth.
- ❑ Determine whether the department is conducting an active search for noncustodial parents and adult relatives available for placement. Conduct an independent search as necessary.
- ❑ Request evaluations as soon as possible, monitor compliance, and obtain results.
- ❑ Research paternity and identify/locate father(s).
- ❑ Formulate position on adjudication, treatment plan, and visits.

DURING

- ❑ Determine whether notice was sent to parties, CASA, and caregivers.
- ❑ Actively participate in settlement discussions.
- ❑ Advocate for position and inform court of child's position, if appropriate.
- ❑ Ensure orders are consistent with any collateral cases, such as a related criminal case.
- ❑ Ensure court addresses pretrial issues such as discovery, pretrial motions, and evidentiary issues. Seek court resolution of any issues with diligent search, if necessary.
- ❑ If set as an advisement hearing or if no advisement was previously given, ensure the court fully advises respondent(s) of their legal rights and responsibilities, critical timelines, and

possible consequences of a finding that the child is dependent or neglected, as follows:

- The right to a jury trial on the issue of adjudication.
- The right to be represented by counsel at every stage of the proceeding, including the right to seek appointment of counsel if the respondent financially qualifies.
- The right to object to the magistrate's jurisdiction, as appropriate.
- The minimum and maximum time frames for the D&N process.
- The obligation to complete and file the relative/kin affidavit.
- That termination of the parent-child legal relationship is a possible remedy if the petition is sustained.

- Ensure that court addresses, if appropriate:
  - Placement.
  - Services for family.
  - Parentage.
  - Indian heritage (ICWA).
  - Visits with respondents, siblings, relatives, and other appropriate persons.
  - School placement and transportation, if needed.
  - Any other necessary orders.
  - Setting next hearing(s).

AFTER

- Review court orders for accuracy.
- Consider whether it is necessary to file pretrial motions or motions in *limine* and file either or both as appropriate.
- Communicate results of hearing with child and/or caregiver when appropriate. Consult with child regarding next hearing, obtain his or her position when ascertainable, and determine whether child wants his or her position reported to the court.

PRETRIAL HEARING CHECKLIST—RPC

BEFORE

- ❑ Review petition in dependency and neglect.
- ❑ Review case management orders and/or local district plans, if any.
- ❑ Obtain and review discovery (e.g., the Colorado Safety Assessment Instrument).
- ❑ Meet with client. Discuss petition, facts, investigation, and potential placements and/or visit hosts. Inquire about paternity. Inquire about collateral cases such as prior custody, immigration, or criminal cases. Review upcoming dates.
- ❑ Prepare client for court hearing. Discuss possible settlement options. Prepare for admission if anticipated, including thorough advisement.
- ❑ Identify whether client needs or wants any evaluations or referrals for services.
- ❑ Have client sign the release of information forms authorizing disclosure to you. Discuss release of information forms requested by the GAL and department.
- ❑ Identify if client is already engaged in any services. Contact service providers for information.
- ❑ Request service referrals from caseworker if protected by C.R.S. § 19-3-207(2).
- ❑ Assess if reasonable efforts have been made and continue to be made.
  - ❍ Assess reunification if child has been placed out of the home. Consider proposing elements for a safety plan and a return home.
  - ❍ Assess department's efforts to locate and place child with relatives/kin or other appropriate persons.
- ❑ Ensure regular visits are scheduled if child is placed out of the home. Identify and address issues with transportation to scheduled visits. Advocate for phone contact in addition to visits.
- ❑ Ensure client is actively engaged in child's education and medical, dental, and therapeutic services.
- ❑ Consult with client and obtain position on adjudication, treatment plan/services, disposition, reunification, and visits.

DURING

- ❑ Participate in settlement discussions.
- ❑ Discuss settlement offers with client privately. Advise client as to adjudication.
- ❑ Advocate for client's position.
- ❑ Enter admission with client, if agreed resolution reached.
- ❑ Make sure orders are consistent with any collateral cases, such as a related criminal case.
- ❑ Ensure court addresses pretrial issues such as discovery requests, pretrial motions, and evidentiary issues.

AFTER

- ❑ Review court orders for accuracy and mail a copy to the client.
- ❑ Monitor compliance with court orders.

BLACK LETTER DISCUSSION AND TIPS

The time between the preliminary protective proceeding and the adjudication hearing is often one of the busiest times of a case. It is also one of the most important times in the case, because what happens during this phase often sets the trajectory for the entire proceeding. Because counsel typically is appointed immediately prior to the preliminary protective hearing or at the hearing itself, the hearings that take place between the preliminary protective hearing and the adjudicatory hearing are generally the first opportunity for counsel to present independently investigated information to the court. Counsel must begin a prompt and thorough investigation of the facts and circumstances of the case, while simultaneously preparing for a possibly contested adjudication hearing and investigating appropriate placement, services, visits, and supports for the child(ren) and parent(s).

A variety of court hearings and settings may happen during this period, depending on the practice of the local jurisdiction and the facts of the case. Typically, cases are set for status reviews, settlement conferences, pretrial status conferences, or a combination thereof. If motions are filed, a motions hearing may also occur. These hearings/settings will be discussed below, in addition to possible motions practice at this stage in the D&N court process. Each of these hearings/settings presents an opportunity to educate the court and other parties about counsel's theory of the case and the child's and family's strengths and needs.

TIMING OF HEARING

Pretrial settings are set sometime before the contested adjudicatory hearing. *See* **Adjudicatory Hearing chapter**.

- **TIP:** Case management orders and/or local district plans promulgated pursuant to CJD 98-02 may set forth specific settings/hearings that must occur prior to a contested adjudicatory hearing, as well as specific time frames for filing motions and scheduling such settings/hearings. Counsel should be familiar with such requirements.

NOTICE

All parties are entitled to notice of the hearing. § 19-3-502(7). In addition, anyone with whom the child is placed is entitled to notice. *Id.* The person with whom the child is placed shall also give notice to the child of any hearings regarding the child. *Id.* A CASA volunteer appointed to the case must also be notified of the hearing. § 19-1-209(3). If the child is an Indian Child as defined by the Indian Child Welfare Act (ICWA) and out-of-home placement is sought at the hearing, the petitioner must send proper notice to any Indian parents or custodians and the child's tribe. § 19-1-126, 25 U.S.C. § 1912(a). *See* **ICWA fact sheet**.

TYPES OF SETTINGS/HEARINGS

1. Advisement Hearings

In some jurisdictions, the parent does not make the decision whether to enter an admission or set the case for trial at the preliminary protective proceeding. In these jurisdictions, the case is set for an advisement hearing. *See generally* C.R.J.P. 4.2(b). It is at this hearing that the parents enter an admission or denial. *See* **Adjudicatory Hearing chapter** (discussing admissions).

2. Pretrial Conferences

A pretrial conference will typically occur when a denial has been entered by the respondent parent and an adjudicatory trial has been requested and scheduled. At the pretrial conference, the court will address issues for trial, including, but not limited to, discovery, witnesses, and trial management orders.

At any hearing occurring between the preliminary protective proceeding and the adjudicatory trial, the court may also address the issues of visits, placement, services, and diligent search for relatives/kin. The court may also enter additional protective orders at these hearings pursuant to §§ 19-1-104(3)(a) and 19-1-114. Issues related to noncustodial parents may also be addressed, including service and notice, default judgments, appointment of counsel, and possibly paternity testing. *See* §§ 19-1-104(2), 19-3-202. If the child is to remain in out-of-home

placement, the court must make reasonable/active efforts findings at this hearing. § 19-1-115(6.5).

> **TIP:** The time period before an adjudicatory hearing is a critical stage for finding noncustodial parents and including them in the case. The department is required to commence a diligent search for the noncustodial parent within three days and to have completed a diligent search for grandparents and adult relatives (including those related to noncustodial parents) within 30 days. 7.304.52. Counsel should ensure this process is happening. Ongoing inquiries of the respondent custodial parent and attorney representing that parent can facilitate this process. Early in the case is the prime opportunity to find the noncustodial parent, establish paternity, appoint counsel, consider the parent or relatives for placement, and establish frequent and meaningful visits between the parent and the child.

3. Settlement Conferences

Some jurisdictions require the parties to meet in an informal setting to discuss possible settlements. In other jurisdictions, such meetings are available on request by one of the parties or the court. These meetings may be facilitated by a court magistrate, a family court facilitator, a professional mediator, or other designated professional. Such meetings often take place at the courthouse. Although the name of the meeting may vary depending on the jurisdiction, this chapter will generally refer to such meetings as "settlement conferences."

> **TIP:** The Children's Code does not address settlement conferences. Many judicial district plans developed pursuant to CJD 98-02 address the use of settlement conferences. Counsel should be familiar with the procedures and expectations regarding settlement conferences set forth in the applicable district's plan.

In a typical settlement conference, the attorney representing the department, the caseworker, the parents and their attorneys, and the GAL are present. Unlike family engagement meetings hosted by the department, extended family, support people, and service providers are generally not included in settlement conferences. After introduction of parties and discus-

sion of ground rules for mediation/settlement discussions, the department's attorney typically starts by briefly covering the allegations, the witnesses, and evidence that will be presented at trial. The department attorney will also often make an offer with regard to acceptable admissions and resolution of the case. *See* **Adjudicatory Hearing chapter** (discussing potential admissions and outcomes at the adjudicatory stage of a case). Other elements of settlement conferences may include visits, reunification, treatment needs, services, referrals, substance-abuse monitoring, and potential kinship placements.

- **TIP:** Counsel must prepare for a settlement conference. Visiting with the child/client and discussing the case, the truth of the allegations, and the client's/child's wishes for the direction of the litigation are important for both GALs and RPC. Counsel should conduct an initial investigation of the facts of the case prior to the settlement conference, including interviewing potential witnesses. Investigating potential placements and a preliminary treatment plan are also important, because they will likely be discussed at the conference. Although the child's wishes will not be dispositive of the GAL's position at a settlement conference, they should inform the GAL's advocacy. After initial investigation and consultation with client, counsel may proactively open the settlement conversation by asking for a specific disposition. Under certain circumstances, it may also be appropriate for the child to be present for the settlement conference. Having the child present at the settlement conference underscores the seriousness of the matter, encourages buy-in, and impresses upon the child the need for the child's participation in the proceedings and services.

- **TIP:** RPC should consult GALs about acceptable resolution of the contested issues. GALs are parties to D&N proceedings and have the same standing as other parties to weigh in on placement, services, and visits. § 19-1-111(3). Additionally, the GAL may assume the role of the petitioner if the department for some reason decides not to pursue its case after filing it and plans to withdraw or dismiss the case; the court may not dismiss a case over the GAL's objection without a hearing. *People in the Interest of R.E.*, 729 P.2d 1032 (Colo. App. 1986).

The judicial officer presiding over the case is not involved in the settlement conference. All discussions at settlement conferences are confidential. C.R.C.P. 121 § 1-17(2). Statements made

at a settlement conference are not admissible in any other proceeding for any purpose. *Id. See also* C.R.E. 408.

If the parties reach an agreement at the settlement conference, some judicial districts provide for the parties to move directly from the settlement conference to an impromptu hearing before a judicial officer for entering an admission and setting a dispositional hearing. *See* **Adjudicatory Hearing chapter**. Other districts proceed by having the parent file a written admission following the settlement conference, *see Id.*, or simply proceed with the results of the settlement at the adjudicatory hearing.

If the parties do not reach an agreement as to adjudication, some time may then be spent on discovery and trial issues. Many jurisdictions will next set the parties for a pretrial hearing before a judicial officer.

4. Motions Hearings

Depending on issues unique to each case, motions hearings may be scheduled between the preliminary protective hearing and the adjudicatory hearing. Generally, the motions filed at this stage of the proceeding fall into two categories: motions regarding placement, services, or visits and motions relating to the adjudicatory hearing.

Generally, motions practice is governed by C.R.C.P. 10, 11, and 12, as well as the Practice Standards set forth by 121 § 1-15 and any local rules developed pursuant to C.R.C.P. 121. District plans developed pursuant to CJD 98-02 may also set forth procedures for motions practice in dependency cases. Generally, except for motions for summary judgment, motions involving contested issues must be supported by legal authority. C.R.C.P. 121 §§ 1-15(1), (3). Oral argument or evidentiary hearings prior to ruling may be requested by the court or any party. C.R.C.P. 121 § 1-15(4). Any motion requiring immediate disposition should be brought to the clerk's attention. *Id.* Prior to filing a motion, counsel has a duty to confer with the other parties. C.R.C.P. 121 § 1-15(8). Motions are required to contain a statement describing the results of the conference with other counsel. *Id.* Unopposed motions should be so designated in the caption. C.R.C.P. 121 § 1-15(9).

a. Motions Regarding Placement, Services, or Visits: Counsel, as a result of the independent investigation during this stage of the proceeding, may identify a need for amendments to the protective and placement orders entered at the preliminary protective proceeding. For example, a suitable relative placement may be located, a visit host to support more frequent and meaningful visits between a parent and a child may be identified, or issues regarding school stability may arise. Timely resolution of such issues is important to the child and parent, and the GAL and/or RPC may file motions to bring such matters to the immediate attention of the court instead of waiting for the next scheduled hearing.

Examples of such motions include, but are not limited to, motions for change of placement, motions to conduct a kinship home study, motions for visits, and motions for reconsideration of previously entered orders.

> **TIP:** GALs should consider consulting with the OCR's motions bank at **www.coloradochildrep.org** for potential sample motions and should submit redacted versions of motions they file to the OCR for addition to the bank. To access the RPC motions bank, RPC must join the RPC listserv through the Colorado Court Improvement Program. *See* **http://www.courts.state.co.us/Courts/Supreme_Court/Committees/rptf.cfm**.

b. Motions Relating to the Adjudicatory Hearing: If a case is set for a contested adjudication hearing, both GAL and RPC should consider filing motions to distill the evidence that will be presented at trial and to address any unresolved discovery issues. Examples of such motions include, but are not limited to, evidentiary motions pursuant to C.R.E. 401–408, motions to redact hearsay within hearsay pursuant to C.R.E. 805, and motions to introduce child hearsay pursuant to § 13-25-129. Hearings on these motions, if requested, will be scheduled prior to the adjudicatory hearing. C.R.C.P. 121 § 1-15(4).

> **TIP:** Counsel should discuss their motions practice with the parent/child. Although whether to file a motion is within the lawyer's discretion under C.R.P.C. 1.2. C.R.P.C. 1.4 requires counsel to discuss with the client the means being used to achieve the client's objectives. Although GALs have the unique responsibility of representing the best interests of the child, a

GAL must also consult with the child about the child's position on the motion in a developmentally appropriate manner and must communicate the child's position when appearing in court unless the child instructs the GAL not to do so. CJD 04-06 (V)(B), (V)(D)(1).

Motions for summary judgment may also be filed at this stage in the proceeding. *See* **Adjudicatory Hearing chapter**.

SPECIAL CONSIDERATIONS

1. Establishing the Attorney-Client / GAL-Child Relationship

By this stage in the case, RPC should be establishing a relationship with the client, and the GAL should be establishing a relationship with the child. For RPC, this includes meeting with the client and discussing the objectives of representation, as well as sending written communication to the client outlining the scope of representation. *See Denver Bar Association, Ethics Opinion 114: Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings* (2010). For GALs, the duties outlined in CJD 04-06 should be followed, including conducting timely visits with the child in placement, maintaining contact with the child, and consulting with the child in a developmentally appropriate manner.

2. Diligent Search for Relatives/Kin

By the time of any pretrial hearings, parents should have been given a copy of the relative affidavit at the preliminary protective proceeding and completed the affidavit. §§ 19-3-403(3.6)(a)(I), (III). All parties should receive a copy once it is completed. § 19-3-403(3.6)(a)(III) (requiring the court to order the respondent to complete the form no later than seven business days after the date of the hearing or prior to the next hearing on the matter, whichever occurs first).

The department is required to commence a diligent search for any noncustodial parent within three days and to have a diligent search for grandparents and adult relatives within 30 days. *See* 7.304.52. The GAL is required to confirm the department has

conducted a diligent search or to personally conduct one. *See* CJD 04-06 (V)(D)(4)(f). The home assessment of potential kin placement must begin as soon as possible and be completed within 60 days. 7.304.21(D)(2). Hence, the parties should be in a position to provide the court with an update on diligent search and potential relative placements/supports at any pretrial setting.

- **TIP:** All counsel should play an active role in facilitating a diligent search. RPC should inquire whether the relative affidavit was filed with the court and a copy given to the department and, if not, should help facilitate its return. RPC can also play a critical role in helping the parent understand the importance of the affidavit and address any reservations a parent may have about identifying potential relatives. For any potential relative placements/supports, counsel should encourage the department to complete a background check and visit the relative's home prior to the hearing, even if the 60-day time frame will not have expired by the hearing date. Counsel should also be proactive in moving for immediate placement or visits with appropriate relatives/kin. Counsel should keep in mind that relatives/kin may serve not only as a placement resource but also as a support for children and families, for example, through visits and as visit hosts. *See* **Family Finding / Diligent Search fact sheet**; **Visits fact sheet**.

3. Siblings

If siblings are not placed together, pretrial settings present another opportunity to address whether the department has made "thorough efforts" to locate a joint placement for the siblings. § 19-3-213(1)(c). *See* **Siblings fact sheet**. If such a placement has not been located or it has been determined that the best interests of any of the siblings require separate placements, counsel should address the status of sibling visits at each pretrial hearing and ensure that frequent and meaningful visits are occurring between the siblings in their best interests. *See id*. Note that § 19-1-128 requires the department to arrange visits between siblings if the siblings make a mutual request.

4. Visits

The settings occurring at this time present a significant opportunity for counsel to investigate and report on the status

of visits between the parent(s) and child and to move for more frequent and meaningful visits when appropriate. Frequent and meaningful visits are key for children in out-of-home care. *See, e.g.*, Sonya J. Leathers, *Parental Visiting and Family Reunification: Could Inclusive Practice Make a Difference?* 81 CHILD WELFARE 595 (2002). Plans to move visits out of the department visitation rooms as quickly as possible are also key. *See* Wendy L. Haight et al., *Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research*, 82 THE SOCIAL WORKER 195 (2003). *See also* **Visits fact sheet**.

5. Educational Issues

Counsel should investigate and report on the child's educational status. Attendance and special education needs should be verified as soon as possible. By any pretrial settings, the GAL should have conducted an independent investigation regarding the child's best interests that includes the child's educational needs. CJD 04-06 (V)(D)(4). Counsel should bring any unresolved issues regarding meeting a child's educational needs, including the need for school stability, to the attention of the court. *See* **Education Law: Rights and Issues fact sheet**.

6. Discovery

Discovery issues may be addressed at the pretrial conference. Some judicial districts handle discovery procedures in a standing case management order or in their district plan for handling D&N cases.

Courts in some jurisdictions issue written case management orders setting forth dates for the exchange of witness lists, discovery, and other pretrial issues, whereas other jurisdictions address the issues orally at the pretrial hearing. The Colorado Rules of Civil Procedure generally apply to juvenile proceedings absent a conflicting Rule of Juvenile Procedure or statute in the Children's Code. *See* C.R.J.P. 1; *People in the Interest of Z.P.*, 167 P.3d 211 (Colo. App 2007). However, C.R.C.P. 26 specifically states that it does not apply to juvenile proceedings unless "otherwise ordered by the court or stipulated by the parties."

❖ **TIP:** Counties, particularly the large metropolitan counties, often have standard protocols in place for the parties to exchange

information. Many even have "open file" policies, where counsel can review the caseworker's file at any time, given counsel provides advance notice so that any information protected under the attorney-client privilege can be redacted. §§ 19-1-303(1)(a), 13-90-107(1)(b). Accordingly, counsel should first try requesting information informally. Otherwise, counsel seeking pretrial discovery should refer to C.R.C.P. 26–37, C.R.S. § 19-1-307(2), and C.R.S. § 19-1-303. Counsel should request application of the particular rules in question and specific discovery orders. Whenever possible, counsel should make a record of why discovery is necessary to promote due process in the proceedings and to investigate/advocate for the best interests of the child.

TIP: To be sure that counsel is obtaining all relevant information in a case, counsel may need to proactively identify the discovery sought. For example, use of the Colorado Safety Intervention Model is required for all initial investigations, and the Colorado Safety Assessment Instrument must be completed within 30 days. *See* 7.202.53 *et seq.*; 7.202.532(C). The caseworker's documentation regarding the threshold criteria and 15 specific safety concerns outlined in this model may not be routinely provided in a district but may be helpful to both RPC and GALs in identifying the issues leading to the filing of the petition, as well as any weaknesses in the department's case.

7. Services

Counsel needs to keep an eye on services—that is, what the family needs, how the services will be provided, and whether there is compliance with referrals and attendance.

If possible, an interim treatment plan should be discussed. It is best to start services in a case as early as possible and not wait until the disposition hearing to start treatment. Referrals to services should be made immediately; payment issues, if any, should be addressed; and § 19-3-207(2) protections for statements made during the course of treatment should be put in place.

8. Protections for Statements Made by Parents and Children in the D&N Proceeding

Section 19-3-207 provides some protection for statements made by parents and children during court-ordered treatment.

See **§ 19-3-207 fact sheet**. The protections of § 19-3-207 apply only to statements made pursuant to court-ordered treatment. *Id.*

> **TIP:** When a parent or child could be, or is, facing criminal charges stemming from the events that led to the filing of the petition or potential delinquency charges, counsel should be aware of the protections and limitations of § 19-3-207. Not all statements made pursuant to court-ordered treatment are protected, and § 19-3-207 does not protect against the use of statements in the investigation of criminal charges or the introduction of any evidence obtained derivately from such statements. *See* **§ 19-3-207 fact sheet**. Because the protections of § 19-3-207 apply only to statements made pursuant to court-ordered treatment, in any case in which the parent or child may be facing criminal or delinquency charges, counsel should ensure all treatment in which the parent/child participates is court-ordered. If an interim treatment plan is not an option, counsel should also consider seeking protective orders requiring participation in treatment or requesting that the initial assessment plan be adopted as an interim, preliminary, or provisional treatment plan. *See People v. District Court*, 731 P.2d 652 (Colo. 1987) (addressing protective orders preventing the questioning of parents regarding alleged criminal acts and prohibiting the use of statements made during treatment).

NEXT STEPS/SETTING THE NEXT HEARING

If the parent has entered an admission, the case should be set for a dispositional hearing. The dispositional hearing should take place on the same day as the adjudicatory hearing whenever possible and within 30 days of the admission in an expedited permanent placement (EPP) case. § 19-3-508(1). *See* **EPP fact sheet**. In a non-EPP case, the dispositional hearing should be set within 45 days. *Id. See also* **Dispositional Hearing chapte**r (discussing additional considerations regarding the timing of dispositional hearings).

If the parent has not entered an admission, the case should be set for a contested adjudication hearing within 60 days of service of the petition in an EPP case and 90 days in a non-EPP case. § 19-3-505(3).

III
Adjudicatory Hearing

ADJUDICATORY HEARING CHECKLIST—GAL

BEFORE

- ❑ Conduct an independent investigation:
  - ❍ Obtain discovery: make informal requests and use releases of information and/or discovery procedures as necessary.
  - ❍ Subpoena records, including police reports and medical/treatment records if necessary.
  - ❍ Review all documents, including department files.
  - ❍ Interview potential witnesses.
- ❑ Meet and consult with child. Determine whether child has notice of hearing. Discuss issues in a developmentally appropriate manner to determine the child's position regarding adjudication and placement. Determine whether child wants his or her position reported to the court.
- ❑ Assess and formulate position on:
  - ❍ Strength of evidence supporting each allegation, including whether there is a nexus between the alleged behavior and risk to the child.
  - ❍ Current situation and risk of harm to the child.
  - ❍ Whether any presumptions apply.
  - ❍ Need for contested adjudication hearing by bench or jury trial.

- ❑ Determine what evidence you will proffer during hearing:
  - ❍ Evaluate need for child's testimony and determine manner in which testimony will be proffered (e.g., through closed-circuit television).
  - ❍ Determine whether child hearsay statements are necessary.
  - ❍ Evaluate need for other witnesses, including need for expert testimony. If expert testimony is needed, request permission from OCR for expert fees.
  - ❍ Determine whether you will proffer documentary evidence.
- ❑ Negotiate with counsel. Attempt to resolve any issues by stipulation.
- ❑ File necessary pretrial motions (e.g., motions *in limine*, motion for discovery, and pretrial statement).
- ❑ Respond to any motions filed.
- ❑ Prepare for and participate in mandatory case-management conferences and/or pretrial status conferences. Anticipate and participate in drafting treatment plan.
- ❑ Determine whether proper notice has been sent to parties, caregivers, and, if applicable, Indian tribes.
- ❑ If adjudication is to be contested, formulate position and litigation strategy and:
  - ❍ Issue subpoenas.
  - ❍ Exchange witness and exhibit lists.
  - ❍ Conduct witness interviews.
  - ❍ Comply with pretrial orders.
- ❑ Prepare *voir dire* questions, if needed.
- ❑ Prepare jury instructions, if needed.

DURING

- ❑ Actively participate in trial and ensure record is complete. Examine witnesses. Make arguments and appropriate objections.

- ❑ If the petition is sustained, ensure the court finds, based on a preponderance of the evidence, that the child is dependent or neglected based on D&N criteria, which include:
  - ❍ Abandonment.
  - ❍ Abuse or mistreatment.
  - ❍ Lacking proper parental care.
  - ❍ Injurious environment.
  - ❍ Neglect.
  - ❍ "No fault," i.e., the child is homeless, without proper care, or not domiciled with parents.
  - ❍ Beyond parental control.
  - ❍ Testing positive at birth for a controlled substance.
  - ❍ Identifiable pattern of habitual abuse of another child by the respondent.
- ❑ Request appropriate interim orders pending disposition (i.e., placement, visitation, services).
- ❑ If the dispositional hearing report has not been provided, request that the court order the department to provide the report at a date certain to be in advance of the dispositional hearing.
- ❑ Ensure court sets the next hearing in a proper and timely manner.

AFTER

- ❑ Communicate with the child in a developmentally appropriate manner to explain court rulings, obtain input and position, and answer questions.
- ❑ Prepare for dispositional hearing and participate in drafting treatment plan.
- ❑ Follow up with caseworker on making referrals for services and progression of visits.
- ❑ Review court order for accuracy.
- ❑ File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.

ADJUDICATORY HEARING CHECKLIST—RPC

BEFORE

- ❑ Conduct an independent investigation.
  - ❍ Obtain discovery: make informal requests and motions to compel if necessary.
  - ❍ Subpoena records, including police reports and medical/treatment records if necessary.
  - ❍ Review all documents, including department files.
  - ❍ Interview potential witnesses.
  - ❍ Take depositions if needed.
- ❑ If client is in custody, ensure that a transportation order is issued.
- ❑ Discuss with client:
  - ❍ Accuracy and completeness of information in petition.
  - ❍ Position regarding truth of allegations.
  - ❍ Desired outcomes and direction of litigation.
  - ❍ Alternative strategies and probable outcomes.
- ❑ Assess and formulate position on:
  - ❍ Strength of evidence supporting each allegation, especially whether there is a nexus between the alleged behavior and risk to the child.
  - ❍ Current situation and risk of harm to the child.
  - ❍ Whether any presumptions apply.
  - ❍ Need for contested adjudication, i.e., bench or jury trial.
  - ❍ Need for client's and child's testimony, or other witnesses, and client's position regarding witnesses.
- ❑ Negotiate with counsel and GAL.
- ❑ Determine what evidence you will proffer during hearing.
  - ❍ Evaluate the need for expert testimony and documentary evidence.
  - ❍ Prepare all witnesses, including client, for direct and cross-examination.
- ❑ Issue subpoenas.
- ❑ Exchange witness and exhibit lists.
- ❑ File any pretrial motions (i.e., motions *in limine*, motion to dismiss, motion for discovery, pretrial statement).

- ❑ Respond to all motions filed.
- ❑ Prepare *voir dire* questions, if needed.
- ❑ Prepare jury instructions, if needed.

DURING

- ❑ Be aware of the law and applicable burdens of proof.
- ❑ Actively participate in trial and ensure record is complete. Examine witnesses. Make arguments and appropriate objections.
- ❑ Consider motion to dismiss after the department's case.
- ❑ If the petition is sustained, ensure the court's findings are based on a preponderance of the evidence and the criteria defining a dependent or neglected child:
  - ❍ Abandonment.
  - ❍ Abuse or mistreatment.
  - ❍ Lack of proper parental care.
  - ❍ Injurious environment.
  - ❍ Neglect.
  - ❍ "No fault," i.e., the child is homeless, without proper care, or not domiciled with parents.
  - ❍ Beyond control of parent.
  - ❍ Testing positive at birth for a controlled substance.
  - ❍ Identifiable pattern of habitual abuse of another child by the respondent.
- ❑ Request appropriate interim orders pending disposition (i.e., placement, visitation, services).
- ❑ If the dispositional hearing report has not been provided, request that the court order the department to provide the report at a date certain to be in advance of the dispositional hearing.
- ❑ Ensure that the court sets the next hearing in a proper and timely manner.

AFTER

- ❑ Communicate and consult with client to explain court rulings and answer questions.
- ❑ Prepare for dispositional hearing and participate in drafting the treatment plan.
- ❑ Set tentative deadlines with client for events to occur (e.g., beginning services, increasing visits).
- ❑ Follow up with caseworker on making referrals for services and progression of visitation.
- ❑ Request that caseworker meet with client to develop a treatment plan before the caseworker submits a treatment plan to the court.
- ❑ Review the court order for accuracy.
- ❑ File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.

BLACK LETTER DISCUSSION AND TIPS

PURPOSE OF THE HEARING

The purpose of the adjudicatory hearing is to determine whether the child is, in fact, neglected and dependent. *People in the Interest of E.A.*, 638 P.2d 278, 283 (Colo. 1981); *People in the Interest of K.S.*, 515 P.2d 130, 132 (Colo. App. 1973). An adjudication serves to furnish the jurisdictional basis for state intervention. *People in the Interest of O.E.P.*, 654 P.2d 312, 317 (Colo. 1982).

TIMING OF THE HEARING

The adjudicatory hearing must be held within certain time frames, which are dependent on both the timing of the petition's filing and the age of the child.

The Children's Code provides that an adjudicatory hearing must occur within 90 days of service of the petition. § 19-3-505(3). An adjudicatory hearing in an EPP case must occur within 60 days of service of the petition, unless the court finds that good cause is shown and that granting a delay will serve the child's best interests. §§ 19-3-505(3), 19-3-104. If the court determines that a delay is necessary, it must set forth the specific reasons necessitating the delay and schedule the adjudicatory hearing at the earliest possible time following the delay. § 19-3-505(3). In EPP cases, the court must schedule the matter within 30 days after granting the delay. § 19-3-104.

Failure to hold the adjudicatory hearing within the statutory time frames does not require dismissal. *People in the Interest of S.B.*, 742 P.2d 935, 938 (Colo. App. 1987) (holding that, in light of the Children's Code's declaration in § 19-1-102 that it should be liberally construed to serve the welfare of the children and the best interests of society, a delay of one day was insufficient to require dismissal, particularly when the GAL was the party requesting the delay); *see also P.F.M. v. District Court in and for County of Adams*, 520 P.2d 742, 745 (Colo. 1974) (stating that the failure to hold temporary custody hearing according to time frames does not deprive court of jurisdiction).

The same standards for granting a delay of the adjudicatory hearing in EPP cases also apply to the granting of continuances.

§ 19-3-104. Additionally, CJD 96-08(4) provides that continuances will be granted by a judicial officer only upon a finding that manifest injustice would occur in the absence of a continuance.

NOTICE REQUIREMENTS

All parties, including GALs, must receive notice of the adjudicatory hearing, as must foster parents, pre-adoptive parents, and relatives with whom the child is placed. § 19-3-502(7). Persons with whom a child is placed must provide prior notice of the hearing to the child. *Id.* A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

The petition serves as notice of the basis for the department's allegation that the child is dependent or neglected. The petition must set forth plainly the facts that brought the child into the court's jurisdiction. § 19-3-502(2). The petition must be verified, and the statements within it may be made upon information and belief. § 19-3-502(1).

Section 19-3-503 outlines specific notice requirements once a D&N petition is filed. After the filing of the petition, the court must promptly issue a summons reciting briefly the substance of the petition, as well as a statement that termination of the parent-child relationship is a possible remedy under the proceedings. § 19-3-503(1). The summons must set forth the constitutional and legal rights of the child, parents, guardian, legal custodian, and any other respondent or special respondent, including the right to have an attorney present at the hearing on the petition. *Id.* A summons shall not be issued to any respondent who appears voluntarily or who waives service, but any such respondent must be provided with a copy of the petition and summons upon appearance or request. § 19-3-503(2).

For a court to have jurisdiction in an adjudicatory hearing, timely service and advisement of the nature of the hearing is required. *Ziemer v. Wheeler*, 1 P.2d 579, 581 (Colo. 1931). However, failure to state in the summons that termination of the parent-child relationship is a possible remedy has been held not to deny due process when the department has substantially complied with the summons and service provisions and the parents have been advised of their rights by the court. *Robinson v. People in the Interest of Zollinger*, 476 P.2d 262, 264 (Colo 1970).

❖ **TIP:** If the petition involves an Indian child as defined by ICWA, ICWA notice provisions apply. *See* **ICWA fact sheet**. Counsel should ensure that the notice provisions of 25 U.S.C. § 1912(a) have been complied with, particularly if the tribe has recently been identified or a party is seeking foster care placement of the child at the adjudicatory hearing.

PROCEDURAL ISSUES/CONSIDERATIONS

1. Discovery

The Colorado Rules of Civil Procedure generally apply to juvenile proceedings absent a conflicting rule of juvenile procedure or statute in the Children's Code. C.R.J.P. 1; *see, e.g., People ex rel. Z.P.*, 167 P.3d 211, 214 (Colo. App. 2007). C.R.C.P. 26 specifically states that it does not apply to juvenile proceedings unless otherwise ordered by the court or stipulated by the parties.

❖ **TIP:** Regardless of whether the adjudicatory issues are anticipated to be resolved by trial, admission, or some other means, it is important for both the GAL and RPC to request discovery orders and exercise discovery to make an informed decision about the issues in the case and the merits of an adjudication. *See* **Pretrial Hearing chapter** (discussing strategies for obtaining discovery).

2. Appeals

An order decreeing a child to be neglected or dependent is a final and appealable order once the disposition is entered under § 19-3-508. § 19-1-109(2)(c). Because the adjudication of a child as dependent or neglected does not become a final judgment until a decree of disposition is entered, the appellate time frames do not begin until the entry of a decree of disposition. *People in the Interest of E.A.*, 638 P.2d 278, 282 (Colo. 1981). The appeal does not affect the trial court's jurisdiction to enter further orders it believes are in the best interests of the child. § 19-1-109(2)(c).

If the adjudication hearing is held before the magistrate and any party seeks relief from that order, a timely petition for review must be sought pursuant to § 19-1-108(5.5) as a prerequisite to

filing an appeal with the Colorado Court of Appeals or Colorado Supreme Court. *See* **Magistrates fact sheet**. A request for review must be filed within five days after the parties have received notice of the magistrate's ruling. § 19-1-108(5.5).

3. Amendments to Petition

The petition may be amended up to and during the adjudicatory hearing. The department may amend it once as a matter of course within 20 days of its filing. C.R.C.P. 15(a) (establishing a 20-day time frame for amending pleadings when a response is not required); C.R.J.P. 4.1(a) (stating that responsive pleadings are not required in D&N proceedings). After this time period, the department may amend the petition only by leave of court or written consent of the adverse party. C.R.C.P. 15(a). Leave to amend the petition shall be freely given when justice so requires. *Id.*

When it appears that the evidence at the hearing discloses facts not alleged in the petition, the court may proceed immediately to consider the additional or different matters raised by the evidence if the parties consent. § 19-3-505(4)(a). The court, on the motion of any interested party or its own motion, shall order the petition to be amended to conform to the evidence. § 19-3-505(4)(b). When the amendment results in a substantial departure from the original allegations, the court may continue the hearing if it finds that doing so is in the best interests of the child or any other party, and the court must continue the hearing on the motion of any interested party. § 19-3-505(4)(c). The party requesting a continuance must demonstrate substantial departure from the initial allegations. *People ex rel. A.E.L.*, 181 P.3d 1186, 1193 (Colo. App. 2008).

> **TIP:** Often a significant amount of time has passed between the petition's filing and the adjudicatory trial, and the GAL and/or department may have obtained additional information about the status of the child. If the information is relevant to the adjudicatory hearing and to the ultimate ability to address the safety and well-being of the child, the GAL should ensure that the department amends the petition sufficiently in advance of trial to avoid delay of the adjudicatory hearing.

PROCEDURAL MEANS OF RESOLVING ADJUDICATORY ISSUES

Whether a child is dependent or neglected may be determined by a jury trial, hearing before a judge or magistrate, default adjudication, summary judgment, dismissal of the petition, or admission by the parent(s). Additionally, the Children's Code allows the court to enter a continued/deferred adjudication and to make an informal adjustment in limited circumstances. Specific requirements and considerations unique to each of these means of resolving adjudicatory issues will be discussed below.

- **TIP:** On the rare occasion that a parent is unable to understand the nature of the proceedings well enough to make a knowing and voluntary admission or to waive the right to a jury trial, RPC should ensure that the procedural means selected to resolve the adjudicatory issues protect the client's interests and preserve the client's due process rights. In such circumstances, the appointment of a GAL for the parent pursuant to § 19-1-111(2)(c) may be necessary. *See* **Preliminary Protective Proceeding chapter** (discussing considerations relevant to the appointment of a GAL for a parent). If the parent in such cases determines to proceed by admission, counsel should ensure a sufficient record is made regarding the basis for the adjudication, for example, establishing facts supporting the adjudication by offers of proof even though the parent has entered an admission.

- **TIP:** When a parent is also facing criminal charges as a result of the alleged abuse or neglect of the child, RPC should attempt to coordinate with defense counsel in the criminal proceeding. Although § 19-3-207(3) offers some protection to admissions made by a parent in open court or by written pleading in dependency cases, its protections are not absolute. *See* **§ 19-3-207(3) fact sheet**. Typically, the adjudicatory hearing will be scheduled before the trial in the criminal proceeding. Depending on the case, this timing may serve as an advantage or disadvantage to the preparation and presentation of a defense in the criminal proceeding. Because the outcome of the criminal proceeding may have a significant impact on visits and family preservation/reunification in the dependency case, it is important for RPC to minimize the possibility that the decisions made and strategy employed in the dependency case will undermine the parent's due process rights or chance at successfully defending the criminal case.

1. Jury Trial

The petitioner, any respondent, or the GAL may demand an adjudicatory trial by a jury of six persons, or the court on its own motion may order an adjudicatory jury trial. § 19-3-202(2). A six-member jury for the adjudicatory hearing satisfies due process requirements. *People in the Interest of T.A.W.*, 556 P.2d 1225 (Colo. App. 1976). A magistrate may not preside over a jury trial. § 13-5-201(3).

> **TIP:** Thorough preparation for trial is key to effective representation. Trial notebooks are useful trial preparation tools. Suggested components of a trial notebook include questions for *voir dire*, opening statements, direct and/or cross-examination of all anticipated witnesses with specific reference to impeachment and refreshing recollection materials, a skeletal outline for anticipated closing argument, proposed jury instructions, and copies of statutes and cases supportive of the legal arguments counsel intends to make.

The request for a jury trial must be made when the petition allegations are denied; otherwise, the right to a jury is deemed waived. C.R.J.P. 4.3(a). However, if a party withdraws its demand for a jury trial, the court at its discretion may grant a request for a jury trial made by another party to the proceeding. *S.A.S. v. District Court*, 623 P.2d 58, 63 (Colo. 1981).

The Colorado Rules of Juvenile Procedure provide that the petitioner, respondents, and GAL are entitled to three peremptory challenges. C.R.J.P. 4.3(b). No more than nine peremptory challenges are authorized. *Id.*

> **TIP:** The statutory language allowing for three peremptory challenges may be in conflict with the language limiting the total number of such challenges to nine when multiple parents/respondents are proceeding to a jury trial or when there are multiple GALs on a case. Counsel in such circumstances should argue for the full number of challenges necessary to protect the client's due process rights.

Rules for examination, selection, and challenges for jurors are set forth in C.R.C.P. 47. The purpose of *voir dire* is to inform prospective jurors of their duty and to ascertain information to facilitate intelligent exercise of challenges for cause and peremptory challenges. C.R.C.P. 47(a). Generally, the judge initially asks

prospective jurors questions concerning their qualifications to serve as jurors, and then the attorneys are permitted to ask additional questions. C.R.C.P. 47(a)(3). The court has discretion to limit repetitive, unreasonably lengthy, irrelevant, abusive, or otherwise improper examination. *Id.*

- **TIP:** The formulation of a theory of the case and the ongoing presentation of that theory are particularly important in jury trials. Voir dire presents counsel's first opportunity to educate the jury about counsel's theory of the case, and counsel should take care to ask questions that not only assist in selecting jurors but that also begin to educate the jury. Voir dire also presents an opportunity for the GAL to explain the GAL's unique role as the legal representative of the child's best interests.

Challenges for cause are controlled by C.R.C.P. 47(e). Examples of cause include, but are not limited to, lacking statutory qualifications to serve as a juror, consanguinity or affinity within the third degree to any party, having formed or expressed an unqualified opinion or belief as to the merits of the case, and existence of a state of mind evincing enmity against or bias toward or against either party. *Id.*

- **TIP:** The statutory qualifications relating to jurors set forth in §§ 13-71-104 and 13-71-105 and the challenges for cause set forth in C.R.C.P. 47(e) are highly detailed. Counsel should be familiar with these provisions and should bring a copy of these provisions to every jury trial.

Other considerations unique to jury trials include the preparation of jury instructions, *see* C.R.C.P. 51–51.1, special verdicts and interrogatories, *see* C.R.C.P. 49, and motions for directed verdicts, *see* C.R.C.P. 50. Counsel should also be familiar with motions for post-trial relief, including motions for judgment notwithstanding the verdict. *See* C.R.C.P. 59 and 60.

- **TIP:** It is particularly important in jury trials to resolve as many evidentiary issues as possible outside the presence of the jury. C.R.J.P. 4.1(d) requires all motions to be in writing and signed by the moving party or counsel unless the court grants leave to make a motion orally. C.R.C.P. 7-15 and the statewide practice standards set forth by C.R.C.P. 121 § 1-15 address determination of motions in civil proceedings, and counsel should be familiar with these rules, any local rules developed pursuant to

C.R.C.P. 121, or memoranda of procedures developed pursuant to CJD 98-02, as well as any time frames set forth in any case management order issued in the case. *See* **Pretrial Hearing chapter** (discussing pretrial motions practice). GALs may access jury instructions specific to dependency and neglect cases on the OCR website at **www.coloradochildrep.org.**

TIP: It is important for RPC to inform each client of the need to appear at the jury trial. Failure to appear at a jury trial may constitute a waiver of the right to the jury trial. C.R.C.P. 39(a)(3); *Whaley v. Keystone Life Ins. Co.*, 811 P.2d 404, 405 (Colo. App. 1989). Any party failing to appear is also at risk of default judgment. *See* C.R.C.P. 55(a), (b).

2. Trial before a Judge/Magistrate

If parties do not request a jury trial or the court does not order a jury trial on its own motion pursuant to § 19-3-202(2), the adjudicatory trial may proceed before a judicial officer. Absent objection by any party, magistrates may preside over adjudicatory trials. §§ 19-1-105(1), 19-1-108(3)(a.5). The right to a trial before a judge will be deemed waived unless a request is made at the time the matter is set for hearing if counsel is present. §§ 19-1-108(3)(b), (c).

With consent of the parties, the trial may proceed by offer of proof. *See generally People ex rel. E.D.*, 221 P.3d 65, 67–68 (Colo. App. 2009) (holding that an evidentiary hearing was not required when offers of proof provided the court with sufficient information to evaluate the motion before it); *People v. Moore*, 117 P.3d 1, 3 (Colo. App. 2004) (holding that a trial court may properly base its preponderance of evidence determination on the parties' offers of proof).

TIP: As with jury trials, it is important for counsel to anticipate and resolve in advance as many evidentiary issues as possible. Knowing what evidence is admissible and what evidence may be excluded promotes competent trial preparation. *See* **Pretrial Hearing chapter** (discussing motion practice). As for jury trials, counsel should consider preparing a trial notebook including, but not limited to, an opening statement, direct and/or cross-examination of all anticipated witnesses with specific reference to impeachment and materials for refreshing recollection, and at least a skeletal outline for anticipated closing argument.

3. Default Adjudications

To enter a default adjudication, the court must make findings, either based on evidence or offers of proof, that the child is dependent or neglected. A default adjudication is only appropriate when proof of notice is established, followed by a failure to appear. C.R.C.P. 55(b).

4. Summary Judgment

Summary judgment is a permissible method to adjudicate a child dependent or neglected. *See* C.R.C.P. 56; *see also S.B.*, 742 P.2d at 938–39. However, summary judgment is a drastic remedy warranted only if it is clearly shown that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *People ex rel. A.C.*, 170 P.3d 844, 845–46 (Colo. App. 2007); *People in the Interest of C.C.G.*, 873 P.2d 41, 43 (Colo. App. 1994).

> **TIP:** Once a party moving for summary judgment has demonstrated that no genuine issue of material fact exists, the party opposing summary judgment must set forth by affidavit or properly authenticated documents facts showing that there is a genuine issue for trial. A.C., 170 P.3d at 846. Allegations in pleadings or arguments will not suffice. *Id.*

Given the time frames for adjudication in EPP cases, it is not possible for a party moving for summary judgment to comply with the time frames set forth in C.R.C.P. 56(c). A.C., 170 P.3d at 844. Hence, a court order allowing the department to file a motion for summary judgment 21 days before the scheduled trial has been upheld by the Court of Appeals. *Id.*

5. Dismissal

If the department seeks to dismiss the dependency and neglect petition, the GAL has standing to object to the department's request to dismiss. *People in the Interest of R.E.*, 729 P.2d 1032, 1033–34 (Colo. App. 1986). The dependency and neglect petition may not be dismissed over the objection of the GAL without a hearing to specifically determine whether the petition is supported by a preponderance of the evidence and whether the child is, in fact, dependent or neglected. *Id.* The GAL has standing to appeal a court's order dismissing the petition. *Id.*

6. Admissions

Procedures for admission of the allegations in the petition are set forth in C.R.J.P. 4.2. After advisement, the respondents must admit or deny the allegations contained in the petition. C.R.J.P. 4.2(b). To accept an admission, the court must find that the admission is voluntary and that the respondent understands his or her rights, the allegations contained in the petition, and the effect of the admission. C.R.J.P. 4.3(c). The court may accept a written admission if the respondent has affirmed under oath that the respondent understands the advisement and the consequences of the admission and if the sworn statement allows the court to make the required findings regarding the respondent's understanding and the voluntariness of the admission. C.R.J.P. 4.2(d).

An admission by one parent is "not necessarily dispositive of allegations disputed by other named respondents." *People in the Interest of A.M.*, 786 P.2d 476, 479 (Colo. App. 1989). Hence, an admission by one parent that the child is dependent or neglected as a result of actions/inactions of another parent is not legally sufficient to sustain the petition as to the other parent, and the other parent retains the right to a jury trial. *See id.* at 479. If one parent admits that a child is dependent or neglected but the other parent exercises the right to an adjudicatory trial and prevails, the child is not dependent or neglected, and the court no longer has jurisdiction over the matter. *See People ex rel. A.H.*, 271 P.3d 1116, 1121–23 (Colo. App. 2011) (holding that the court's subject matter jurisdiction terminated when jury found child not dependent or neglected as to the father, even though the mother had entered a "no-fault" admission); *People in the Interest of T.R.W.*, 759 P.2d 769, 771 (Colo. App. 1988) (dependency and neglect petition was not sustained when noncustodial parent entered a "no-fault" admission but jury found that the child was not dependent or neglected as to the custodial parent); *People ex rel. S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009) (custodial mother's admission that child was dependent or neglected based on lack of proper parental care was not binding as to custodial father); *People ex rel. U.S.*, 121 P.3d 326, 327 (Colo. App. 2005) (noncustodial father's fault-based admission was legally insufficient to bind custodial mother, who prevailed at an adjudicatory jury trial). However, because adjudication is to the status of the child, a parent does

not have to be adjudicated to be at fault for the dependence or neglect of the child and a no-fault admission is legally binding. *People in the Interest of P.D.S.*, 669 P.2d 627 (Colo. App. 1983). In instances in which one parent has entered an admission and the other parent has requested an adjudicatory trial, the admission supports continuing jurisdiction pending determination of whether the child is dependent or neglected. *A.H.*, 271 P.3d at 1122–23.

- **TIP:** In cases in which a client seeks to enter into an admission but the other parents/respondents have not entered into an admission, RPC should make sure the client understands that if the other parent/respondent prevails at trial, the court will no longer have jurisdiction over the matter and the child will be returned to the prevailing parent/respondent.

- **TIP:** When making an admission, the respondent may also choose to waive the establishment of the factual basis. C.R.J.P. 4.2(b), (c); *People ex rel. N.D.V.*, 224 P.3d 410, 415 (Colo. App. 2009). In such circumstances, the GAL should ask the court to reserve the right to treat all issues, if the court does not do so on its own motion. This will preserve the ability to appropriately address any and all treatment issues that arise during the case.

7. Continued/Deferred Adjudication

Section 19-3-505(5) allows a court, after finding that the allegations in the petition are supported by a preponderance of the evidence, to continue the hearing from time to time. To continue the adjudicatory hearing under these circumstances, consent must be given by all parties, including the child and the parent after being fully informed of their rights, including the right to have an adjudication either dismissing or sustaining the petition. § 19-3-505(5)(a). The continuance may not extend beyond six months without review by the court. § 19-3-505(5)(b). After review, the court may continue the case for an additional period not to exceed six months, after which the petition shall either be dismissed or sustained. *Id.*; *see also People in the Interest of K.M.J.*, 698 P.2d 1380, 1381–82 (Colo. App. 1984). During the time the hearing is continued, the court may allow the child to remain at home or in the temporary custody of another person or agency. § 19-3-505(5).

- **TIP:** In cases in which a child is under six and placed out of the home, the GAL must keep EPP time frames in mind when making a determination of whether to agree to a continued adjudication. *See* § 19-3-703 (requiring child to be placed in a permanent home no later than 12 months after the original out-of-home placement); **EPP fact sheet**. Additionally, the GAL should keep in mind that a valid adjudicatory order is required for the court to allocate parental responsibilities to a nonparent, *see People ex rel. K.A.*, 155 P.3d 558, 561 (Colo. App. 2006), and that an adjudication of dependency or neglect is a prerequisite to termination of the parent-child legal relationship, §§ 19-3-604(1)(a)–(c).

8. Informal Adjustment

Although technically not an adjudication, an informal adjustment can serve as an alternative to an adjudication. On the basis of a preliminary investigation, the court may make whatever informal adjustment is practicable without a petition if the child and his or her parents, guardian, or other legal custodian are informed of their constitutional and legal rights, including being represented by counsel at every stage of the proceedings; facts establishing prima facie jurisdiction are admitted; and written consent is obtained from the parents, guardian, or other legal custodian and from the child, if the child is of sufficient age and understanding. § 19-3-501(1)(c)(I). Informal adjustments may not extend longer than six months. § 19-3-501(1)(c)(II). Admissions of fact made to establish prima facie jurisdiction shall not be used in evidence if a petition is filed. § 19-3-501(1)(c)(I)(B).

- **TIP:** As with continued adjudications, GALs should keep in mind EPP time frames and the requirement of a valid adjudicatory order for termination of parental rights or allocation of parental responsibilities to a nonparent in determining whether an informal adjustment is in the best interests of the child. *See* § 19-3-703; **EPP fact sheet**.

BURDEN OF PROOF

To adjudicate a child dependent or neglected, the court must find one of the bases set forth by § 19-3-102 by a preponderance

of the evidence. § 13-25-127(1); *Zollinger*, 476 P.2d at 265; *In re People in the Interest of R.K.*, 505 P.2d 37, 38 (Colo. App. 1972); *People in the Interest of O.E.P.*, 654 P.2d 312, 316–17 (Colo. 1982) (applying preponderance of evidence burden to adjudicatory hearing does not violate parent's due process rights). Vague references to a child's best interests cannot be substituted for the specific findings required by the Colorado Children's Code. *C.M. v. People*, 601 P.2d 1364, 1365 (Colo. 1979).

> **TIP:** ICWA does not set forth a higher burden of proof for the adjudicatory hearing. *See* 25 U.S.C. § 1912. However, if the court places a child in foster care at the adjudicatory hearing, additional findings will need to be made based on clear and convincing evidence. *See* **ICWA fact sheet**.

REQUIRED FINDINGS/BASES FOR ADJUDICATION

Section 19-3-102 sets forth the criteria defining a dependent or neglected child, which include abandonment, abuse or mistreatment, lack of proper parental care, injurious environment, neglect, "no-fault," beyond control of parent, testing positive at birth for a controlled substance, and habitual abuse of another child by the parent/guardian. Specific considerations for each of these criteria will be detailed below.

The child's age and residence are deemed admitted unless specifically denied before the adjudicatory hearing. § 19-3-505(1). The petitioner is not required to prove the child must be separated from the parent, guardian, or legal custodian. § 19-3-505(2). Evidence that child abuse or non-accidental injury has occurred constitutes prima facie evidence that a child is neglected or dependent, and such evidence is sufficient to support an adjudication. § 19-3-505(7)(a).

Adjudications of neglect or dependency are not made as to the parents but rather relate only to the status of the child. *P.D.S.*, 669 P.2d at 628; *People v. Interest of T.T.*, 128 P.3d 328, 331 (Colo. App. 2005). There is no distinction between findings of dependency and neglect. *People in the Interest of D.L.E.*, 645 P.2d 271, 275 n. 6 (Colo. 1982) (citing *People in the Interest of D.L.E.*, 614 P.2d 873 (Colo. 1980)).

An adjudication must be based on consideration of existing circumstances and not on speculation concerning future

possibilities. *People in the Interest of C.T.*, 746 P.2d 56, 58 (Colo. App. 1987). However, a child may be adjudicated dependent or neglected even if the parents have never had custody of the child, because a requirement that the child be placed with a parent to determine whether the parent could provide proper care would contravene the preventative and remedial purposes of the Children's Code. *People in the Interest of D.L.R.*, 638 P.2d 39, 42 (Colo. 1981). Evidence showing prospective harm to the child if returned to the parents may be sufficient to support the adjudication of the child. *Id.* at 40.

1. Abandonment

A child is dependent or neglected if abandoned by a parent, guardian, or legal custodian. § 19-3-102(1)(a). Although § 19-3-102 does not define abandonment, § 19-3-604(1)(a)(I) sets forth abandonment as an appropriate basis for termination of parental rights when the parents have surrendered custody for at least six months and have not manifested during that period a firm intention to resume custody or made permanent legal arrangements for the child's care during that time or the identity of the parents has been unknown for at least three months and reasonable efforts to find them in accordance with § 19-3-603 have failed.

When a child has been abandoned by parents, a court may find that the child is dependent or neglected, notwithstanding the fact that the child may be currently receiving adequate care from other persons. *People in the Interest of F.M.*, 609 P.2d 1123, 1124–25 (Colo. App. 1980); *see also Jones v. Koulos*, 349 P.2d 704, 706 (Colo. 1960) (distinguishing parent providing for child's well-being by placing care in a trusted family member or friend, indicating parent's proper concern for the child, from parent leaving her child with total strangers and failing to provide care or support). However, if a parent makes arrangements to place the child in the care of someone who has a genuine interest in the child's well-being, the evidence tends to establish that the child was not abandoned. *Diernfeld v. People*, 323 P.2d 628, 631 (Colo. 1958). A child placed with friends or relatives has been held to receive proper parental care when the parent sends gifts of clothing, money, food, and medical supplies to the child and has engaged in frequent visits and communication with the child. *Jones*, 349 P.2d at 706 (citing *Foxgruber v. Hansen*, 265 P.2d 233,

234 (Colo. 1954)). The single fact that the parent has not made support payments does not establish that a child is dependent or neglected. *In re People in the Interest of E.F.C.*, 490 P.2d 706, 709 (Colo. App. 1971). Additionally, the Court of Appeals has dismissed the notion of "constructive" abandonment as not within the statute, finding that the likelihood of ongoing criminal activity and re-incarceration is insufficient to demonstrate abandonment. *People in the Interest of M.C.C.*, 641 P.2d 306, 309 (Colo. App. 1982).

2. Abuse or Mistreatment

A child is dependent or neglected if a parent, guardian, or legal custodian has subjected the child to mistreatment or abuse. § 19-3-102(1)(a). Allowing another to mistreat or abuse a child, without taking lawful means to stop or prevent it, can be held to establish dependency or neglect. *Id.*; *see also R.K.*, 505 P.2d at 38; *People in the Interest of C.R. v. E.L.*, 557 P.2d 1225, 1227 (Colo. App. 1976). Evidence of abuse or neglect includes acts or omission where a child exhibits skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death when such condition cannot be justifiably explained by the history given, the history of the condition is at variance with the type of condition, or the circumstances indicate the condition may not be the product of an accidental occurrence. § 19-1-103(1)(a). Evidence of past abuse or mistreatment can also be sufficient to support an adjudication of dependency or neglect. *People in the Interest of T.R.W.*, 759 P.2d 768, 771–72 (Colo. App. 1988). The abuse may be physical, sexual, or emotional. §§ 19-1-103(1)(a)(I), (II), (IV); *People v. D.A.K.*, 596 P.2d 747, 750 (Colo. 1979). Abuse does not include the reasonable exercise of parental discipline; in such cases, the question of reasonableness is one that must be decided by the trier of fact. *People in the Interest of M.A.L.*, 553 P.2d 103, 105 (Colo. App. 1976).

3. Lacking Proper Parental Care

A child lacking proper parental care because of the acts or omissions of a parent, guardian, or legal custodian is a neglected or dependent child. § 19-3-102(1)(b). The court may find a child

neglected or dependent even if such lack of care is through no fault of the parent. *M.S. v. People*, 812 P.2d 632, 634 (Colo. 1991). For example, a child who is developmentally disabled and whose parents cannot find suitable affordable care for the child may be adjudicated dependent or neglected. *Id.* Similarly, although the fact of parental incarceration alone cannot be the sole basis for an adjudication, the Court of Appeals has upheld an adjudication in a case in which the father was bound over for first-degree murder of the child's mother and had not made any arrangements for the child's care. *S.B.*, 742 P.2d at 939.

4. Injurious Environment

If the child's environment is injurious to the child's welfare, the child is dependent or neglected. § 19-3-102(1)(c). A child's physical care, surroundings, and well-being are material to the issue of dependency and neglect. *Diernfeld*, 323 P.2d at 631. The Colorado Court of Appeals has affirmed a dependency and neglect adjudication based on the mother's chaotic home life, being subject to domestic violence, lack of a stable residence, and exposure of children to drugs and sexual activities. *People in the Interest of J.E.B.*, 854 P.2d 1372, 1376 (Colo. App. 1993). However, a child cannot be adjudicated dependent or neglected under this provision based on a mere contention that the child's condition "would be improved by changing [the child's] parents or custodians." *People in the Interest of T.H.*, 593 P.2d 346, 348 (Colo. 1979) (upholding district court's determination that children were not dependent or neglected based on evidence that the children dressed inappropriately, did not observe proper hygiene, fought with one another, lived in a house in need of repair, and were not well accepted at school).

5. Neglect

A child is neglected when a parent, guardian, or legal custodian fails or refuses to provide the child with proper or necessary care, which includes subsistence, education, medical care, or any other care necessary for the child's health, guidance, and well-being. § 19-3-102(1)(d).

The use of spiritual means through prayer in lieu of medical treatment, if in accordance with recognized methods of religious

healing, may not be the sole basis for an adjudication. § 19-3-103(1). A method of religious healing is deemed to be a recognized method if the religious healing treatment provides a success rate equivalent to that of medical treatment or fees and expenses incurred for the treatment are permitted to be tax-deductible medical expenses or generally recognized by insurance companies as reimbursable medical expenses. § 19-3-103(2).

Religious rights may not interfere with a child's access to medical care if the child is in a life-threatening situation or if the child's condition will result in serious disability. § 19-3-103(1). The court may order the provision of medical treatment for the child pursuant to § 19-1-104(3) if it determines, based on relevant evidence, that the child is in a life-threatening situation or likely to suffer serious disability. § 19-3-103(1). The court may order a medical evaluation of the child to make this determination. *Id.* A child is determined to be neglected if the parent, guardian, or legal custodian inhibits or interferes with the provision of court-ordered medical treatment. *Id.*

In *D.L.E.*, the Colorado Court of Appeals held that although a parent's failure to provide medical treatment for her child's grand mal seizures was insufficient to support a dependency and neglect adjudication, given her legitimate use of spiritual healing, once her child's health deteriorated to the point his life was endangered, the child was properly adjudicated dependent or neglected. *D.L.E. II*, 645 P.2d 271; *see also D.L.E. I*, 614 P.2d 873.

6. No Fault

A child is dependent or neglected if, through no fault of the parents, guardian, or legal custodian, the child is homeless, without proper care, or not domiciled with them. § 19-3-102(1)(e). Although a no-fault admission by one parent is not sufficient to support an adjudication of the child when the other parent prevails at trial, *see* **Admissions section** *supra*, because adjudication pertains to the status of the child, a no-fault adjudication does give the court jurisdiction to enter treatment orders concerning the parent. *P.D.S.*, 669 P.2d at 627.

7. Beyond Control of Parent

A child can be determined to be dependent or neglected if the child has run away from home or is otherwise beyond the control of the parent, guardian, or legal custodian. § 19-3-102(1)(f). The Colorado Court of Appeals has held that a child's refusal to return home after being brought to the department to disclose sexual abuse did not establish that the child was beyond the control of the parent when there was no evidence that the child had run away from home. *C.C.G.*, 873 P.2d at 42–43.

8. Testing Positive at Birth for a Controlled Substance

A child who tests positive at birth for a Schedule I controlled substance or a Schedule II controlled substance is dependent or neglected unless the child tests positive for a Schedule II controlled substance as a result of the mother's lawful intake of the substance as prescribed. § 19-3-102(1)(g). Schedules I and II controlled substances are defined in §§ 18-18-203 and 18-18-204, respectively. The Court of Appeals has held that although a fetus is not specifically included in the Children's Code's definition of "child," evidence of a parent's prenatal substance abuse is sufficient to support the filing of a dependency or neglect petition. *T.T.*, 128 P.3d at 330.

9. Identifiable Pattern of Habitual Abuse of Another Child by Parent, Guardian, or Legal Custodian

A child is dependent or neglected if the parent, guardian, or legal custodian has subjected another child or children to an identifiable pattern of habitual abuse. § 19-3-102(2)(a). To adjudicate a child under § 19-3-102(2), the court must also make two additional findings. First, the child/children must also have been adjudicated dependent or neglected based on allegations of physical or sexual abuse or a court of competent jurisdiction must have found the parent caused another child's death. § 19-3-102(2)(b). Second, the pattern of habitual abuse and the abuse must pose a current threat to the child. § 19-3-102(2)(c).

If a petition is filed alleging that a child is dependent or neglected under this criteria, the county department must engage in concurrent planning to expedite the permanency planning process. § 19-3-312(5).

EVIDENTIARY ISSUES/CONSIDERATIONS

1. Inapplicability of Exclusionary Rule

The exclusionary rule does not apply to dependency and neglect cases because the societal cost of excluding relevant evidence does not outweigh the deterrent benefits of applying the rule. *People ex rel. A.E.L.*, 181 P.3d 1186, 1192 (Colo. App. 2008).

2. No Privilege against Self-Incrimination

Unlike a criminal trial, which allows witnesses to protect themselves against self-incriminating testimony, if the respondent refuses to answer any questions based on a claim of self-incrimination, a negative inference may be drawn. *See Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Asplin v. Mueller*, 687 P.2d 1329, 1332 (Colo. App. 1984).

SETTING THE NEXT HEARING

1. If Child Is Not Found to Be Dependent or Neglected

If the child is found dependent upon proper evidence, then, and only then, should the court in orderly procedure receive evidence to determine the disposition of the child. *See Peterson v. Schwartzmann*, 179 P.2d 662, 663–4 (Colo. 1947); *In re People in the Interest of Murley*, 239 P.2d 706, 709 (Colo. 1951). If the child is not found to be dependent or neglected, there is nothing further to be considered and the action should be dismissed. *Peterson*, 179 P.2d at 663–64; *T.R.W.*, 759 P.2d at 771. When the court finds that the allegations of the petition are not supported by a preponderance of the evidence, the court must order the petition dismissed and the child discharged from any detention or restriction previously ordered; order the discharge of the parents, guardian, or legal custodian from any restriction or other previous temporary order; and inform the respondent that, pursuant to § 19-3-313.5(3)(f), the department shall expunge the records and reports for purposes related to employment or background checks. § 19-3-505(6).

2. If the Child Is Found to Be Dependent or Neglected

If the child is found to be dependent, the next scheduled hearing will be the dispositional hearing. The Colorado Children's Code provides for a combined or bifurcated adjudicatory-dispositional procedure. *People in the Interest of M.B. v. J.B.*, 535 P.2d 192, 195 (Colo. 1975). When possible and appropriate, the dispositional hearing should occur at the same hearing after the order of adjudication; otherwise, it must be set within 30 days for EPP cases and 45 days for all other cases. *See* **Dispositional Hearing chapter**.

IV
Dispositional Hearing

DISPOSITIONAL HEARING CHECKLIST—GAL

BEFORE

- ❑ Review the dispositional hearing report and proposed treatment plan in advance of the dispositional hearing. Determine whether the proposed treatment plan:
  - ❍ Addresses the issues affecting the child's health, safety, and welfare that require state intervention.
  - ❍ Is reasonable and calculated for success.
  - ❍ Is specific to the needs of the family.
  - ❍ Appropriately addresses each household member, including the child.
    - ■ Determine whether the child is able to comply with the proposed orders and whether orders regarding the child are appropriate and necessary.
    - ■ Determine whether any person who is not a respondent should be made a special respondent for inclusion in the treatment plan.
  - ❍ Provides for services that are culturally appropriate and available in respondent's and child's first language, if necessary.
- ❑ In EPP cases, determine whether the department has listed services in the dispositional hearing report that are available to families, specific to the needs of the child and the child's family, and available in the community where the family resides as required by § 19-1-106(2.5).

- Conduct independent investigation and consider whether:
  - Services can be consolidated.
  - Any additional services are needed.
  - If an appropriate treatment plan cannot be devised, statutory grounds exist to support such a finding and it is in the child's best interests to proceed without a treatment plan for the family.
- Determine whether notice has been sent to parties and caregivers.
- Respond to motions filed by parties and intervenors, as appropriate.
- Contact the child and discuss the treatment plan in a developmentally appropriate manner.
  - Determine whether the child has maintained a network of supportive, stable adults including relatives and others important to the child.
  - Explain the components of the treatment plan and obtain the child's input and position regarding:
    - Treatment plan recommendations.
    - Placement options.
    - Need for services and whether services are reasonably tailored to meet those needs.
    - Visits with respondent(s), sibling(s), relatives, and others.
    - Availability of a visit supervisor (e.g., friend, relative, church member).
    - Interest in respondent's involvement in child's life through attendance at school events, doctor appointments, or other similar events. Identify events and activities.
  - Obtain child's position and determine whether child wants you to report his or her position to the court.
- Continue independent investigation, conduct assessment, and formulate position on:
  - Custody and placement of the child.
    - Whether there is a current safety risk to the child if in, or returned to, the physical custody of one or both respondents.
    - What can be done to prevent/eliminate need for removal (e.g., changes in living environment, services) or to facilitate return home.

- Treatment plan components. Consider whether:
  - The court should order the child be examined by a physician, surgeon, psychiatrist, or psychologist.
  - The child has a developmental disability, thereby requiring the court to refer the matter to a community-centered board.
  - Older youth services, such as independent living programs or emancipation services, should be included in the treatment plan.
- Review the need for testimony, including the need to proffer testimony of the preparer of any reports, evaluations, or assessments being offered by the parties.
  - Determine whether you need to proffer expert testimony. If needed, request approval from OCR.
  - Serve subpoenas on needed witnesses.
- Review respondents' compliance with interim services and get updates from service providers.
- Consider whether to seek placement change, service provider input (caveat privilege waiver), evaluations, visitation changes, sibling visitation or reunification, kinship placement, or interpreter services.
- Determine whether delay or continuance is necessary, serves the child's best interests, and meets statutory restrictions.

DURING

- Advocate position and proffer necessary evidence.
- Present child's position to court unless requested by child not to do so.
- Ensure court, by a preponderance of the evidence:
  - Enters orders regarding appropriate custody of the child according to one of the following:
    - Legal custody with one or both parents or the guardian.
    - Temporary legal custody with a relative or other suitable person.
    - Temporary legal custody with the department or a child placement agency.
    - Placement of the child in a hospital or other suitable facility for the purpose of examination/treatment by a physician, surgeon, psychiatrist, or psychologist.

- Approves and orders an appropriate treatment plan or finds that an appropriate treatment plan cannot be devised as to a specific respondent under narrowly defined statutory bases.

- Request appropriate orders, such as:
  - Case plan specific to the family and child.
  - Special services (to address, e.g., foreign language or geographical concerns).
  - Protective order under C.R.S. § 19-3-207(2) to protect statements made during the course of treatment from being used against the respondent.
- Ensure court addresses:
  - Placement.
  - Services.
  - Visits with respondents, siblings, relatives, and other appropriate persons.
    - Advocate for frequent and meaningful visits outside of the agency when appropriate; agency visits may not fairly depict family functioning or provide an opportunity for meaningful interaction.
  - Whether the department has made reasonable efforts to prevent or eliminate the need for removal. Make record of any issues with reasonable efforts.
  - Setting the next hearing.

AFTER

- Review court orders for accuracy.
- Consult with child in a developmentally appropriate manner to explain court rulings and answer questions. Seek child's position regarding next hearing.
- File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.

DISPOSITIONAL HEARING CHECKLIST—RPC

BEFORE

- ❑ Review the dispositional hearing report and proposed treatment plan in advance of the dispositional hearing. Determine whether the proposed treatment plan:
  - ❍ Addresses the issues affecting the child's health, safety, and welfare that required state intervention.
  - ❍ Is reasonable and calculated for success.
  - ❍ Is specific to the needs of this family.
  - ❍ Appropriately addresses each household member.
    - ■ Determine whether the client is able to comply with the proposed orders and whether it is appropriate and necessary to make such an order.
    - ■ Determine whether any person not a respondent should be made a special respondent for inclusion in the treatment plan.
  - ❍ Provides for services that are culturally/developmentally appropriate and available in the client's first language, if necessary.
  - ❍ In EPP cases, lists services in the dispositional hearing report that are available to families, specific to the needs of the child and the child's family, and available in the community where the family resides as required by § 19-1-106(2.5).
- ❑ Meet with the client. Counsel and strategize regarding desires and positions on the following:
  - ❍ Recommended treatment plan components and measurements of success. Confirm that client was consulted in developing the treatment plan.
  - ❍ Placement (with client, noncustodial parent, relative, current caretaker).
  - ❍ Need for services, convenience of proposed treatment providers, and whether services are reasonably tailored to client's needs.
  - ❍ Ability to substantially comply with treatment plan within allotted time.
  - ❍ Visits with child, siblings, grandparents, and others.
  - ❍ Availability of a visitation supervisor (e.g., friend, family, church member, co-worker, or other person).

- Ability to be involved in child's life through attendance at school events, doctor appointments, or other similar events. Identify events and activities.
- Assess client's support system.
- Provide client a copy of the proposed treatment plan.

- Assess and formulate positions on the following:
  - Current safety risk to child if in custody of one or both parents.
  - What can be done to prevent/eliminate the need for removal (changes in living environment, services) or to facilitate return home.
- Consider the need for testimony, including expert testimony, and the need to require testimony of the preparer of any reports, evaluations, or assessments being proffered by the parties. Issue subpoenas, as appropriate.
- Review client's compliance with interim services and get updates from service providers.
- Consider filing motions addressing change of placement, evaluations, increased visits, decreased substance abuse monitoring, the need for in-patient treatment, sibling visits or reunification, kinship placement, and interpreter services.
- Determine whether delay or continuance is necessary and meets statutory restrictions.

DURING

- Advocate client's position and proffer necessary evidence.
- Ensure that the court, by a preponderance of the evidence:
  - Enters order regarding appropriate custody of the child according to one of the following:
    - Legal custody with one or both parents or the guardian.
    - Temporary legal custody with a relative or other suitable person.
    - Temporary legal custody with the department or a child placement agency.
    - Placement of the child in a hospital or other suitable facility for the purpose of examination/treatment by a physician, surgeon, psychiatrist, or psychologist.

- Approves and orders an appropriate treatment plan or finds that an appropriate treatment plan cannot be devised as to a specific respondent under narrowly defined statutory bases.

- Request appropriate orders such as:
  - Case plan specific to the family and child or children.
  - Special services (addressing, e.g., foreign language or geographical concerns).
  - Protective order under § 19-3-207(2) to protect statements made during the course of treatment from being used against the respondent.
- Present evidence as to client's compliance with interim treatment plan orders or changed circumstances.
- Ensure court addresses:
  - Placement.
  - Services.
  - Visits with child, siblings, relatives, and other appropriate persons.
    - Advocate for frequent and meaningful visits outside of the agency; agency visits may not fairly depict family functioning.
  - Whether the department has made reasonable efforts to prevent or eliminate the need for removal.
  - Setting the next hearing.

AFTER

- Develop timeline of important dates and calendar reminders.
- Discuss with client how to keep track of important dates and contact information for service providers.
- Ask caseworker to provide you with a written copy of service referrals.
- Consult with client to explain court rulings and answer questions.
- Discuss interim objectives with client (e.g., when should services have begun, when should visits increase, etc.) and instruct client to contact you when appropriate.
- File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.

BLACK LETTER DISCUSSION AND TIPS

The goal of the dispositional hearing is to determine, for a child who has been adjudicated dependent or neglected, the proper order of disposition best serving the interests of the child and the public. §§ 19-3-507(1)(a), 19-1-103(43). Specifically, the court makes a determination about the child's legal custody, decides whether an appropriate treatment plan can be devised to address the issues that led to the department's involvement, and approves an appropriate treatment plan. The dispositional hearing also serves as another juncture in the case at which the court evaluates the department's efforts to prevent unnecessary out-of-home placement and to facilitate reunification, determines whether placement with siblings is in the best interests of each child in a sibling group, and reviews the efforts that have been made to locate an appropriate relative placement. *See generally* § 19-3-508.

> **TIP:** The dispositional hearing is a critical time to ensure that a child's network of supportive, stable adults is in place and that orders are made to enable the child to remain in contact with not only relatives but also other important people in the child's life. It is better practice to maintain relationships with extended family members and others from the outset than to attempt to restore connections later in the case.

TIMING OF HEARING

The date of the adjudication determines the date of the dispositional hearing. A child must be adjudicated dependent or neglected before a dispositional hearing can be held. § 19-3-507(1)(a); *People ex rel. J.L.*, 121 P.3d 315, 316 (Colo. App. 2005). A dispositional hearing cannot take place for a particular parent until the child has been adjudicated with regard to that parent. *People ex rel. U.S.*, 121 P.3d 326 (Colo. App. 2005). A parent does not have to be adjudicated to be at fault for the dependence or neglect of the child, and a no-fault admission is legally binding. *See People in the Interest of P.D.S.*, 669 P.2d 627 (Colo. App. 1983). However, if a jury has found that the child is not dependent or neglected with regard to one parent, the court does not have a basis on which to exercise continuing jurisdiction over the

case and cannot hold a dispositional hearing on the child. *In the Interest of A.H.*, 271 P.3d 116, 1121–23 (Colo. App. 2011).

The dispositional hearing may be held the same day as the adjudicatory hearing. § 19-3-508(1). It is the legislative intent that the adjudicatory and dispositional hearings be held on the same day whenever possible. *Id.*; *see also* § 19-3-505(7)(b).

The court must enter a decree of disposition within 30 days of the adjudication in an EPP case unless good cause is shown and the court finds delay will serve the best interests of the child. §§ 19-3-508(1), 19-3-104; *see also* **EPP fact sheet**. In cases that are not considered EPP cases, the court's entry of a dispositional decree must occur within 45 days of the adjudication unless the court finds the best interests of the child will be served by granting a delay. § 19-3-508(1).

> **TIP:** The Children's Code states that, if appropriate, any hearing conducted involving a child subject to EPP procedures must include all other children residing in the same household whose placement is subject to determination in a dependency and neglect proceeding. § 19-3-104. *See* **EPP fact sheet**.

CJD 96-08 recommends that if the disposition cannot occur at the adjudicatory hearing, all dispositional hearings occur within 30 days of adjudication. CJD 96-08(2)(c).

If the court grants a delay, the court must set forth the reasons why a delay is necessary and the minimum amount of time needed to resolve the reasons for the delay, and it must schedule the hearing at the earliest possible time following the delay. § 19-3-508(1). In EPP cases, the court must also find good cause for the delay and that the delay will serve the best interests of the child. § 19-3-104.

> **TIP:** Although counsel should advocate for a timely dispositional hearing, holding the adjudicatory and dispositional hearings on the same day may lead to an insufficient treatment plan. Although it may be in the interests of the child and family to proceed with treatment as quickly as possible, both the RPC and the GAL must independently investigate whether (1) the treatment plan is tailored to address the issues affecting the safety of the child in the parents' home and (2) the parents are able to comply with the requirements of the treatment plan. Counsel should engage in discovery, communication with the client / the child, and an independent investigation in making

this assessment. Counsel may request interim treatment orders pending the dispositional hearing to facilitate timely participation in services and invoke any protections of § 19-3-207. *See* **§ 19-3-207 fact sheet**. Additionally, as the court will address placement / temporary legal custody of the child at the dispositional hearing, counsel must assess placement / temporary legal custody options by investigating potential relative placements and appropriate joint sibling placements.

The Children's Code specifically authorizes the dispositional hearing to be continued on the motion of an interested party or by the court for a reasonable period to receive reports or other evidence. § 19-3-507(3)(a). However, any continuance must not exceed 30 days and must be held within the 30-day and 45-day time frames established for the entry of a dispositional decree unless the required best interests and good cause findings are made. §§ 19-3-505(7)(b), 19-3-508(1). The continuance of a dispositional hearing in an EPP case must be supported by judicial findings of good cause for the continuance and evidence that the best interests of the child will be served by granting the continuance. § 19-3-104.

Once the date of the dispositional hearing is scheduled, CJD 96-08 sets a strong presumption against continuances in D&N cases, providing "continuances [should] be granted . . . only upon a finding that a manifest injustice would occur in the absence of a continuance." CJD 96-08(4).

❖ **TIP:** Delay in beginning an appropriate treatment plan serves neither the children nor the parents in a dependency and neglect proceeding. Although counsel may appropriately need to request that the dispositional hearing not be held on the same date as the adjudicatory hearing, once a dispositional hearing is set, counsel should prepare diligently for the hearing to avoid needing to request a continuance of the hearing. Counsel should object to other parties' requests for a continuance of the hearing when a continuance will not serve the interests of the child/client.

When the proposed disposition is termination of the parent-child relationship, the termination hearing may not be held on the same date as the adjudicatory hearing and the 45-day / 30-day time frames for dispositional hearings do not apply. § 19-3-508(1). The court may schedule the dispositional hearing in

accordance with the time frames and procedures set forth for the termination hearing. § 19-3-508(1); *see also* **Termination Hearing chapter**, *infra*.

CASEWORKER'S REPORT

Prior to the dispositional hearing, the department must provide the court and the parties a statement of the details of the services offered to the family to prevent unnecessary out-of-home placement and to facilitate reunification. § 19-3-507(1)(b). For children under age six, the caseworker must submit a list of services available to families that are specific to the needs of the child and the child's family and that are available in the community where the child resides. § 19-1-107(2.5). The caseworker may also submit reports and other materials relating to the child's physical, mental, and social history. § 19-1-107(2). The department is required to file and serve reports at least five days in advance of hearings and permits sanctions to be imposed if such filing and service are not obtained. CJD 96-08(3).

- **TIP:** Counsel should proactively address any issues with receiving the dispositional hearing report in a timely manner. The treatment plan ordered by the court is a critical document because it sets forth the expectations for the parent(s), the child, and the department with regard to the services and efforts that must be made. The report is a part of the department's records and may become part of the court's records through § 19-1-107(2) or other evidentiary means. *See* **Hearsay in D&N Proceedings fact sheet**. It is important for counsel to review the report in advance of the hearing to confirm the accuracy of the information in the report and for the RPC to review the report with the parent to confirm that the parent understands the information presented in the report. Review of the report is also necessary preparation for the dispositional hearing, because counsel should ensure that the treatment plan is tailored to the unique needs of the family as documented in the report. Receipt of the report at the beginning of the dispositional hearing does not allow for adequate preparation. Counsel should object to the late filing of the report and carefully consider the need for a continuance. Although returning to court at a later date may delay the beginning of treatment, it is important for counsel to be sufficiently prepared for

the hearing. In districts in which dispositional reports are not being provided in a timely manner, counsel should raise the timely filing of reports as a systematic issue to be addressed by, for example, the district's Best Practice Court Team.

Although the Children's Code allows the court to receive written reports and other material relating to the child's mental, physical, and social history, along with other evidence, it also states that the court must require the person who wrote the report to appear at the dispositional hearing and be subject to direct and cross-examination if requested by any of the parties. § 19-1-107(2). The court may also, on its own initiative, order the preparer of the report to appear at the dispositional hearing if it finds that doing so will be in the best interests of the child. *Id.*

❖ **TIP:** Particularly in cases in which counsel disagrees with the proposed treatment plan or placement, counsel should subpoena the preparer of any of the reports, evaluations, or assessments being offered by the department. Through examination of the preparer of a report, evaluation, or assessment, counsel can highlight the proposed treatment plan's shortcomings, as well as information supportive of counsel's position regarding the appropriate disposition of the case.

NOTICE

All parties, including GALs, must receive notice of the dispositional hearing, as must foster parents, pre-adoptive parents, and relatives with whom the child is placed. *See* § 19-3-502(7). Foster parents, pre-adoptive parents, or relatives who make a written request for notice of court hearings are entitled to receive written notice of the dispositional hearing. § 19-3-507(5)(c). Persons with whom a child is placed must provide prior notice of the dispositional hearing to the child. § 19-3-502(7). A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

❖ **TIP:** In cases in which the dispositional hearing is held on the same day as the adjudicatory hearing, counsel must ensure that the required parties have received notice of the dispositional hearing.

The Indian Child Welfare Act (ICWA) sets forth more stringent notice requirements. *See* **ICWA fact sheet**.

BURDENS OF PROOF

At the dispositional hearing, the court enters findings regarding the temporary legal custody of the child and the treatment plan. Generally, the findings made at the dispositional hearing must be made by a preponderance of the evidence. § 13-25-127(1). However, if a party is moving the court to order an Indian child into foster care placement at the dispositional hearing, the party must prove by clear and convincing evidence, using expert testimony, that remaining in the home will result in serious emotional or physical damage to the child. § 25 U.S.C. 1912(e). *See* **ICWA fact sheet**.

- **TIP:** The statute does not establish a higher burden of proof for orders finding that no appropriate treatment plan can be devised. *See* 19-3-508(1)(e)(I). However, such orders likely mean the case is on the trajectory for terminating the parent-child legal relationship, which ultimately will require a finding by clear and convincing evidence that an appropriate treatment plan cannot be devised. §19-3-604(1). Therefore, counsel should advocate that any findings regarding the inability to devise an appropriate treatment plan at the dispositional hearing be based on clear and convincing evidence. *See, e.g., People in the Interest of T.W.*, 797 P.2d 821, 822–3 (Colo. App. 1990)(upholding a district court order, containing findings made by clear and convincing evidence, that no appropriate treatment plan could be devised at the dispositional hearing phase).

LEGAL CUSTODY ORDERS

At the dispositional hearing, the court will order one of four legal custody options: (1) legal custody with one or both parents or the guardian; (2) temporary legal custody with a relative or other suitable person; (3) temporary legal custody with the department or a child placement agency for placement in foster care, a group home, or other appropriate facility; or (4) placement of the child in a hospital or other suitable facility for the purpose of examination/treatment by a physician, surgeon, psychiatrist, or psychologist. §§ 19-3-508(1)(a)–(d).

1. Legal Custody with the Parent

It is the purpose of the Children's Code to secure care and guidance for a child preferably in the child's own home, to preserve and strengthen family ties, and to remove a child from the custody of parents only when the child's welfare and safety or the protection of the public would otherwise be endangered. §§ 19-1-102(1)(a)–(c). Legal custody with a parent is, thus, the preferred placement option for children who have been adjudicated dependent or neglected. §§ 19-3-508(1)(a), (2). The court may place the child in the legal custody of one or both parents or the child's guardian. § 19-3-508(1)(a). Such placement may be ordered with or without protective supervision. *Id.*

The department is required to provide reasonable efforts to promote in-home placement. *See* **Reasonable Efforts fact sheet**. In ICWA cases, the department must make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d). *See* **ICWA fact sheet**.

❖ **ADVOCACY TIP:** In evaluating the possibility of in-home placement and advocating for in-home placement, counsel should fully consider the potential services, supports, and protective orders available to maintain legal custody with parents. Examples of such supports / protective orders may include, but are not limited to, one parent moving out of the home; respite care; the presence of an appropriate relative, kin, or neighbor in the home during key points during the day; and monitoring by the department. This is an area where counsel should think outside the box to promote stability and family connections for children while protecting their safety and well-being. If cost concerns are raised regarding such arrangements/supports, it is helpful for counsel to address the reasonableness of such costs in light of the costs of placing the child(ren) out of the home.

2. Legal Custody with Relative or Other Suitable Person

Placement with a relative or a kinship placement is preferred over foster care. §§ 19-3-508(1)(b), (3)(b.5), (5)(b); *see also* § 19-1-115(1)(a); 7.304.21. The Children's Code does not define relatives. Volume 7 defines kin as relatives or persons ascribed by the family as having a family-like relationship or

individuals with a prior significant relationship with the child. 7.304.21(A).

Although relatives/kin may ultimately serve as placements for children through an allocation of parental responsibilities, designation as guardians, or adoption, the two most common forms of relative/kinship placement that typically occur at the dispositional hearing are (1) temporary legal custody granted to the relative/kin and (2) temporary legal custody granted to the department and placement with a relative.

Temporary legal custody granted to a relative/kin may be ordered pursuant to § 19-3-508(1)(b)(allowing the court to "place the child in the legal custody of a relative, including the grandparent, or other suitable person"). The court may enter protective supervision under such conditions as the court deems necessary and appropriate. *Id.* Relatives with the temporary legal custody of the child may be made special respondents and required to follow the orders of the court. *See* **Special Respondents fact sheet**. If temporary legal custody is ordered to a relative/kin and it becomes necessary to subsequently remove the child from the kin placement, the court must order a change in temporary custody.

> **TIP:** Counsel should consider requesting that relatives/kin with temporary legal custody of a child be made special respondents. As special respondents, the relative/kin will be under the jurisdiction of the court and be required to comply with the court orders necessary for the safety and well-being of the child (e.g., protective orders and orders to facilitate visits). *See* **Special Respondents fact sheet**.

A relative/kin may also serve as a placement when temporary legal custody is ordered to the department. § 19-3-508(1)(c); 7.304.21(D). Relatives or kin who serve as a placement for a child in the temporary legal custody of the department should be assessed in light of the foster care certification requirements. 7.304.21(D)(2). Relative/kin placements are considered child-specific placements subject to the 60-day waiver for emergency placements. 7.304.21(D)(2)(e); 7.500.311(C), (D).

The department must advise relative/kinship placements of available support options, the option of being certified as a foster home, and the possibility of subsidized guardianship, and it must work with the relative/kin to consider all funding options

and support services. *See* **Relative and Kinship Placement fact sheet**.

- **TIP:** Regardless of whether temporary legal custody of the child is ordered to the relative/kin or the relative/kin is serving as a placement while the department has temporary legal custody, the GAL should ensure the county is meeting its obligation to fully explore all possible supports as set forth in 7.304.21. Foster care payments, social security benefits, and other supports will promote the immediate and long-term viability of the placement and thus serve the best interests of the child by promoting stability in placement and permanency for the child.

- **TIP:** It is important for RPC to work with parents to provide information about potential relative placements for the child in compliance with § 19-3-403(3.6)(a)(III) and to continue to discuss potential relative placements with the parent. If additional information is obtained, RPC should share it with the other parties as early as possible before the dispositional hearing. Providing this information as early as possible gives the department and GAL more time to examine the appropriateness of the potential placement, decreasing the likelihood that unresolved questions about the placement will delay appropriate placement with relatives/kin at the dispositional hearing. GALs also should engage in an independent investigation of potential relative/kin placements as early as possible in the case.

Although preferred, placement with a relative/kin is an out-of-home placement. Before the court may order custody of a child to a relative/kin, the court must find by a preponderance of the evidence that separation of the child from the parent or guardian is in the child's best interests. § 19-3-508(2). Additionally, if a court order placing the child in the temporary legal custody of the department for placement with relatives must contain the reasonable efforts, remaining in the child's home would be "contrary to the child's best interests," and procedural safeguards findings required by § 19-1-115(6). *See* **Legal Custody in the County Department of Social Services section**, *infra*. If the child is an Indian child, two additional findings are required: (1) the department has made active efforts to prevent the breakup of the Indian family; and (2) remaining in the home will result in serious emotional or physical damage to the child. 25 U.S.C. §§ 1912(d), (e).

The latter of these two findings must be made by clear and convincing evidence using expert testimony. 25 U.S.C. § 1912 (d).

3. Legal Custody in the County Department of Social Services

The court may order temporary legal custody of the child to the county department of social services or a child placement agency for the purpose of placement in a foster care home or other child placement facility. § 19-3-508(1)(c).

To remove a child from the custodial parent, the court must make the following findings:

1. Separation of the child from the parents or guardian is in the best interests of the child;
2. Continued placement of the child with the parent is contrary to the child's best interests;
3. Reasonable efforts to prevent out-of-home placement have been made or are not required under § 19-1-115(7);
4. Reasonable efforts will be made to reunite the child with the family or are not required under § 19-1-115(7). Specifically, the court must find one of the following: (a) reasonable efforts have been complied with to prevent the removal; (b) an emergency situation exists necessitating removal and preventative efforts are not required because of that emergency situation; or (c) reasonable efforts are not required pursuant to § 19-1-115(7);
5. Procedural safeguards with respect to parental rights have been applied in connection to any removal of child from the home, placement change, or determination affecting visitation.

See §§ 19-3-508(2); 19-1-115(6).

If the child is an Indian child, two additional findings are required: (1) the department has made active efforts to prevent the breakup of the Indian family; and (2) remaining in the home will result in serious emotional or physical damage to the child. 25 U.S.C. §§ 1912(d), (e). The latter of these two findings must be made by clear and convincing evidence using expert testimony. 25 U.S.C. § 1912(d).

When the court places the child in the temporary legal custody of the department, the parent will be ordered to pay a fee for the residential care, and that fee is based on child support guidelines. *People ex rel. B.S.M.*, 251 P.3d 511 (Colo. App. 2010), § 19-1-115(4)(d)(I); 42 U.S.C. § 671(a)(17).

- **TIP:** Although effective advocacy entails out-of-court inquiry and advocacy for reasonable efforts, in instances in which counsel has determined reasonable efforts have not been made, counsel must make a record of lack of reasonable efforts at the earliest possible hearing, including the dispositional hearing. Otherwise, the issue may be deemed to have been waived for appellate review. *People ex rel. D.P.*, 160 P.3d 351, 355–56 (Colo. App. 2007); *People ex rel. T.E.H.*, 168 P.3d 5 (Colo. App. 2007).

- **TIP:** When the court orders temporary legal custody to the department, counsel should advocate for an appropriate placement for the child. Considerations that inform whether a placement is appropriate include whether the placement (1) promotes the safety of the child; (2) is the least restrictive setting; (3) sufficiently meets the child's immediate and ongoing needs; (4) is in close proximity to the parents to facilitate visits and other contact; (5) allows the child to continue attending the child's previous school; (6) is sensitive to cultural considerations and religious preferences; (7) allows siblings to remain together; and (8) will be able to serve as a permanent placement for the child if such need arises. *See generally* 42 U.S.C. § 675(5)(A) (discussing federal requirements for case plan); § 19-1-102 (setting forth purposes of the Children's Code and the intent that children who are removed from a home should be placed in a secure and stable environment); § 19-3-213 (discussing placement criteria, including but not limited to educational stability and sibling placement); § 19-3-508(5)(a) (discussing responsibility of the court, in making placement decisions, to take into consideration religious preferences of the parent and child whenever practicable). The placement evaluation report required by §§ 19-1-115(8)(e) and 19-1-107(3) will likely contain information helpful to this consideration. For GALs, an independent assessment of the appropriateness of the placement is also warranted.

4. Placement of the Child in a Hospital/Other Suitable Facility for Examination/Treatment

The court may order that a child be "examined or treated by a physician, surgeon, psychiatrist, or psychologist or that he or she receive other special care and may place the child in a hospital or other suitable facility for such purposes." § 19-3-508(1)(d)(I). The court must find by a preponderance of the

evidence that separation of the child from the parent or guardian is in the child's best interests. § 19-3-508(2).

A child may not be placed in a mental health facility operated by the Colorado Department of Human Services until the child has received a mental health prescreening recommending the child be placed in a facility for evaluation pursuant to § 27-65-105 or § 27-65-106 or a hearing is held. § 19-3-508(1)(d)(I).

- **TIP:** Section 19-3-506 sets forth additional procedures for mental illness screening. A child who is suspected of having a mental illness must be given a prescreen by a mental health professional. § 19-3-506(1)(b). The prescreening must be done as quickly as possible, and the report must be provided to the court within 24 hours, excluding weekends and legal holidays. *Id.* If the prescreen indicates a child may have a mental illness, the court must review the report within 24 hours, excluding weekends and legal holidays. § 19-3-506(1)(c). If the prescreen indicates that the child does not have a mental illness, any party may request a second prescreening of the child. § 19-3-506(1)(e).

  The court must order a 72-hour treatment and evaluation pursuant to § 27-65-105 or 27-65-106 if the prescreen indicates the child may suffer from a mental illness. §§ 19-3-506(1)(b), (e). If the prescreening indicates that a child does not have a mental illness, the court may not order a 72-hour evaluation unless the court holds a hearing and finds, based on evidence presented by a mental health professional, that the prescreen is inadequate, incomplete, or incorrect and that mental illness is present in the child. § 19-3-506(1)(e). If the evaluation indicates the child has a mental illness, the evaluation must be treated as a short-term certification under § 27-65-107, and the procedural protections applying to short-term certification attach. § 19-3-506(3)(a).

TREATMENT PLAN

At the dispositional hearing, the court also approves an appropriate treatment plan unless it makes specific findings that an appropriate treatment plan cannot be devised.

- **TIP:** If part of the treatment plan is deemed by any party to not be reasonable and counsel is unable to correct the prob-

lems with the treatment plan through negotiation or other non-adversarial means, counsel should request an evidentiary hearing to contest disputed issues.

1. Adoption of a Treatment Plan

Unless there is a determination that no treatment plan is appropriate pursuant to § 19-3-508(1)(e)(I), the court must adopt an appropriate treatment plan that is "reasonably calculated to render the parent fit to provide adequate parenting to the child within a reasonable period of time and that relates to the child's needs." §§ 19-3-508(1)(e)(I), 19-1-103(10). Each respondent parent and child may be given a treatment plan. § 19-3-508(1)(e)(I). A special respondent may also be included in a treatment plan. § 19-1-103(100).

> **TIP:** Counsel should consider relationships the parent has with any significant others who are not respondent parents and whose issues may impact the parent's ability to succeed at reunification efforts. Such significant others may be made special respondents to the case, and it may be in the interests of the parent and/or child to add them. *See* **Special Respondents fact sheet**.

The appropriateness of the treatment plan is measured by the factors existing at the time of its implementation. *In the Interest of A.G.-G.*, 899 P.2d 319, 322 (Colo. App. 1995). When considering the appropriateness of adopting a treatment plan, the court may consider written reports or other materials relating to the child's mental, physical, and social history. § 19-1-107(2). The author of the report may be called as a witness by any party or by the court's own motion. *Id.* Once the treatment plan is adopted, it becomes an order of the court and the parent must comply with those orders. Failure to comply with the court-ordered treatment plan may result in the termination of the parent-child relationship. § 19-3-604(1)(c)(I).

> **TIP:** Counsel must play an active role in the development of the treatment plan. Counsel should ensure the child and parent have the opportunity to participate in the development of the treatment plan as required by § 19-3-209 and 7.301.22. Effective participation in the treatment plan necessarily entails advance review of the treatment plan, and whether through an agreement with the department, a case management order,

or some other means, counsel should establish a process for being involved in the development of the plan and for obtaining the proposed treatment plan sufficiently in advance of the dispositional hearing. District plans developed pursuant to CJD 98-02 or other procedures developed through a district's Best Practice Court Team may also facilitate advance distribution of proposed treatment plans and child and parent involvement in the development of such plans.

Counsel should advocate for a treatment plan that is specifically tailored to the needs of each parent and child and is likely to succeed in rendering the parent fit to care for the child. Independent investigation and consultation with the client/child should inform counsel's advocacy. In addition, counsel should review the department's records, including the North Carolina Family Assessment Scale (NCFAS). The NCFAS must be completed within 60 days of the assignment of the investigation and assessment, and its identification of strengths and needs must be considered in developing the treatment plan. 7.301.1(F)(1). The services in the treatment plan must be directed toward the areas of need identified in the assessment. 7.301.23(A). Review of the NCFAS and the department's other reports is an important component of counsel's independent investigation. When the NCFAS has not been completed prior to the dispositional hearing, counsel should review the NCFAS as soon as it becomes available to assess whether there is a need to modify the treatment plan to more appropriately address the family's needs.

Although counsel should be involved in the out-of-court development of the treatment plan, any remaining issues with the treatment plan must be litigated at the dispositional hearing. Counsel should use the dispositional hearing as an opportunity to address problems with the treatment plan at the outset of its implementation instead of waiting until these problems become barriers to reunification or grounds for termination of parental rights. Additionally, because the appropriateness of the treatment plan is relevant to the ability to terminate parental rights, the treatment plan must be objected to if determined to be unreasonable. § 19-3-604(1)(c)(I). If the reasonableness is not objected to prior to the termination, that issue may be deemed waived and might not be able to be raised on appeal. *See D.P.*, 160 P.3d at 355–56; *T.E.H.*, 168 P.3d at 8–9; **Appeals fact sheet**. Because the appropriateness of the treatment plan is examined in light of the facts existing at the time the plan was ordered and the treatment plan is evaluated by its likeli-

hood of success in reuniting the family, it is important to make a record of the facts at the time of the plan's adoption. *A.G.-G.*, 899 P.2d at 322. If counsel objects to the treatment plan or the department's efforts at the dispositional hearing, counsel should ensure the objection is documented in the minute orders and/or flag the hearing as a hearing for which the transcript should be designated as part of the record on appeal.

The services the department is required to provide to children and families are outlined in the Children's Code. Volume 7 also addresses services to be provided. 7.202.62(B); 7.301.2 *et seq.*; 7.303.1 *et seq.* The treatment plan is designed to remedy the issues that brought the family to the attention of the department. The treatment plan should take into account the reasons for the adjudication for each individual parent and should address the child's needs in tandem with the parents' needs. The treatment plan should build on parents' strengths and be tailored to the unique needs and challenges of each parent. 7.301.1(G), (H). Services provided must be culturally and ethnically appropriate. 7.301.23(C). The outcomes in the treatment plan must be "described in terms of specific, measurable, agreed-upon, realistic, time-limited objectives and action steps to be accomplished by the parents, child, service providers, and county staff." 7.301.23(A).

In EPP cases in which the child is in the care of a parent, the treatment plan must include a requirement that the family obtain services specific to the family's needs if available in the community where the family resides and based on the social study and reports provided pursuant to § 19-1-107(2.5). § 19-3-508(1)(a).

The treatment plan is one place in which the department documents the provision of reasonable efforts in traditional cases and active efforts in ICWA cases. *See* **Reasonable Efforts fact sheet**; **ICWA fact sheet**.

❖ **TIP:** If services are required and a family does not have insurance to pay for the services, counsel should advocate for evaluations and assessments to be paid for by the department or alternative funding sources. If a family has insurance but has cost-prohibitive copayments for accessing those services, counsel should address this problem at the dispositional hearing so that alternative funding sources may be ordered by the court.

If the department asserts that it does not have funding to provide services that are necessary for successful reunification,

counsel should make a complete record of the necessity of the services and litigate the funding issue. *See* **Funding and Rate Issues fact sheet**; **Reasonable Efforts fact sheet**.

- **TIP:** Visits are not only for the benefit of the parent, but they are also for the benefit of the child. *See* **Visits fact sheet**. As appropriate to the safety and needs of the child, GALs should advocate for frequent and meaningful visits in the most natural setting possible. Absent safety concerns prohibiting contact, parents and children are entitled to face-to-face visits and the court may not delegate the determination of entitlement to visit to caseworkers, therapists, or others. *People ex rel. D.G.*, 140 P.3d 299, 302 (Colo. App. 2006).

- **TIP:** The department bears the burden of proving that the parent is incapable of utilizing services and is unlikely to be capable of adequately caring for the child even if services are provided. *See* **No Appropriate Treatment Plan section**, *infra.* If necessary, counsel should request an independent expert to testify as to the parent's ability to benefit from these services.

In addition to the treatment services provided for in § 19-3-208, additional services may be provided to the child. The court may order that the child be examined by a physician, surgeon, psychiatrist, or psychologist. § 19-3-508(1)(d)(I). If the court believes a child may have a developmental disability, it must refer the child to a community-centered board. § 19-3-507(2). If the court believes a child has a mental illness, it must order a mental health prescreening. *Id.* Services to assist older youth, such as independent living programs or emancipation services, should be considered for inclusion in the treatment plan. *See* **Transition to Adulthood and Independent Living fact sheet**.

2. No Appropriate Treatment Plan

The circumstances in which a court may find that an appropriate treatment plan cannot be devised for a specific respondent are narrowly defined and statutorily based. § 19-3-508(1)(e)(I). The determination that a treatment plan cannot be created necessarily means that the case is heading toward termination of parental rights. In "no appropriate treatment plan" cases, the court must find by clear and convincing evidence that no appropriate treatment plan can be developed to address the parent's unfitness. §§ 19-3-508(1)(e)(I), 19-3-604(1)(b); *T.W.*, 797 P.2d at 822–23.

Section 19-3-508(1)(e)(I) sets forth the exclusive list for when the court may find that an appropriate treatment plan may not be devised for a specific respondent:

- Abandonment—the child has been abandoned as defined in § 19-3-604(1)(a)(I) and the parents cannot be located.
- Emotional / mental illness / mental deficiency—the parent has emotional illness, mental illness, or mental deficiency of such duration and nature as to render the parent unlikely within a reasonable time to care for the ongoing physical, mental, and emotional needs and conditions of the child. § 19-3-604(1)(b)(I).
- Serious bodily injury or disfigurement of the child—a single incident resulting in a serious bodily injury or disfigurement of the child. § 19-3-604(1)(b)(II).
- Extended incarceration—a parent who is incarcerated and ineligible for parole for at least six years from the date of adjudication if the child is six or over, or at least 36 months if the child is under the age of six. § 19-3-604(1)(b)(III).

  ❖ **TIP:** Although incarceration can be the basis for the assertion of no appropriate treatment plan, it is not a per se prohibition on the creation of a treatment plan. *People in the Interest of M.C.C.*, 641 P.2d 306, 309 (Colo. App. 1982). The creation of a treatment plan for a person who is incarcerated beyond the time frames defined in § 19-3-604(1)(b)(III) may be appropriate based on the age of the child, the ability of family to provide care, and other pertinent factors. *See People in the Interest of E.I.C.*, 958 P.2d 511, 514 (Colo. App. 1998). Regardless of whether a treatment plan is being developed, it is important to obtain information from the incarcerated client about relatives/kin who might be appropriate placements or supports for the child.
- Sibling injury/death—serious bodily injury or death to a sibling resulting from proven abuse or neglect by the parent. § 19-3-604(1)(b)(IV).
- Habitual abuse—an identifiable pattern of habitual abuse to the child or another child and either (1) the parent has been adjudicated as to that other child because of allegations of sexual or physical abuse, or (2) a court of competent jurisdiction has determined that the abuse or neglect caused the death of another child. § 19-3-604(1)(b)(V). *See also* § 19-3-102(2)

(setting forth § 19-3-508 as another basis for finding that no appropriate treatment plan can be devised).

- Sexual abuse—an identifiable pattern of sexual abuse of the child. § 19-3-604(1)(b)(VI).
- Torture or cruelty—the torture of or extreme cruelty to the child, the sibling of the child, or a child of either parent. § 19-3-604(1)(b)(VII).

> **TIP:** The statute permits but does not require the court to find that an appropriate treatment plan cannot be devised. In these circumstances, RPC should advocate for a treatment plan and, if necessary, present evidence as to why a parent should get a treatment plan in light of circumstances unique to the case. RPC should seek an expert if necessary and make a record of how the parent's constitutional due process rights may be violated if the request is denied.

> **TIP:** Throughout the proceeding, a GAL has a duty to be an independent advocate for the child. If the department is proposing that the court make a finding that no appropriate treatment plan can be devised, the GAL must conduct an independent investigation to determine whether such a finding is in the child's best interests.

If the court enters a finding that no appropriate treatment plan can be devised, one of the following must occur within 30 days: (1) a permanency hearing must be held or (2) a termination motion must be filed. §§ 19-3-508(1)(e)(I); 19-3-702(1).

In some no appropriate treatment plan cases, the dispositional hearing may be held on the same date as the termination of parental rights hearing. If the termination of parental rights hearing also presents the parent with the full opportunity to litigate the issue as to whether no appropriate treatment plan could be developed, combining the dispositional hearing with the termination of parental rights hearing has been held to be in compliance with the statutory scheme of the Children's Code. *See People ex rel. T.L.B.*, 148 P.3d 450, 455–57 (Colo. App. 2006).

SPECIAL ISSUES AND CONSIDERATIONS

1. Intervention

At the dispositional hearing, intervention for a parent, grandparent, or foster parent who has cared for the child for more than three months is a matter of right. § 19-3-507(5)(a). Intervenors may proceed with or without counsel. *Id. See* **Intervenors fact sheet**.

2. Appeals

A dispositional order is a final judgment that can be appealed. § 19-1-109(2)(c); *see also People in the Interest of E.A.*, 638 P.2d 278, 282 (Colo. 1981). An adjudication of dependency and neglect is final for the purposes of appeal upon completion of the dispositional hearing. *People in the Interest of T.R.W.*, 759 P.2d 768, 770 (Colo. App. 1988).

Many dispositional hearings are handled by magistrates rather than judges. The proper relief sought based on a ruling by a magistrate is a motion for judicial review. *See* **Magistrates fact sheet**. If the district court denies the motion, appellate review may be sought. *Id.*

3. Change of a Case Plan from Treatment Plan to No Treatment Plan

Although rare, it is possible in a case in which a treatment plan has been ordered for the court to subsequently find that no appropriate treatment plan can be devised. *See, e.g., In re D.C.-M.S.*, 111 P.3d 559, 562 (Colo. App. 2005).

SETTING THE NEXT HEARING

If the child is placed out of home, the hearing after the dispositional hearing is the permanency hearing and/or the placement review hearing.

For a child who is six years or older at the time a petition is filed, a permanency hearing must take place as soon as possible after a dispositional hearing but within 12 months of the date

the child entered foster care. § 19-3-702(1). If a child is under six years old, a permanency hearing must be held no more than three months after the dispositional decree. *Id.* District plans developed pursuant to CJD 98-02 may set forth quicker time frames for scheduling the permanency hearing. If a determination of no treatment plan has been made pursuant to § 19-3-604, a permanency hearing must be set within 30 days unless a motion to terminate parental rights is filed prior to that date. § 19-3-508(1)(e)(I).

For children in out-of-home placement, placement review hearings must occur within 90 days of the dispositional hearing, within 30 days of the initial temporary custody order, and at least once every six months. *See* §§ 19-3-507(4), 19-1-115(4), 19-3-702(6), (8)(a); 42 U.S.C. § 675(5)(B); **Placement Review Hearing chapter**, *infra*. Whenever possible, the court should combine the review hearing with the permanency hearing. § 19-3-702(1).

If the child remains in the custody of a parent, a permanency hearing is not required and the next scheduled hearing is typically a review hearing.

> **TIP:** It is crucial that attorneys for parents counsel their clients to begin complying with the treatment plan as quickly as possible and remain in contact with clients to immediately address any issues with compliance.

V
Permanency Hearing

PERMANENCY HEARING CHECKLIST—GAL

BEFORE

- ❑ Review caseworker's report. The caseworker's report must be provided three working days before hearing.
- ❑ Request and review department's file and visit notes.
- ❑ Request and review reports from service providers.
- ❑ Ensure all court-ordered programs and services were provided in a timely fashion and comply with the court-ordered treatment plan.
- ❑ Review efforts to place siblings together or reunify siblings.
- ❑ Visit and consult with child to obtain input, assess position, and discuss possible outcomes on the permanency plan. Review updated family services plan with child, if appropriate. Determine whether child wants his or her position reported to the court. Determine whether child wants to appear at hearing and prepare child for court appearance, as appropriate.
- ❑ If child wants to appear in court, follow local court rules. File a motion for *in camera* interview if needed. Consider rescheduling hearing to a non-docket day to allow time for the court to visit the child.
- ❑ Meet with caregiver.
- ❑ Contact the caseworker to discuss progress of visits and respondent's compliance with the treatment plan. Discuss child's potential appearance in court and transportation for child to court.

- ❑ Contact service providers to discuss child's/respondent's progress in treatment, barriers to success, and whether additional services are suggested and why.
- ❑ Formulate position on permanency goal or case closure, visits, services, and whether to request a contested placement hearing. Determine whether the child may be returned home and, if not, whether placement with relative is possible.
- ❑ Contact opposing counsel to discuss position and need for evidentiary hearing.
- ❑ Consider filing motions regarding, among other issues, placement change, exploration of kinship placement, change of services or follow-through on delivery of services, an investigation pursuant to ICPC, increased visitation, discovery, and sibling reunification.
- ❑ Determine if notice has been provided to the parties, CASA, caregiver, and child.

DURING

- ❑ Be aware that the appropriate standard is the best interests of the child and the applicable burden of proof is a preponderance of the evidence. Request contested hearing if appropriate or necessary to further the best interests of the child.
- ❑ Inform court of child's wishes. Introduce child to court if child is present. Request that the child address the court in a suitable manner.
- ❑ Proffer information/evidence regarding:
  - ❍ The child's situation and progress in services.
  - ❍ Barriers to success for treatment plan and need for additional orders.
  - ❍ Thorough efforts to locate a joint placement for all children in a sibling group.
- ❑ Ensure the court finds:
  - ❍ Whether procedural safeguards to preserve parental rights have been applied to any change in the child's placement or visits.
  - ❍ Whether reasonable efforts have been made to finalize the permanency plan in effect at the time of the hearing.
  - ❍ Whether an out-of-state placement, if applicable, remains appropriate and in the best interests of the child.

- Whether the permanency plan for a child age 16 or older includes independent living services.
- Whether reasonable efforts have been made to find a safe and permanent placement for the child.
- Whether the child can be returned to the physical custody of the parent and, if not, whether there is a substantial probability that the child will be returned to the parent, guardian, or legal custodian within six months.

- Ensure the court addresses the following:
  - Respondent's compliance with the treatment plan and respondent's progress toward alleviating or mitigating the causes necessitating placement in foster care.
- Ensure the court enters:
  - A permanency goal for every child for whom the court has determined cannot be returned to the physical custody of the parents and there is not a substantial probability that the child will be returned to such custody within six months.
  - A permanency goal for all children who were under six at the time of the filing of the petition and who have been out of the home for three months, regardless of whether the court has made a determination that the child is likely to return home within six months.
  - One of the following permanency goals:
    - Return to parent (also known as "reunification").
    - Adoption.
    - Legal guardianship or allocation of parental responsibilities.
    - Another planned permanent living arrangement if the court has documentation of a compelling reason to so order.
- If concurrent permanent goals are entered, ensure they are meaningful and in the child's best interests.
- Request orders regarding frequent and meaningful visits with discretion given to the caseworker and GAL to expand visits without further court order.
- Request that discretion be granted to caseworker and GAL to return the child home without further court order.

AFTER

- ❑ Consult with the child to explain court orders and answer questions.
- ❑ Set deadlines and future goals for child.
- ❑ Review court orders for accuracy.

PERMANENCY HEARING CHECKLIST—RPC

BEFORE

- ❑ Review caseworker's report. The caseworker's report must be provided three working days before hearing.
- ❑ Request and review department's file and visit notes.
- ❑ Request and review reports from service providers.
- ❑ Ensure all court-ordered programs and services were provided in a timely fashion. Determine whether client has complied and is complying with the court-ordered treatment plan.
- ❑ Check for efforts to place siblings together.
- ❑ Contact client to discuss possible outcomes and positions on the following:
  - ❍ Possible permanent plans and appropriateness of concurrent plan.
  - ❍ Department's proposed permanent plan and recommendations.
  - ❍ Frequency and quality of visits and position concerning both.
  - ❍ Activities, appointments, and events in the child's life that the client would like to attend.
  - ❍ Appropriateness of current placement.
  - ❍ Progress in and appropriateness of current services.
  - ❍ Child's educational, medical, dental, and therapeutic issues.
  - ❍ Client's contact and relationship with caseworker.
- ❑ Update client's contact information.
- ❑ Provide client with a copy of court report.
- ❑ Contact caregiver, as appropriate.
- ❑ Contact caseworker to discuss visits, progress on treatment plan, recommendations, and concerns.
- ❑ Contact service providers to discuss client's participation and progress in treatment, the appropriateness of treatment services, and opinions regarding continuing needs for treatment.
- ❑ Formulate position on the following:
  - ❍ Reunification and/or case closure and appropriateness of placement.
  - ❍ Visits.
  - ❍ Services.
  - ❍ Whether to request a contested placement hearing.

- ❑ Contact opposing counsel to discuss position and determine if hearing will be contested.
- ❑ Consider filing motions such as change of placement and contempt for non-delivery of services or for orders requiring exploration of kinship placement, ICPC, visits, discovery, sibling reunification, or changes in or cessation of services.

DURING

- ❑ Be aware that the appropriate standard is the best interests of the child and the applicable burden of proof is a preponderance of the evidence. Request a contested hearing if appropriate or necessary.
- ❑ Inform court of client's wishes.
- ❑ Proffer information/evidence regarding:
  - ❍ Client's situation and progress in services.
  - ❍ Success of treatment components and/or barriers to success and need for additional orders.
  - ❍ Thorough efforts to locate a joint placement for all children in a sibling group.
- ❑ Ensure the court finds:
  - ❍ That procedural safeguards to preserve parental rights have been applied in any change in the child's placement or visitation.
  - ❍ That reasonable efforts have been made to finalize the permanency plan in effect at the time of the hearing.
  - ❍ Whether an out-of-state placement, if applicable, remains appropriate and in the best interests of the child.
  - ❍ Whether the permanency plan for a child age 16 or older includes independent living services.
  - ❍ Whether reasonable efforts have been made to find a safe and permanent placement for the child.
  - ❍ Whether the child can be returned to the physical custody of his or her parent and, if not, whether there is a substantial probability that the child will be returned to the parent, guardian, or legal custodian within six months.
- ❑ Ensure that the court addresses the client's compliance with the treatment plan and the respondent's progress toward alleviating or mitigating the causes necessitating placement in foster care.

- Ensure the court enters:
  - A permanency goal for every child for whom the court has determined cannot be returned to the physical custody of the parents and there is not a substantial probability that the child will be returned to such custody within six months.
  - A permanency goal for all children who were under six at the time of the filing of the petition and who have been out of the home for three months, regardless of whether the court has made a determination that the child is likely to return home within six months.
  - One of the following permanency goals:
    - Return to the parent (also known as "reunification").
    - Adoption.
    - Legal guardianship or allocation of parental responsibilities.
    - Another planned permanent living arrangement if the court has documentation of a compelling reason to so order.
- Request orders regarding frequent and meaningful visits, with discretion given to the caseworker and GAL to expand visits without further court order.
- Request order that visits be videotaped and reviewed with client.
- Request that discretion be granted to the caseworker and GAL to return the child home without further court order.
- Request visit orders with specific times, locations, and plan for progression, if previously denied or evidence supports increased visits.

AFTER

- Consult with client to explain court orders and rulings and to answer questions.
- Set deadlines and future goals for client.
- Review court orders for accuracy.

BLACK LETTER DISCUSSION AND TIPS

The purpose of a permanency hearing is to plan for the future status of a child who has been adjudicated dependent or neglected and to provide a stable and permanent home for the child in the shortest time possible. § 19-3-702(1). The permanency hearing statute applies to all children placed out of home, not just those placed in foster care. *People ex rel. C.M.*, 116 P.3d 1278, 1282 (Colo. App. 2005).

> **TIP:** Permanency hearings are intended to keep the case moving forward so that the child is not "warehoused" in the system. GALs have a responsibility to play an active role in making sure that all efforts are expended to get the child in a safe, loving, and permanent home.

TIMING OF HEARING

The time limits imposed by the permanency hearing statute recognize a child's need to bond with and attach to a family. *See People ex rel. A.W.R.*, 17 P.3d 192, 196 (Colo. App. 2000). Federal law requires that a permanency hearing occur within 12 months of the date the child entered foster care and at least once every 12 months for as long as the child remains in foster care. 42 U.S.C. § 675(5)(C). Colorado provides for different permanency hearing timelines depending on the child's age and the permanency goal.

The initial permanency hearing for a child who was six years or older at the time a petition was filed must take place as soon as possible after a dispositional hearing but no later than 12 months after the date the child entered foster care. § 19-3-702(1). A child is considered to have entered foster care on the date the child was placed out of his or her home. *Id.* If a child was less than six years old on the date of the filing of the petition, a permanency hearing must be held no more than three months after the dispositional decree. *Id.* When appropriate, any permanency hearing conducted under the expedited procedures for children under six must include all the children residing in the same household, regardless of their age. § 19-3-104; *see* **EPP fact sheet**.

If the court has entered a finding that reasonable efforts for reunification are not required pursuant to § 19-1-115(7), the court

must hold a permanency hearing that includes consideration of in-state and out-of-state placement options for the child within 30 days of that finding. § 19-3-702(1). Similarly, if the court rules at a dispositional hearing that an appropriate treatment plan cannot be devised pursuant to § 19-3-508(1)(e)(I), a permanency hearing must be held within 30 days of the dispositional hearing unless a motion for termination of the parent-child relationship has been filed in the interim. § 19-3-702(1).

Subsequent permanency hearings must take place every 12 months while the child is out of his or her home and more frequently if deemed necessary by the court. *Id.* If a child is not returned to the custody of a parent or guardian at a permanency hearing and the court finds that there is a substantial probability that the child will be returned to the parent's or guardian's physical custody within six months, the court must set a permanency hearing within six months. § 19-3-702(3).

A court's failure to hold a permanency hearing within the time frames established by the statute is not jurisdictional. *People ex rel. R.W.*, 989 P.2d 240, 243 (Colo. App. 1999).

NOTICE REQUIREMENTS

When a permanency hearing is scheduled, the court is required to promptly issue notice of the hearing to all parties, as well as to the foster parents, pre-adoptive parents, and relatives of the child with whom the child is placed. *See* §§ 19-3-702(2), 19-3-502(7). The notice must briefly describe the substance of the motion, as well as the constitutional and legal rights of the child and the child's parents or guardian. § 19-3-702(2). The notice should not reveal to the respondent parents the address, last name, or any other identifying information regarding the child's caretaker. § 19-3-502(7). The person providing care to the child must inform the child about the upcoming permanency hearing. *Id.* A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

If the proceedings involve an Indian child and a foster care placement is sought at a permanency hearing, the notice provisions of the Indian Child Welfare Act apply. *See* 25 U.S.C. § 1912(a); **ICWA fact sheet**.

PROCEDURAL ISSUES/CONSIDERATIONS

1. Participation of Parties and Others

Any hearing or action—such as a paper review, *ex parte* hearing, or stipulated agreement made by an order of the court—that is not open to participation of a parent, the child (if appropriate), and the foster parents, relative caregivers, or pre-adoptive parents of the child may not be considered a permanency hearing. § 19-3-702(1.5); *People ex rel. M.B.*, 70 P.3d 618, 623 (Colo. App. 2003). However, nothing in the permanency hearing statute requires the presence of any one person unless the court directs that person to appear. § 19-3-702(2). Foster parents, pre-adoptive parents, and relatives with whom a child is placed have a right to be heard at the permanency hearing. § 19-3-502(7). Although § 19-3-507(5) provides a right of intervention following adjudication for grandparents, relatives, and foster parents who have had the child in their care for more than three months who have information or knowledge concerning the child, case law limits this right of intervention at the permanency planning hearing. *See A.W.R.*, 17 P.3d at 197 (upholding district court's limitation on foster mother's intervention at permanency hearing to providing direct testimony regarding the child's best interests); *In re A.M.*, 2010 WL 5621076 (Colo. App. 2010) (reaffirming holding of *A.W.R.* that right to full intervention by foster parents set forth in § 19-3-507(5)(a) is limited to dispositional hearing), *cert. granted* 2011 WL 3276665 (Colo. 2011).

2. Participation of Child in Permanency Planning Hearings

At any permanency planning hearing, the court is required to consult with the child in an age-appropriate manner regarding the child's permanency plan. § 19-3-702(3.7). The statute does not define what it means to consult in an age-appropriate manner, and courts construe the requirements of this statute differently. Some courts require all children to be present or children of a certain age to be present, but other courts have determined that they are in compliance with the statute as long as the child's position is stated by the GAL.

❖ **TIP:** GALs should explain to children the statutory requirement of consultation regarding the permanency plan and should dis-

cuss the possibility of coming to court. In instances in which a child wants to attend the permanency planning hearing and/or in which a GAL believes it is in a child's best interests to do so, the GAL should advocate for such participation and work to remove any obstacles to the child's participation in the hearing (e.g., scheduling, transportation, protective orders). *See* **Children in Court fact sheet**.

3. Advance Submission of Proposed Permanency Plan

Upon setting the permanency hearing, the court must order the department to prepare a permanency plan for the child. § 19-3-702(2). The department must submit the plan to the court and the parties at least three working days in advance of the permanency hearing. *Id.*

4. Contemporaneous Hearings

When possible, the court must combine the six-month reviews required by § 19-1-115(4)(c) with the permanency hearing. § 19-3-702(1). However, in so doing, the court must make the separate findings required for each type of hearing. § 19-3-702(6.5).

If reasonable efforts are not required and a motion for the termination of the parent-child relationship has been filed in accordance with § 19-3-602, the permanency hearing may be combined with the termination hearing, and the court may make findings for both at the combined hearing. § 19-3-702(1). Additionally, it is possible for the court to hold a hearing on a motion to terminate the parent-child relationship even if a permanency goal consistent with termination of parental rights has not been ordered, as long as the parent has sufficient opportunity to be heard at the termination hearing regarding the change in the permanency goal. *See M.B.*, 70 P.3d at 624.

BURDEN OF PROOF

At a permanency hearing, the appropriate standard is the best interests of the child, and the applicable burden of proof is a preponderance of the evidence. *See R.W.*, 989 P.2d at 243.

If a child was under six at the time of the filing of the petition and is not placed in a permanent home within 12 months of the

original out-of-home placement, the court must make specific best interests findings based on clear and convincing evidence. § 19-3-703; *see also* **Required Findings section**, *infra*.

REQUIRED FINDINGS

The court must make a series of findings at the permanency hearing:

- ✓ Whether:
  - ❍ Procedural safeguards to preserve parental rights have been applied in any change in the child's placement or visitation. § 19-3-702(3.5)(a).
    - ❖ **TIP:** A court's lack of express findings pursuant to § 19-3-702(3.5)(a) does not, in itself, establish that the court failed to observe procedural safeguards to protect a parent's rights. *See M.B.*, 70 P.3d at 625.
  - ❍ Reasonable efforts have been made to finalize the permanency plan in effect at the time of the hearing. § 19-3-702(3.5)(b).
  - ❍ An out-of-state placement, if applicable, remains appropriate and in the best interests of the child. § 19-3-702(3.5)(c).
  - ❍ The permanency plan for a child age 16 or older includes independent living services. § 19-3-702(3.5)(d).
  - ❍ Reasonable efforts have been made to find a safe and permanent placement for the child. § 19-3-702(3). *See* **Reasonable Efforts fact sheet**.
  - ❍ The child can be returned to the physical custody of the parent and, if not, whether there is a substantial probability that the child will be returned to the parent, guardian, or legal custodian within six months. § 19-3-702(3).
- ✓ If the court determines the child cannot be returned to the physical custody of the child's parents and that there is not a substantial probability that the child will be returned to such custody within six months, the court must enter an order determining the future status or placement of the child, commonly referred to as the permanency goal. *Id.* The court must enter a permanency goal for all children who were under six at the time of the petition's filing and who have been out of the home for three months, regardless of whether the court has made a determination that the child is likely to return home within six months. §§ 19-3-702(2.5), (3). The court must

enter one of the following permanency goals: return to parent, legal guardianship or allocation of parental responsibilities, adoption, or another planned permanent living arrangement. *See* **Permanency Goals section**, *infra*.

- ✓ If ordering a permanency goal other than reunification, adoption, or legal guardianship, the court must be provided with documentation of a compelling reason to do so. § 19-3-702(4).
- ✓ Another required finding potentially required at the permanency planning hearing relates to children subject to the expedited placement procedures. Specifically, if the child was under six at the time of the petition's filing and is not placed in a permanent home within 12 months of the original out-of-home placement, the court must find that placement in a permanent home is not in the child's best interests. § 19-3-703. The court may enter a finding that the placement delay is in the best interests of the child only if it is shown by clear and convincing evidence (1) that reasonable efforts were made to find the child an appropriate permanent home and such a home is not currently available or (2) that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement. *Id.*

  ◆◆ **TIP:** In such cases, the caseworker and the GAL must provide the court with a report specifying which services are being provided to remedy the child's condition, and the court must review the case every six months until the child is permanently placed. *See id.* The GAL must be careful to provide required information in a manner that does not unnecessarily waive the patient-therapist privilege and to object to any other party's disclosure of privileged information. *See People ex rel. L.A.N.*, 2011 WL 2650589 (Colo. App. July 7, 2011), *cert. granted sub. nom. L.A.N. v. L.M.B.*, 2012 WL 59445 (Colo. January 9, 2012).

PERMANENCY GOALS

The Children's Code enumerates the permanency goals (referred to in the statute as "placement goals") as follows: return to parent; legal guardianship or allocation of parental responsibilities; adoption; or another permanent planned living arrangement. § 19-3-702(4).

- **TIP:** Although § 19-3-702(4) lists referral for termination of the parent-child relationship and placement with a fit and willing relative as placement/permanency goals, these designations are more accurately described as means to a permanency goal rather than permanency goals in and of themselves. In some courts, these steps will be combined with other permanency goals (e.g., termination of the parent-child relationship / adoption or relative guardianship).

- **TIP:** In determining the appropriateness of any given permanency goal, counsel should keep in mind the time frames for filing a motion for termination of parental rights set forth by federal law. Federal law requires the state to ensure that in cases in which a child has been placed in foster care under the responsibility of the state for 15 of the most recent 22 months, the department will file a motion to terminate parental rights of the child or to join in such a motion unless the child is being cared for by a relative at the option of the department, the department has documented in the case plan a compelling reason why termination of parental rights would not be in the best interests of the child, or the department is required to provide reasonable efforts pursuant to 42 U.S.C. § 671(a)(15)(B)(ii) and it has not followed through with the time frames for the provision of services documented in the case plan. 42 U.S.C. § 675(5)(E)(iii).

1. Return Home

The Children's Code establishes a preference for the goal of returning children home to their parents, guardian, or legal custodian. §§ 19-1-102(1), 19-3-702(3); *see also* **Required Findings section**, *supra*.

In determining whether a child should return home at a permanency planning hearing, the question for the court to decide is whether the parent can provide reasonable parental care. *See A.W.R.*, 17 P.3d at 198. Reasonable parental care requires, at minimum, that the parents "provide nurturing and protection adequate to meet the child's physical, emotional, and mental health needs." *Id.* (referring to definition of reasonable parental care set forth in § 19-3-604(2)).

The goal of returning the child home may be made concurrent with adoption, allocation of parental responsibilities, and/or guardianship. § 19-3-508(7).

❖ **TIP:** In cases in which concurrent permanency goals have been set, it is important for counsel to explain what concurrent planning means to the parents and child and to hold the department accountable to its obligation to make reasonable efforts to achieve each permanency goal.

2. Adoption

Another permanency goal available to the court is adoption. § 19-3-702(4). If the court orders the permanency goal of adoption, the department must file a motion for termination of parental rights. *Id.*

If the court finds at a permanency hearing that the child appears to be adoptable and meets the criteria for adoption set forth in § 19-5-203, the court may order the department to show cause why it should not file a motion to terminate parental rights. § 19-3-702(5)(a). Additionally, if the child was under six at the time of the petition's filing and has been placed out of the home for three months, the court may order the department to show cause why it should not file a motion to terminate parental rights. § 19-3-702(2.5). Cause may include, but is not limited to, the following circumstances:

- The parents have maintained regular parenting time and contact, and the child would benefit from continuing this relationship (children of all ages);
- The criteria for termination of parental rights have not been met (children of all ages);
- The foster parents are unable or unwilling to adopt because of exceptional circumstances (not including an unwillingness to accept legal responsibility for the child), but they are willing and capable of providing the child with a stable and permanent home, and removal of the child from the foster parents' custody would be seriously detrimental to the child's physical and emotional well-being (children six and over);
- The child objects to the termination (children 12 and older). *See* §§ 19-3-702(2.5), (5)(a).

The goal of termination of parental rights / adoption may be made concurrent with the goal of return home. § 19-3-508(7).

❖ **TIP:** Adoption assistance may be available to support the permanency goal of adoption for a child. *See* 42 U.S.C. §§ 673(a),

675(3); 7.306.4 *et seq.* The GAL should be familiar with this possibility and the procedure for determining eligibility for adoption assistance, which is set forth in Volume 7. *See* 7.306.4. Although advocacy for adoption assistance may further the best interests of the child by supporting successful permanency for the child, the ultimate adoption assistance agreement is an agreement between the adoptive parent(s) and the department. *See* 42 U.S.C. § 675(3). If the GAL advocates for appropriate adoption assistance for a child, the GAL must make clear to the adoptive parents through the GAL's words and advocacy that the GAL is not their advocate and is not representing them in the adoption agreement negotiations.

3. Legal Guardianship/Allocation of Parental Responsibilities

The court may order legal guardianship or allocation of parental responsibilities as a permanency goal. § 19-3-702(4). Although this goal is typically used to effectuate permanency in the form of a stable, long-term placement with a relative, a court may award guardianship or allocate parental responsibilities to an unrelated person, including a foster parent. *See L.L. v. People*, 10 P.3d 1271, 1277 (Colo. 2000); § 14-10-123(1).

Unless parental rights have been terminated, the effectuation of either of these permanency options leaves open the possibility of visits between the parent and the child and/or future modification of the order. *See* **Allocation of Parental Responsibilities/Guardianship fact sheet**.

- **TIP:** Depending on the circumstances of the case, the possibility of visits between the parent and child and modification of the order may be considered a pro or con of this permanency goal. Although these possibilities may render this permanency option less stable than termination of parental rights, they may also serve the best interests of the child when adoption is not an available or appropriate permanency option.

- **TIP:** The Fostering Connections to Success and Increasing Adoptions Act of 2008 gave states the option of providing guardianship assistance payments in some relative/kinship guardianship arrangements. *See* Pub. L. No. 110-351, 101 & 122 Stat. 3049–3953 (2008); 42 U.S.C. §§ 673(D), 675(F). Colorado has pursued this option, and the details of its Relative Guardianship Assistance Program are set forth in Volume 7 at 7.311 *et seq.* Notably, this option in Colorado is currently only available to

relatives who have been certified as foster parents for a consecutive period of six months while the child resided in their home. 7.311.1(C). As with adoption assistance, advocacy by a GAL for an appropriate relative guardianship assistance agreement may advance the best interests of a child by ensuring the relative has the necessary financial stability and support to provide for the child on a long-term basis. In advocating for appropriate relative guardianship assistance, a GAL must make clear that the GAL's involvement is solely to advance the best interests of the child and that the GAL is not representing the relative guardian in any capacity.

The goal of allocation of parental responsibilities / guardianship may be made concurrent with the goal of return home. § 19-3-508(7).

4. Another Planned Permanent Living Arrangement

Another planned permanent living arrangement (also commonly referred to as "other permanent planned living arrangement"; hereafter, "OPPLA") is a permanency goal contemplated by federal law and allowed by the Children's Code. *See* 42 U.S.C. § 675(5)(C); § 19-3-702(4). Because this permanency goal does not contemplate actual permanency for a child in the sense that it sets the child up for long-term foster care placement, it is a disfavored goal. The court must be provided with documentation of a compelling reason for ordering this permanency goal instead of the goals of reunification, adoption, or legal guardianship. § 19-3-702(4).

❖ **TIP:** Before supporting a permanency goal of OPPLA, GALs must be satisfied that every other permanency option has been satisfactorily ruled out and that a goal of OPPLA is truly in the best interests of the child. In cases in which the GAL is not satisfied that the permanency goal of OPPLA serves the best interests of the child, the GAL must litigate against that permanency goal. If the permanency goal of OPPLA is ordered, the GAL should not give up on other permanency goals. The GAL should continuously monitor the case and investigate on an ongoing basis other potential permanency options, remaining open to the possibility that new permanency options may arise for a child and that changed circumstances may make someone who was not previously an appropriate permanency option for a child an acceptable current permanency option.

❖ **TIP:** "Independent living" is a set of programs and services designed to ensure that children age 16 and older in out-of-home care are learning the necessary skills to transition from a structured environment to living on their own. 7.305.1. Independent living is not a permanency goal. § 19-3-702; *see also* Foster Care Independence Act of 1999, Pub. L. No. 106-169 § 101(a)(2), 113 Stat. 1822, 1823 (1999) (expressly finding that independent living programs are not an alternative to adoption for older children and that such programs should occur concurrently with efforts to locate adoptive families in cases in which OPPLA has been ordered). However, in cases in which the permanency goal of OPPLA has been ordered, GALs should pay careful attention to the independent living plan and services provided to ensure that they are tailored to support the child in making a successful transition to independence. *See* **Transition to Adulthood and Independent Living fact sheet**. Although Volume 7 mandates only the development of independent living plans for children ages 16 and older, it makes clear that services for all children in out-of-home care should include efforts to build life-skills competency. 7.305.1. GALs should advocate for such planning as early as possible in cases in which the permanency goal of OPPLA has been ordered. GALs should also advocate that permanent connections be established for children with an OPPLA permanency goal. Even if such connections may not be appropriate placement options for a child, they may serve as a critical support for a young adult aging out of foster care. *See* **Family Finding / Diligent Search fact sheet**.

SPECIAL CONSIDERATIONS

1. Concurrent Planning

Federal law permits concurrent planning, which allows the state to simultaneously pursue reunification and alternative permanent options if reunification cannot occur. 42 U.S.C. § 671(a)(15)(F). Although some courts will combine any of the permanency goals in a concurrent plan, Colorado law expressly states that adoption, allocation of parental responsibilities, or guardianship may be combined with the goal of return home. § 19-3-508(7).

2. Placement Determinations at the Permanency Hearing

In making placement decisions at a permanency hearing, the court may consider any information it finds relevant. § 19-3-702(9). However, the court is to give strong consideration to the following information prior to removing the child from the child's current placement:

- An individualized assessment of the child's needs;
- Whether the current placement is a safe and potentially permanent placement;
- The child's age, developmental state, and attachment needs;
- The child's psychological ties to any person who could provide a permanent placement for the child, including a relative, and whether that person has maintained contact with the child;
- Whether a person who could provide a permanent placement for the child is willing to maintain appropriate post-adoption contact with relatives, particularly the child's siblings, if such contact is safe, reasonable, and appropriate;
- Whether a person who could provide a permanent placement for the child is aware of the child's culture and willing to provide the child with positive ties to the child's culture;
- The child's medical, physical, emotional, or other needs and whether the potential permanent placement is able to meet the child's needs;
- The child's attachment to current caregiver and the possible impact on the child's emotional well-being if the child is removed from the caregiver's home. *See id.*

If the child was under six at the time of the petition's filing and is not in a permanent home within 12 months of out-of-home placement, additional findings are required. *See* **Required Findings section**, *supra.*

If the child is an Indian child, the provisions of the Indian Child Welfare Act that establish priorities for placement apply at a permanency planning hearing. *See* 25 U.S.C. §§ 1915(a), (b); **ICWA fact sheet**.

3. Sibling Placement

The department is required to make thorough efforts to locate a joint placement for all children in a sibling group, and

the Children's Code sets forth a presumption that siblings be placed together if the department locates an appropriate, capable, willing, and available joint placement. § 19-3-213(1)(c). *See* **Siblings fact sheet**. However, achieving permanency or expedited permanency planning for children less than six years old should not be delayed based on attempts to place sibling groups together. § 19-3-702(2.7).

4. Ongoing Placement with Foster Parents

The court may order a child not to be removed from a current foster home if the court finds that the foster parents are capable and willing to provide the child with a stable and permanent home and that the removal of the child from the home would cause severe emotional harm to the child because of the psychological ties between the child and the foster parents. § 19-3-702(5)(b).

5. Non-Appealable Order

A permanency plan that does not change permanent custody or terminate parental rights is not a final and appealable order, particularly when the order contemplates further court proceedings to reach a resolution. *See People in the Interest of H.R.*, 883 P.2d 619, 621 (Colo. App. 1994). However, if the hearing occurs before a magistrate, the magistrate's findings and recommendations are subject to judicial review under § 19-1-108(5.5). Request for judicial review must be filed within five days of the magistrate's order. *Id. See also* **Magistrates fact sheet**. In extraordinary circumstances, counsel may consider seeking discretionary review of a district court's decision by the Colorado Supreme Court pursuant to C.A.R. 21.

SETTING THE NEXT HEARING

Depending on the case, the next hearing may be a placement review hearing, a permanency planning hearing, a hearing on the motion to terminate the parent-child legal relationship, or some other hearing. The time frame for each of these hearings is set forth in the applicable hearings chapters.

The required time frame for setting the next permanency hearing is set forth in the **Timing of Hearing section**, *supra*. Additionally, unless the child was under six at the time of the petition's filing and has been in an out-of-home placement for three months, if the court has ordered that there is a substantial probability that the child will be returned to the physical custody of the child's parent, legal guardian, or legal custodian within six months, the court must set another permanency hearing within six months. §§ 19-3-702(2.5), (3).

The permanency hearings must continue as long as a child remains out of home. §§ 19-3-702(1), 703.

❖ **TIP:** To move a case along, an attorney may request that the court set the matter for a permanency planning hearing, with a settlement conference or staffing to occur beforehand. Often, this forces the various sides to come together and discuss their long-term goals in the case and, at minimum, distills the fundamental issues in disagreement before a contested hearing.

VI
Placement Review Hearing

PLACEMENT REVIEW HEARING CHECKLIST—GAL

BEFORE

- ❑ Investigate:
  - ❍ Whether the child's placement is safe, necessary, and appropriate.
  - ❍ The extent of compliance with the case plan and the extent of the progress made toward alleviating or mitigating the need for out-of-home placement.
  - ❍ Whether reasonable efforts continue to be made to achieve permanency for the child in a timely manner.
- ❑ Meet with the child.
  - ❍ Confer in a developmentally appropriate manner and obtain child's input and position regarding placement, the case plan, and permanency.
  - ❍ Determine whether the child wants his or her position reported to the court.
  - ❍ Determine whether the child wants to appear at the review hearing.
  - ❍ Determine whether the child wants the author of the department's written social study report to appear and provide testimony.
- ❑ Determine whether notice has been sent to parties, caregivers, facility director, and any intervenors.

- Review department's required written social study report.
  - Determine whether the author of the report should be required to appear and provide testimony. If so, request that the court require the author's appearance or subpoena the author.

DURING

- Present information/evidence regarding services, placement, visits, treatment, assessments, child's psychological ties/attachment, child's needs, and permanency issues.
- Ensure the court applies the appropriate standard of best interests of the child and the applicable burden of proof of the preponderance of the evidence.
  - In an EPP case and when the child is not in a permanent home within 12 months of the original out-of-home placement, the court must determine whether the placement delay is in the best interests of the child. Any such finding must be supported by clear and convincing evidence that:
    - Reasonable efforts were made to find the child an appropriate permanent home.
    - Such a home is not currently available or that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement.
  - When applicable, ICWA burden and findings must also be met.
  - Request contested hearing if appropriate or necessary to further the best interests of the child.
- Ensure the court determines whether:
  - The continuation of the out-of-home placement is in the best interests of the child.
  - Reasonable efforts have been made to reunite the child and the family or that reasonable efforts are not required pursuant to § 19-1-115(7).
  - Procedural safeguards with respect to parental rights have been applied in connection with the continuation of the out-of-home placement, a change in the child's placement, and any determination affecting parental visitation.
  - The child's safety is protected in the placement.

- Reasonable efforts have been made to find a safe and permanent placement.
- There is a continuing need for the placement and whether the placement remains appropriate.
- The parent has complied with the case plan and the extent of the progress made toward alleviating or mitigating the causes necessitating placement in foster care.
- There is a likely date by which the child may be returned and safely maintained at the home or placed for adoption, legal guardianship, or another permanent safe placement setting and, if so, sets the date.
- It is in the best interests of the children in a sibling group to be placed together.
- In a case involving older youth, the department is providing independent living services.
- In an EEP case and the child is not in a permanent home, the placement delay is in the child's best interests.
- In an ICWA case, the department is making active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family.
- Child support must be ordered.

❑ Ensure court sets the next appropriate hearing.

AFTER

❑ Obtain court orders and review for accuracy and sufficiency.

❑ Meet and confer with the child in a developmentally appropriate manner. Explain the court's findings and orders. Determine the child's position.

PLACEMENT REVIEW HEARING CHECKLIST—RPC

BEFORE

- ❑ Determine:
  - ❍ Client's compliance with the case plan and the extent of the progress made toward alleviating or mitigating the need for out-of-home placement; and
  - ❍ Whether reasonable efforts continue to be made to achieve permanency for the child in a timely manner.
- ❑ Meet with the client.
  - ❍ Confer and obtain client's position regarding placement, the case plan, and permanency.
  - ❍ Discuss whether the author of the department's written social study report should be required to appear and provide testimony.
  - ❍ Discuss cultural considerations.
- ❑ Determine whether notice has been sent to client, caregivers, child, facility director, and any intervenors.
- ❑ Review department's required written social study report.
  - ❍ Seek an order requiring the department to serve the social study report at least five days in advance of the hearing, as necessary.
  - ❍ Determine whether the author of the report should be required to appear and provide testimony. If so, request that the court require the author's appearance or subpoena the author.

DURING

- ❑ Present information/evidence regarding services, placement, visits, treatment, assessments, child's psychological ties/attachment, child's needs, and permanency issues.
- ❑ Ensure that the court applies the appropriate standard of best interests of the child and the applicable burden of proof of the preponderance of the evidence.
  - ❍ In an EPP case and when the child is not in a permanent home within 12 months of the original out-of-home placement, the court must determine whether the placement delay is in the best interests of the child. Any such finding must be supported by clear and convincing evidence that:

- Reasonable efforts were made to find the child an appropriate permanent home.
- Such a home is not currently available or that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement.

- In ICWA cases, ICWA burden and findings must also be met.
- Request contested hearing if appropriate.

- Ensure the court determines whether:
  - The continuation of the out-of-home placement is in the best interests of the child.
  - Reasonable efforts have been made to reunite the child and the family or that reasonable efforts are not required pursuant to § 19-1-115(7).
  - Procedural safeguards with respect to parental rights have been applied in connection to the continuation of the out-of-home placement, a change in the child's placement, and any determination affecting parental visitation. Object to reduction of visitation made without court order.
  - Reasonable efforts have been made to reunify the family.
  - There is a continuing need for the placement and whether the placement remains appropriate.
  - The extent of the compliance with the case plan and the extent of progress that has been made alleviate or mitigate the causes necessitating placement in foster care.
  - There is a likely date by which the child may be returned and safely maintained at the home, under legal guardianship, or in another permanent safe placement setting and sets the date.
  - It is in the best interests of the children in a sibling group to be placed together.
  - In a case involving older youth, the department is providing independent living services.
  - In an EEP case and the child is not in a permanent home, the placement delay is in the child's best interests.
  - In an ICWA case, the department is making active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family.
  - Child support must be ordered.
- Ensure that the court sets the next appropriate hearing.

AFTER

- ❑ Obtain court orders and review for accuracy and sufficiency.
- ❑ Meet and confer with client. Explain the court's findings and orders.

BLACK LETTER DISCUSSION AND TIPS

PURPOSE/OVERVIEW OF HEARING

Placement review hearings allow the court to regularly assess whether the child's placement is safe, necessary, and appropriate; the extent of compliance with the case plan and the extent of the progress made toward alleviating or mitigating the need for out-of-home placement; and whether reasonable efforts continue to be made to achieve permanency for the child in a timely manner. *See* 42 U.S.C. § 675(5)(B); §§ 19-1-115(4), 19-3-507(4), 19-3-702(6), (8)(a). Through review hearings, the court holds all parties accountable for the timely completion of their responsibilities under the treatment plan and addresses any barriers to fulfillment of these responsibilities.

- **TIP:** Although the federal and state statutes requiring regular review of placement explicitly apply only to cases in which children are in out-of-home placement, many courts hold regular reviews for children who are placed at home. "Review is vital to cases involving each child within the court's jurisdiction, whether or not the child is in placement," and counsel, when appropriate, should seek regular reviews, even in cases in which children are in in-home placement. Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline VI at 66 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 1995). Many of the statutorily required inquiries for placement review hearings are important questions for the court to ask at all review hearings.

TIMING OF HEARING

The timing of review hearings is governed by both federal and state statutes. Federal law requires review of children in foster care to occur at least once every six months. 42 U.S.C. § 675(5)(B). Section 19-1-115(4) provides that an order vesting legal custody of a child in an individual, institution, or agency or providing for the placement of a child pursuant to § 19-3-403 (regarding the temporary custody hearings statute) must be for a determinate period and must be reviewed by the court no later than three months after it is entered. Section 19-3-507(4) requires a review

to be set within 90 days of the dispositional hearing if the disposition is out-of-home placement. Although § 19-3-702, which requires periodic reviews, does not set forth a time limit for the initial review, it requires subsequent reviews to be conducted every six months. §§ 19-3-702(6), (8)(a); *see also* § 19-1-115(4)(c). Read together, these provisions require placement reviews to occur within three months of the initial temporary custody order, within 90 days of the dispositional hearing, and every six months on an ongoing basis.

Review hearings may be held more frequently if the court requires more frequent review or if the parent, guardian, or child requests more frequent review. § 19-3-702(8)(a).

NOTICE REQUIREMENTS

Section 19-3-507(4) specifically requires notice of the original post-dispositional review hearing to be provided to all parties, the director of the facility where the child is placed, any person with physical custody of the child, and any attorney or GAL of record. General notice requirements also apply to review hearings. All parties, including GALs, must receive notice of the hearing, as must foster parents, pre-adoptive parents, and relatives with whom the child is placed. § 19-3-502(7). Foster parents, pre-adoptive parents, or relatives who have had a child in their care for more than three months and who make a written request for notice of court hearings are entitled to receive written notice of the hearing. § 19-3-507(5)(c). Persons with whom a child is placed must provide prior notice of the dispositional hearing to the child. § 19-3-502(7). A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

> **TIP:** The GAL should ensure that the child is aware of the upcoming review hearing and should discuss with the child the possibility of appearing in court. GALs should be familiar with their court's practice of including children in court and, when the child wishes to participate in court or the GAL believes it is in the child's best interests to do so, should proactively resolve any barriers to successful participation. *See* **Children in Court fact sheet**.

The Indian Child Welfare Act (ICWA) sets forth more stringent notice requirements. *See* **ICWA fact sheet**.

PROCEDURAL ISSUES/CONSIDERATIONS

1. Contemporaneous Hearings

Whenever possible, the court should combine the review hearing with the permanency planning hearing. § 19-3-702(1). If the court does combine these hearings, the court must make the specific determinations required for each hearing. § 19-3-702(6.5).

2. Administrative Reviews

Federal law requires that reviews be conducted by either a court or an administrative body. 42 U.S.C. §§ 675(5)(B), (6). In Colorado, if a party does not object, review hearings may be conducted by the Administrative Review Division of the Colorado Department of Health and Human Services. §§ 19-1-115(4)(c), 19-3-702(6)(a), (8)(a). If an administrative review is ordered, all counsel of record must be notified of the review and may appear at the review. § 19-3-702(8)(a). An administrative review must be open to the participation of the parents. 42 U.S.C. § 675(6).

3. Social Study and Report

The department is required to file a written social study and report. § 19-1-107(1). This report must be given to all parties.

The Children's Code allows the court to receive written reports and other material relating to the child's mental, physical, and social history for purposes of determining the proper disposition of a child, but it also states that the court must require the person who wrote the report to appear and be subject to direct and cross-examination if requested by any of the parties. § 19-1-107(2). The court must inform the child, parent, or other interested party of this right of cross-examination. § 19-1-107(4). The court may also, on its own initiative, order the preparer of the report to appear at the dispositional hearing if it finds that "the interest of the child so requires." *Id.*

CJD 96-08(3)(c) directs courts to require reports from the department to be filed and served at least five days in advance of hearings and permits sanctions to be imposed if such filing and service are not obtained.

- **TIP:** Counsel should seek an order pursuant to CJD 96-08 requiring the department to serve its report at least five days in advance of the hearing. Timely filing of the report promotes due process and improves the quality of the hearing in that it allows counsel to review the report and to discuss its content with the parent/child in advance of the hearing. Even attorneys who are regularly in contact with the department and in a position to anticipate the contents of the report should carefully review the report for accuracy. Because the report may become part of the court records through § 19-1-107(2), it is important to address any inaccurate or problematic content in the report.

4. Non-Appealable Order

Orders resulting from a placement review hearing that do not change the temporary legal custody of the child are not final and appealable orders. *See People in the Interest of P.L.B.*, 743 P.2d 980, 981–82 (Colo. App. 1987). However, if the hearing occurs before a magistrate, the magistrate's findings and recommendations are subject to judicial review under § 19-1-108(5.5). Request for judicial review must be filed within five days of the magistrate's order. *Id.*; *see also* **Magistrates fact sheet**. In extraordinary circumstances, counsel may consider seeking discretionary review of a district court's decision by the Colorado Supreme Court pursuant to C.A.R. 21. *See* **Appeals fact sheet**.

EVIDENTIARY ISSUES/CONSIDERATIONS

At the placement review hearing, written reports and other material relating to the child's mental, physical, and social history may be received and considered by the court along with other evidence. § 19-1-107. Hearsay may be contained in these reports and such hearsay may be admissible. *See* **Hearsay in D&N Proceedings fact sheet**.

- **TIP:** Although placement review hearings are generally conducted in an informal manner, counsel intending to litigate any of the required findings should be prepared to present evidence at the hearing. This may involve subpoenaing witnesses in compliance with C.R.C.P. 45 or asking the court to decide the matter based on the department's report and social study

pursuant to § 19-1-107(2) or affidavit or deposition pursuant to C.R.C.P. 43(e). If necessary, counsel should file a motion for absentee (telephone) testimony pursuant to C.R.C.P. 43(i).

BURDEN OF PROOF

The burden of proof at placement review hearings is generally a preponderance of the evidence. § 13-25-127.

If the case is an EPP case and the child is not in a permanent home within twelve months of the original out-of-home placement, a higher burden of proof applies. Specifically, the court must determine whether the placement delay is in the best interests of the child and require any such finding to be supported by clear and convincing evidence that reasonable efforts were made to find the child an appropriate permanent home and that such a home is not currently available or that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement. § 19-3-703. Clear and convincing standards of evidence must apply at any subsequent review. *Id.*

REQUIRED FINDINGS

The required findings for the placement review hearing are set forth in §§ 19-1-115(6.5), 19-3-507(4), and 19-3-702(6.5). Specifically, the court must make the following determinations:

- ✓ Whether the continuation of the out-of-home placement is in the best interests of the child. § 19-1-115(6.5)(a).
- ✓ Whether reasonable efforts have been made to reunite the child and the family or that reasonable efforts are not required pursuant to § 19-1-115(7). §§ 19-1-115(6.5)(b), 19-3-507(4).

  ❖ **TIP:** If counsel believes that additional or different efforts must be made to fulfill the department's reasonable efforts requirements, counsel should raise this issue at the review hearing. *See* **Reasonable Efforts fact sheet**. Failure to bring a deficiency in the department's efforts during the district court proceedings may constitute a

waiver of the right to raise the issue on appeal. *See, e.g., People ex rel. Z.P.*, 167 P.3d 211, 214 (Colo. App. 2007).

- ✓ Whether procedural safeguards with respect to parental rights have been applied in connection to the continuation of the out-of-home placement, a change in the child's placement, and any determination affecting parental visitation. § 19-1-115(6.5)(c).
- ✓ Whether the child's safety is protected in the placement. § 19-3-702(6)(a)(I).
- ✓ Whether reasonable efforts have been made to find a safe and permanent placement. § 19-3-702(6)(a)(II).

  ◆◆ **TIP:** Because review hearings are statutorily required to occur more frequently than permanency hearings, the review hearing presents an opportunity to address any issues with the existing permanency goal and to consider different or additional goals. However, specific notice and participation requirements apply to permanency hearings, and these must be followed for any review hearing that becomes a permanency hearing in which the permanency goal is changed. *See* **Permanency Hearing chapter**.

- ✓ Whether there is a continuing need for the placement and whether the placement remains appropriate. §§ 19-3-702(6)(a)(III), 19-3-507(4).

  ◆◆ **TIP:** If the child is in out-of-home placement, the court should determine the continuing need for placement. If the child cannot be returned home, counsel should consider requesting the court to identify what progress needs to be made to allow the child to return home. Considerations relevant to the need for continued placement include: (1) the extent to which the parents have engaged in and benefitted from the services being provided; (2) the ability and willingness of the parents to care for the child; (3) the appropriateness of interactions between parents and child at visits; (4) the extent to which changed parental behavior would allow for the child to be safe in the parents' home; (5) the extent to which unchanged parental behavior would endanger the child if the child were returned home; and (6) the recommendations of the caseworker and service providers.

  GALs should review the educational progress of the child in determining the appropriateness of the placement

and advocate for any additional supports necessary to ensure the child's educational success. *See* **Education Law: Rights and Issues fact sheet**. Additionally, questions may be raised as to whether the child may need a higher level of care or a lower level of care. Counsel should keep in mind that a child who is not doing well in placement may be able to remain in the placement if additional services are provided, such as respite care, issue-specific therapy, a mentor, or an additional extracurricular activity.

- ✓ The extent of the compliance with the case plan and the extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care. § 19-3-702(6)(a)(IV).

  ❖ **TIP:** Sometimes a treatment that appeared appropriate at the time it was entered may require modification. At review hearings, counsel may have more information about the family's issues and which services will best address those issues. Additionally, barriers to compliance with the treatment plan may become apparent by the review hearing, necessitating further prioritization of its objectives. Counsel should use the review hearing to seek any necessary modifications in the treatment plan. Although it is appropriate to negotiate modifications to the treatment plan outside of court, it is important to make a record of any negotiated modifications and to litigate unresolved issues with the plan. Failure to litigate issues with the treatment plan in a timely manner may constitute a waiver of the ability to bring up issues with the treatment plan on appeal. *See, e.g., People ex rel. M.S.*, 129 P.3d 1086, 1087–88 (Colo. App. 2005).

- ✓ A likely date by which the child may be returned and safely maintained at the home, placed for adoption, legal guardianship, or another permanent safe placement setting.

  ❖ **TIP:** By setting deadlines, the court (1) emphasizes the importance of time in the lives of children and (2) holds the appropriate parties accountable. Counsel should seek realistic and appropriate deadlines.

- ✓ Whether it is in the best interests of the children in a sibling group to be placed together. § 19-3-507(4).

- **TIP:** Section 19-3-507(4) specifically sets forth this inquiry as one of the purposes of the 90-day post-dispositional review hearing. However, counsel should use all review hearings to ensure that efforts continue to be made to find and/or maintain an appropriate joint placement for siblings and to maximize appropriate contact between siblings who are not placed together. *See* **Siblings fact sheet**.

- ✓ Whether, if the case is an ICWA case, the department is making active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family. *See* ICWA fact sheet.
- ✓ Whether, if a child on an EPP case is not in a permanent home, the placement delay is in the child's best interests. § 19-3-703.

  - **TIP:** Any findings that the placement delay is in the best interests of the child must be supported by clear and convincing evidence that reasonable efforts were made to find the child an appropriate permanent home and that such a home is not currently available or that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement. *Id.*

SPECIAL ISSUES/CONSIDERATIONS

1. Cultural and Subcultural Considerations

Counsel should investigate and be aware of any underlying cultural considerations involved in the case. Examples of such questions to consider include whether parents have beliefs about the relative role of mother vs. father in rearing children that affect how they behave and respond to the treatment plan; whether parents have religious beliefs or practices that affect how they behave and respond to the treatment plan; and whether extended family plays a different role in the parents' country of origin and/or culture. Additionally, counsel should be aware of any language and literacy barriers to successful communication and participation.

2. Parenting Time/Visits

The review hearing presents an opportunity to assess the status of visits in the case and to consider whether any modifications need to be made to the visiting/parenting time schedule. *See* **Visits fact sheet**. Additionally, other individuals, such as relatives, kin, stepparents, or special respondents, might appear at the hearing and ask the court to enter orders permitting visits with the child.

> **TIP:** Counsel should be prepared to address the issue of visits at the review hearing, and in instances in which counsel is seeking additional visits or changes to visits, counsel should file motions in advance of the hearing to put all parties on notice.

3. Indian Child Welfare Act (ICWA)

The court and the department are under a continuing duty to inquire whether the child is enrolled or eligible for enrollment in any Indian tribe. § 19-1-126(1)(a). Parents or other relatives do not always have or share this information at the beginning of the case. Even if the question has been asked before, the review hearing presents another opportunity for the continuing duty to inquire.

4. Independent Living Services

For older children and youth, the department is required to provide independent living services to promote a successful transition to adulthood. *See* **Transition to Adulthood and Independent Living fact sheet**. Counsel should bring to the court's attention at the placement review hearing any issues related to such services.

5. Identification and Location of Relatives

Family members and kin not only provide potential placement opportunities but also may serve as a resource and support to children in out-of-home placement. Review hearings provide an opportunity for counsel to inquire about the status of the department's diligent search efforts and to bring to the court's attention any problems with those efforts. *See* **Family Finding / Diligent Search fact sheet**.

6. Prohibition on *Nunc Pro Tunc* Placement Orders

Orders concerning the out-of-home placement of a child must state the effective date of the order and must not use the phrase "*nunc pro tunc.*" § 19-1-115(6.7).

7. Modification of Placement Considerations

In making placement decisions at a permanency hearing, the court may consider any information it finds relevant. § 19-3-702(9). However, the court is to give strong consideration to the following information prior to removing the child from the child's current placement:

- An individualized assessment of the child's needs;
- Whether the current placement is a safe and potentially permanent placement;
- The child's age, developmental state, and attachment needs;
- The child's psychological ties to any person who could provide a permanent placement for the child, including a relative, and whether that person has maintained contact with the child;
- Whether a person who could provide a permanent placement for the child is willing to maintain appropriate post-adoption contact with relatives, particularly the child's siblings, if such contact is safe, reasonable, and appropriate;
- Whether a person who could provide a permanent placement for the child is aware of the child's culture and willing to provide the child with positive ties to the child's culture;
- The child's medical, physical, emotional, or other needs and whether the potential permanent placement is able to meet the child's needs;
- The child's attachment to current caregiver and the possible impact on the child's emotional well-being if the child is removed from the caregiver's home. *See id.*

If the child is an Indian child, the provisions of the Indian Child Welfare Act that establish priorities for placement apply at a placement review hearing. *See* 25 U.S.C. §§ 1915(a), (b); **ICWA fact sheet**.

8. Child Support

If public monies are expended on an out-of-home placement, the court must enter an order requiring the parents to pay a fee to cover the costs of care, based on the parents' ability to pay. § 19-1-115(4)(d)(I). The court in a D&N case also has jurisdiction to order child support pursuant to Article 6 of the Children's Code. § 19-1-104(1)(e). The placement review hearing serves as an appropriate time to assess compliance with child support requirements and to seek modification of existing child support orders.

SETTING THE NEXT HEARING

Depending on the case, the next hearing may be another statutorily required placement review hearing, a permanency hearing, a hearing on a motion to terminate the parent-child legal relationship, or some other hearing. The next review hearing must be held within six months. *See* §§ 19-1-115(4), 19-3-507(4), 19-3-702(6)(a), (8)(a). The court may order the next review to be administrative if the parties do not object. §§ 19-1-115(4)(c), 19-3-702(6)(a), (8)(a).

VII
Termination Hearing

TERMINATION HEARING CHECKLIST—GAL

BEFORE

- ❑ Review or file motion to terminate.
  - ❍ Determine timeliness of motion and whether notice was properly given.
  - ❍ Review allegaions and supporting documentation for sufficiency.
  - ❍ If the termination motion is based on abandonment and the location of the parent(s) is unknown, an affidavit stating the efforts to locate parent must be filed ten days prior to the hearing.
- ❑ Meet with child.
  - ❍ Confer in a developmentally appropriate manner and obtain input and child's position regarding termination of parental rights.
  - ❍ Determine whether child wants position reported to court.
- ❑ Obtain, review, and analyze discovery.
  - ❍ Obtain adjudication transcript/record if necessary.
  - ❍ Obtain service provider records, including visit notes and videotapes.
  - ❍ Obtain court-appointed expert report for respondent parents.
  - ❍ Interview potential witnesses.

- ❑ Prepare timeline regarding key events (e.g., filing of petition, date of adjudication, date treatment plan adopted).
- ❑ Develop litigation strategy.
- ❑ Identify any relatives that have not already been located. Investigate appropriateness of placement.
- ❑ Prepare and distribute witness and exhibit lists. Subpoena witnesses.
- ❑ Conduct depositions or send out interrogatories when appropriate.
- ❑ Participate in status and pretrial conferences and/or hearings.
  - ❍ Ensure post-filing advisement occurs in open court or in writing.
    - ■ Parent must be advised of right to counsel.
    - ■ Parent must be advised that statutorily enumerated relatives must file a request for guardianship and legal custody of the child within 20 days of the filing of the motion.
  - ❍ Settle when possible, if not on the entire case, then on certain issues.
  - ❍ Agree on stipulations when possible; reduce to writing when necessary.
- ❑ Prepare, file, and/or respond to pretrial motions.
- ❑ Prepare trial notebook.
  - ❍ Prepare direct and cross-examinations.
  - ❍ Prepare opening statement and closing argument.

DURING

- ❑ Ensure the court applies the appropriate standard of best interests of the child and the applicable burden of proof of clear and convincing evidence. (In ICWA cases, ICWA burden and findings must also be met.) Request contested hearing if appropriate or necessary to further the best interests of the child.
- ❑ Ensure the court makes the requisite findings, giving primary consideration to the physical, mental, and emotional needs of the child:
  - ❍ The child has been adjudicated dependent or neglected.
  - ❍ One of three statutory grounds for termination have been met:
    - ■ Abandonment.
    - ■ Inability to devise an appropriate treatment plan to address parental unfitness.
    - ■ Lack of compliance/success with an appropriate treatment plan combined with continuing parental unfitness that is unlikely to change within a reasonable time.
  - ❍ Termination of the parent-child legal relationship is in the child's best interests.
  - ❍ Less drastic alternatives have been considered and ruled out.
  - ❍ If ICWA applies, continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.
- ❑ Seek appropriate and necessary orders, including those addressing sibling visits and placement.
- ❑ Ensure court sets next appropriate hearing (e.g., if termination granted, the matter is set for a post-termination review within 90 days; if termination is denied, the court may set the matter for amendment of the treatment plan, placement hearing, and permanency review).

AFTER

Termination Motion Granted

- ❑ Review court order(s) for accuracy.
- ❑ Communicate results of hearing with child in developmentally appropriate manner.
- ❑ Follow up with caseworker on effort to achieve permanency and determine if good-bye visit is in the child's best interests.
- ❑ Draft post-termination report. Report must specify the services being provided to the child.
- ❑ Ensure child's best interests are represented in responses to motions for rehearing/reconsideration and petitions for appellate review.

Termination Motion Denied

- ❑ Review court order(s) for accuracy.
- ❑ Communicate results of hearing with child in developmentally appropriate manner.
- ❑ Ensure child's best interests are represented in responses to motions for rehearing/reconsideration and petitions for appellate review.

TERMINATION HEARING CHECKLIST—RPC

BEFORE

- ❑ Review motion to terminate.
  - ❍ Determine timeliness of motion and whether notice was properly given.
  - ❍ Review allegations and supporting documentation for sufficiency.
  - ❍ If the termination motion is based on abandonment and the location of the parent(s) is unknown, an affidavit stating the efforts to locate the parent must be filed ten days prior to the hearing.
- ❑ Meet with and counsel client. Obtain the client's position regarding motions, evidence, and need for further evaluation.
  - ❍ Identify any relatives that have not already been located and notify them of time frames for request for placement.
- ❑ Obtain, review, and analyze discovery.
  - ❍ Obtain adjudication transcript/record if necessary.
  - ❍ Obtain service provider records, including visit notes and videotapes.
  - ❍ Interview potential witnesses.
  - ❍ Conduct depositions or send out interrogatories when appropriate.
- ❑ File motion and order for appointment of expert, as appropriate.
  - ❍ Seek referrals for experts.
  - ❍ Interview and retain expert.
  - ❍ Provide the expert with necessary/requested case information.
  - ❍ Obtain report from expert, as needed.
- ❑ Develop litigation strategy.
- ❑ Prepare and distribute witness and exhibit lists.
- ❑ Participate in pretrial conferences.
  - ❍ Ensure post-filing advisement occurs in open court or in writing.
    - ■ Parent must be advised of the right to counsel.
    - ■ Parent must be advised that statutorily enumerated relatives must file a request for guardianship and legal custody of the child within 20 days of the filing of the motion.

- Settle when possible, if not on entire case, then on certain issues.
- Agree on stipulations when possible and reduce to writing when necessary.

- ❑ Subpoena witnesses and prepare exhibits.
- ❑ Prepare, file, and respond to pretrial motions.
- ❑ Prepare trial notebook.
  - Prepare direct and cross-examinations.
  - Prepare opening statement and closing argument.

DURING

- ❑ Be aware that the appropriate standard is the best interests of the child and the applicable burden of proof is clear and convincing evidence. (ICWA burden and findings must also be met, if applicable.)
- ❑ Ensure that the moving party is held to the appropriate burden and that the court is focused on the required findings:
  - The child has been adjudicated dependent or neglected.
  - One of three statutory grounds for termination has been met.
    - Abandonment.
    - Inability to devise an appropriate treatment plan to address parental unfitness.
    - Lack of compliance/success with an appropriate treatment plan combined with continuing parental unfitness that is unlikely to change within a reasonable time.
  - Termination of the parent-child legal relationship is in the child's best interests.
  - Less drastic alternatives have been considered and ruled out.
  - If ICWA applies, the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.
- ❑ Seek appropriate and necessary orders such as a good-bye visit.

AFTER

- ❑ Obtain court orders and give a copy to the client.
- ❑ Meet with and counsel client and explain court's findings and orders.
- ❑ If termination is granted:
  - ❍ Meet with the client and discuss an appeal.
  - ❍ Have the client sign the notice of appeal or specifically not authorize the filing of an appeal.
  - ❍ File the notice of appeal and designation of record within 21 days, as required.
    - ■ Identify appellate counsel and make referral if necessary.
    - ■ Order transcript.
  - ❍ Facilitate good-bye visit, if necessary.
- ❑ If termination is not granted:
  - ❍ File appropriate motions (e.g., reunification, amendment of treatment plan).
  - ❍ Ensure that the client continues to engage in treatment and attends visits.

BLACK LETTER DISCUSSION AND TIPS

PURPOSE OF THE HEARING

The purpose of the termination hearing is to determine whether the moving party has met the grounds for terminating the parent-child legal relationship. In making this decision, the court must give primary consideration to the physical, mental, and emotional conditions and needs of the child. § 19-3-604(3).

TIMING OF HEARING

The Children's Code does not set forth a specific time frame for filing a motion to terminate the parent-child legal relationship. The timing of the hearing on the termination motion depends on a number of factors, including federal requirements, the date of filing the written motion to terminate, the age of the children involved, and the nature of other hearings pending before the court.

In cases in which the department is receiving Title IV-E funding to support the placement of the child, federal regulations require the department to file a petition to terminate parental rights or join in such a petition if the child has been in foster care under the responsibility of the department for 15 of the most recent 22 months unless the child is placed with relatives, the department has documented in the case plan a compelling reason why filing a petition to terminate parental rights would not be in the best interests of the child, or the department has not provided timely services necessary for the safe return of the child to the parents. 42 U.S.C. § 675(5)(E).

- **TIP:** In determining whether and when to file/support a motion to terminate, the GAL is bound by the best interests of the child. The GAL may consider many factors including, but not limited to, the presence of grounds supporting termination, the length of time the child has been in care, the child's input, the likelihood of reunification, and the likelihood of locating an adoptive home. The overriding consideration by the GAL is an informed decision regarding the best interests of the child. The GAL must take a position on any termination motion before the court.

The hearing on the motion to terminate the parent-child legal relationship cannot take place sooner than 30 days after filing the motion. § 19-3-602(1).

- **TIP:** Counsel should watch time frames carefully. Failure to comply with the 30-day requirement constitutes reversible error. *People in the Interest of C.L.S.*, 705 P.2d 1026, 1028–29 (Colo. App. 1985).

In EPP cases, the hearing on the motion to terminate the parent-child legal relationship must be held within 120 days of filing the motion unless good cause is shown and the court finds the best interests of the child will be served by granting a delay. *See* §§ 19-3-602(1), 19-3-104; **EPP fact sheet**. The court must set forth the specific reasons necessitating the delay or continuance and must set the matter within 30 days of granting the delay or continuance. § **19-3-104**.

- **TIP:** The 120-day statutory outer limit for holding the hearing on the motion to terminate parental rights is not jurisdictional, and a failure to object to the court's holding of the hearing outside the 120 days constitutes a waiver of the right to raise that issue on appeal. *People ex rel. T.E.H.*, 168 P.3d 5, 7–8 (Colo. App. 2007). Similarly, a lack of objection to the court's failure to make express findings that there was good cause for delay may be deemed a waiver of the issue, particularly when the record makes apparent that there is an appropriate basis for the delay. *See id.; see also People ex rel. D.M.*, 186 P.3d 101, 102–3 (Colo. App. 2008), *disapproved of on other grounds by A.L.L. v. People*, 226 P.3d 1054 (Colo. 2010).

A termination hearing may not take place at the same time as the adjudication hearing. § 19-3-602(1). If a treatment plan has been ordered by the court, a minimum period between the date of a court-approved treatment plan and the date of filing a motion to terminate is not specified in statute. However, a parent must be afforded a reasonable time to comply with an appropriate treatment plan before parental rights may be terminated. *People ex rel. D.Y.*, 176 P.3d 874, 876 (Colo. App. 2007). If inability to devise an appropriate treatment plan is the basis for termination, *see* **Burden of Proof / Required Findings section** *infra*, the termination hearing may be held on the same date as the dispositional hearing as long as the termination of parental

rights hearing also presents the parent with the full opportunity to litigate the issue of whether no appropriate treatment plan can be devised. *See People ex rel. T.L.B.*, 148 P.3d 450, 455–57 (Colo. App. 2006). A termination hearing may also be combined with the permanency hearing if the court finds that reasonable efforts to reunify the child with the parent are not required and a motion for termination has been properly filed. § 19-3-702(1). The court's findings and determinations required at both the permanency and termination hearings must be made in the combined hearing. *Id.*

> **TIP:** Termination of parental rights is a drastic remedy. Counsel should consider whether combining the termination hearing with either the dispositional hearing or the permanency planning hearing allows for adequate preparation and, for the GAL, the completion of a thorough and independent investigation.

NOTICE REQUIREMENTS

As with all hearings in the D&N proceeding, all parties, including GALs, must receive notice of the hearing. In addition, foster parents, pre-adoptive parents, and relatives with whom the child is placed must receive notice of the hearing. *See* § 19-3-502(7). The persons with whom a child is placed must then provide prior notice of the hearing to the child. *Id.* Foster parents, pre-adoptive parents, or relatives who make a written request for notice of court hearings are entitled to receive written notice of the hearing. § 19-3-507(5)(c). A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

The Children's Code sets forth additional notice requirements specific to hearings to terminate the parent-child legal relationship. A written motion is required, and this motion must be filed at least 30 days before the hearing. § 19-3-602(1). The motion must allege the factual grounds for termination. *Id.* The motion must also include, pursuant to § 19-1-126, a statement indicating what continuing inquiries the department has made in determining whether the child involved in the termination proceeding is an Indian child, information as to whether the child is an Indian child, and the identity of the Indian child's tribe if the child is identified as an Indian child. § 19-3-602(1.5)(a).

The motion must also include a statement indicating that a grandparent, aunt, uncle, brother, or sister of the child must file a request for guardianship and legal custody of the child within 20 days of the filing of the petition. § 19-3-602(1.5)(I.5). There is not, however, any requirement that the relatives must be notified of the pending motion to terminate. § 19-3-605(1).

The process for serving the motion on the parent is based on constitutional considerations and rule. Due process requires the provision of adequate notice of the hearing. *See People in the Interest of M.M.*, 726 P.2d 1108, 1115 (Colo. 1986). The service requirements set forth in C.R.C.P. 5 apply to motions to terminate the parent-child legal relationship; however, failure to comply with the time frames of C.R.C.P. 5 has been held to be harmless error when the lack of timely service did not affect the substantive rights of the parent. *Id.* at 1117.

If the case is an ICWA case, more stringent notice requirements apply. *See* **ICWA fact sheet**. If notices have been sent to the parent or Indian custodian of the child and the child's tribe, postal receipts must be attached to the motion or filed within ten days of the filing of the motion. § 19-3-602(1.5)(b).

PROCEDURAL ISSUES/CONSIDERATIONS

1. Post-Filing Advisement

After a motion to terminate the parent-child legal relationship has been filed, the court must advise parents of their right to counsel. § 19-3-602(2). The parent must also be advised that a grandparent, aunt, uncle, brother, or sister of the child must file a request for guardianship and legal custody of the child within 20 days of the filing of the motion. *Id.* This advisement may take place in open court or in writing. *Id.*

2. Right to Counsel

Parents have a right to be represented by counsel at the termination hearing and, if indigent, have a right to be represented by state-paid counsel. § 19-3-202(1). If not already represented by counsel, the parent must be advised of this right after the filing of the motion to terminate the parent-child legal relationship.

§ 19-3-602(2). Counsel must be appointed in accordance with § 19-1-105. § 19-3-602(2). The Colorado Supreme Court has held that because the right to counsel is statutory instead of constitutional, it can be outweighed by considerations of finality and the best interests of the child. *C.S. v. People*, 83 P.3d 627, 630–31, 636–38 (Colo. 2004) (holding district court did not abuse its discretion in allowing a parent's counsel to withdraw at the parent's request and denying the parent's motion to continue the termination hearing to seek what would have been the parent's third attorney in the proceedings). However, "termination proceedings cue constitutional due process concerns." *A.L.L. v. People*, 226 P.3d 1054, 1062 (Colo. 2010). Whether constitutional due process requires the appointment of counsel on any given case involves balancing the private interests at stake, the government's interests, and the risk of an erroneous decision, as well as weighing these considerations against the presumption against the requirement of court-appointed counsel unless deprivation of personal liberty is at issue. *See Lassiter v. Dep't of Social Svcs.*, 452 U.S. 18, 26–28 (1981).

The Colorado Court of Appeals has held that the standard for evaluating a claim of ineffective assistance of counsel is the same as for criminal proceedings, which involves two considerations: (1) whether counsel's performance was outside the wide range of professionally competent assistance; and (2) whether the parent was prejudiced by counsel's errors. *See People ex rel. C.H.*, 166 P.3d 288, 290–91 (Colo. App. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The Colorado Supreme Court has declined to decide whether the *Strickland* analysis applies to ineffective assistance of counsel claims in dependency proceedings but has stated that if a claim of ineffective assistance of counsel is cognizable in such proceedings, a showing of actual prejudice is required. *People ex rel. A.G.*, 262 P.3d 646, 651–52 (Colo. 2011).

3. Appointment of a GAL

A GAL must be appointed to represent the child's best interests in the termination hearing. § 19-3-602(3). Whenever possible, that GAL must be the child's previously appointed GAL. *Id.* The GAL must be an attorney and, whenever possible, be experienced in juvenile law. *Id.* If the respondent parent is a minor,

the court must also appoint a GAL for the respondent parent. *Id.* The court may also appoint a GAL for a parent who has been determined to have a mental illness or developmental disability by a court of competent jurisdiction. § 19-1-111(2)(c). The court's discretionary authority to appoint a GAL for a parent is not limited by statutory criteria defining mental illness or developmental disability. *M.M.*, 726 P.2d at 1117–21. *See* **Preliminary Protective Proceeding chapter**.

4. No Right to Jury Trial

The Children's Code specifically states that there is no right to a jury trial at a termination hearing. § 19-3-602(4).

5. Respondent Parents' Right to Expert at State Expense

Section 19-3-607(3) provides that an indigent parent has a right to a court-appointed expert at the expense of the state. The parent's request for the expert must be made within a reasonable time before the hearing. *People in the Interest of L.G.*, 737 P.2d 431, 434 (Colo. App. 1987). Parents do not have a right to more than one court-appointed expert if they are dissatisfied with the first expert. *People in the Interest of T.R.S.*, 717 P.2d 1025, 1026 (Colo. App. 1986). A parent's communications with the court-appointed expert are protected by attorney-client privilege. *B.B. v. People*, 785 P.2d 132, 138 (Colo. 1990). However, if the expert's evaluation includes the child as well as the parent, communications are not protected under attorney-client privilege, and the expert may testify on the county's behalf. *D.A.S. v. People*, 863 P.2d 291 (Colo. 1993). A parent's statutory right to an expert at state expense may be limited in scope if necessary because of the physical, mental, or emotional conditions of the child. *People in the Interest of M.H.*, 855 P.2d 15, 17 (Colo. App. 1992).

6. Parties with Standing to File the Motion to Terminate Parental Rights

The GAL and the department have standing to file a motion to terminate the parent-child legal relationship. *See People in the Interest of M.N.*, 950 P.2d 674, 675–76 (Colo. App. 1997).

TIP: The GAL's independent determination of whether to seek termination of the parent-child legal relationship is governed by the child's best interests. The GAL's independent investigation and contacts with the child/youth and treatment professionals form the basis of the GAL's decision. The GAL should consider (a) whether grounds support the motion, (b) the length of time the child has been in out-of-home placement, (c) the parent's progress toward overcoming the issues that required court intervention and the likelihood of the parent's success in addressing those issues, (d) the child's needs and position regarding termination and adoption, (e) the likelihood of adoption, and (e) special circumstances presented by the case.

7. Who May Participate in the Hearing

The department, parents, and GAL have a right to participate in the termination hearing. Because a hearing on a motion to terminate is a civil action, due process does not require a respondent parent's presence at the termination hearing. If a parent has an opportunity to appear through counsel and is given an opportunity to present evidence and cross-examine witnesses through deposition or other means, due process is satisfied. *People in the Interest of V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989); *People in the Interest of C.G.*, 885 P.2d 355, 356 (Colo. App. 1994) (in which an incarcerated parent was not entitled to transportation to the termination hearing at state expense).

Foster parents, pre-adoptive parents, and relatives with whom a child is placed have a right to be heard at the hearing. § 19-3-502(7). Whether the provisions of § 19-3-507(5)(a), allowing grandparents, relatives, or foster parents who have had the child in their care for more than three months and who have information or knowledge concerning the care and protection of the child to intervene as a matter of right, allow full participation by foster parents at termination hearings is a matter before the Colorado Supreme Court at the time of the writing of this chapter. *See People ex rel. A.M.*, 2010 WL 5621076 (Colo. App. 2010) (holding that right to full intervention set forth in § 19-3-507(5)(a) is limited to dispositional hearing and that the trial court committed reversible error in permitting the foster parents to participate fully as intervenors in a termination hearing), *cert. granted sub nom., A.M. v. N.M.*, 2011 WL 3276665 (Colo. 2011) (granting certiorari, among other issues, whether the Court of

Appeals erred in determining that foster parent intervenors' cross-examination concerning the care and protection of the child during the termination hearing exceeded the meaning of intervention pursuant to § 19-3-507(5)(a) and violated the parents' right to due process).

8. Motions for Summary Judgment

Termination of the parent-child legal relationship may be granted by summary judgment if the court finds the requisite criteria are met by clear and convincing evidence. *See People in the Interest of A.E.*, 914 P.2d 534, 538–39 (Colo. App. 1996). The court must determine that (1) there are no genuine issues of material fact and (2) the moving party has established the applicable criteria for termination by clear and convincing evidence. *Id.* The motion for summary judgment is filed pursuant to C.R.C.P. 56. A motion for summary judgment must still provide the parent with a meaningful opportunity to participate in the proceeding. *See A.E.*, 914 P.2d at 538. Summary judgment is a drastic remedy available only in limited circumstances and the procedures used to resolve the summary judgment motion must protect a respondent's due process rights. *Id.* at 539 (holding that the department's failure to file summary judgment motion and supporting affidavits in compliance with the time frames set forth in C.R.C.P. 56, 121 § 1-15(2) was an error of such magnitude that the appellate court was allowed to consider the issue despite lack of preservation at the trial level).

9. Abandonment Affidavit

If the termination motion is based on abandonment and the location of the parent remains unknown, the petitioner must file an affidavit stating the efforts that have been made to locate the parent. § 19-3-603. This affidavit must be filed ten days prior to the hearing. *Id.*

10. Discovery, Depositions, and Interrogatories

Neither the Children's Code nor the Colorado Rules of Juvenile Procedure set forth general procedure for discovery, depositions, or interrogatories. Generally, the Colorado Rules of Civil

Procedure apply. C.R.J.P. 1. There are exceptions. C.R.C.P. 26, which governs disclosure and discovery in civil proceedings, and C.R.C.P. 16, which governs case management and trial management, specifically state that they do not apply to juvenile proceedings unless ordered by the court or stipulated by the parties. *See* C.R.C.P. 16(a), 26(a). Local district case processing plans may also address discovery and disclosures.

- **TIP:** Counsel must be familiar with the procedures implemented in the specific judicial district relating to discovery, depositions, and interrogatories in D&N cases. Counsel could request a court order invoking the formal procedures found in C.R.C.P. 16 and 26 to obtain all materials and information needed to prepare for the termination hearing if necessary. In seeking such orders, counsel should make a record of the due process rights underlying counsel's need for formal discovery and case management procedures. *See, e.g., People in the Interest of A.M.D.*, 648 P.2d 625, 641 (Colo. 1982) (holding that the admission of reports under § 19-1-108(2) does not violate confrontation requirements or due process of law "where the reports are made available to all interested parties sufficiently in advance of the termination hearing to permit the parties to compel the attendance" of the individuals who prepared them).

BURDEN OF PROOF/REQUIRED FINDINGS FOR TERMINATION OF PARENTAL RIGHTS

The sources of the required findings for termination are a combination of case law and statute. In summary, the court must make the following findings to terminate the parent-child legal relationship:

- ✓ The child has been adjudicated dependent or neglected.
- ✓ One of three statutory grounds for termination have been met:
  - abandonment;
  - inability to devise an appropriate treatment plan to address parental unfitness; or
  - lack of compliance/success with an appropriate treatment plan, combined with continuing parental unfitness unlikely to change within a reasonable time.

- ✓ Termination of the parent-child legal relationship is in the child's best interests.
- ✓ Less drastic alternatives have been considered and ruled out.
- ✓ If ICWA applies, continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

In considering termination of the parent-child legal relationship, the court must give primary consideration to the physical, mental, and emotional needs of the child. § 19-3-604.

The court may enter an order terminating the parent-child legal relationship only if it finds that the statutory grounds have been proven by clear and convincing evidence. § 19-3-604(1); *A.M.D.*, 648 P.2d at 631–35 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Clear and convincing evidence is "evidence persuading the fact finder that the contention is highly probable." *People ex rel. A.J.L.*, 243 P.3d 244, 251 (Colo. 2010) (citation omitted). Case law does not clarify the burden of proof for the required best interests and less drastic alternatives findings. *But see People in the Interest of S.T.*, 678 P.2d 1054, 1056 (Colo. App. 1983) (upholding termination when trial court found by clear and convincing evidence that best interests of child would be served by termination of the relationship and that alternatives to termination would be detrimental to the child).

❖ **TIP:** Because of the lack of clarity regarding the requisite burden of proof for the best interests and less drastic alternatives findings, counsel is encouraged to require proof by clear and convincing evidence of all findings necessary to support termination.

If ICWA applies, the court may enter an order terminating the parent-child legal relationship only if it makes findings, beyond a reasonable doubt, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f); *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. App. 1999). This finding must be supported by testimony of a qualified expert witness. *Id. See* **ICWA fact sheet**. The Colorado Jury Instructions for Criminal Proceedings define reasonable doubt as "a doubt based upon reason and common sense which arises from a fair and rational consideration of all the evidence, or the lack of evidence, in the case… a doubt

which is not a vague, speculative, or imaginary doubt, but such a doubt as would cause reasonable [persons] to hesitate to act in matters of importance to themselves." CJI-Crim. 3:04-A (1993).

Specific criteria and relevant considerations for each of the required findings are detailed below.

1. Adjudication

The court must find, by clear and convincing evidence, that the child has been adjudicated dependent or neglected. §§ 19-3-604(1)(a), (b), (c). The Colorado Supreme Court has held that it does not violate a parent's due process rights for an adjudication based on preponderance of evidence standards to serve as a predicate for termination. *A.M.D.*, 648 P.2d at 635–41. The evidence establishing adjudication may be proffered by judicial notice of the court's file as provided by C.R.E. 201.

2. Statutory Grounds for Termination

Section 19-3-604(1) sets forth three statutory grounds for termination of the parent-child legal relationship: abandonment; inability to devise an appropriate treatment plan to address parental unfitness; and lack of compliance or success with a treatment plan, combined with continuing parental unfitness unlikely to change within a reasonable time.

a. Abandonment: Abandonment of a child by his or her parents is primarily a question of intent. *People ex rel. A.D.*, 56 P.3d 1246, 1248 (Colo. App. 2002) (citation omitted). Abandonment is determined by the parent's actions as well as the parent's words. *Id.* In determining whether a child has been abandoned by the parent, the court must view the circumstances in light of the child's best interests. *Id.* (citing *People in the Interest of G.D.*, 775 P.2d 90 (Colo. App. 1989)). The Children's Code sets forth two bases for a finding of abandonment on which a termination of the parent-child legal relationship may be sustained.

First, a court may find a child has been abandoned by the child's parent if the parent has surrendered physical custody of the child for a period of six months or more and has not manifested during such period the firm intention to resume physical custody of the child or to make permanent legal arrangements for the

care of the child, unless voluntary placement has been renewed under § 19-1-115(8)(a). § 19-3-604(1)(a)(I). The Colorado Court of Appeals has upheld a trial court's termination based on abandonment when the father had been advised during the early phases of the proceedings that he was the biological parent of the child but never asserted his custodial rights and failed to manifest a firm intention to resume physical custody or make arrangements for the child's care. *People ex rel. A.D.*, 56 P.3d at 1248.

Second, a court may find a child has been abandoned if the identity of the parent is unknown and has been unknown for three months or more. § 19-3-604(1)(a)(II). The court must also find that reasonable efforts to locate the parent in accordance with § 19-3-603 have failed. *Id.* Notably, § 19-3-603 does not specify what efforts must be made to locate the parent if the location of the parent remains unknown. It does, however, specify that before a termination of the parent-child relationship based on abandonment can be ordered, the petitioner must file an affidavit stating the efforts that have been made to locate the parent of the child. This affidavit must be made no later than ten days prior to the termination hearing. § 19-3-603.

> **TIP:** The GAL, whether the moving party or a party in support of the motion, must ensure that a thorough search for the parent is conducted to further the child's best interests and promote finality of the proceedings. The GAL's independent investigation may identify potential leads in locating the parent. The GAL should consult with the child regarding parentage and the location of the missing parent. The search should include a review of property and criminal records. Internet searches, including social networking sites, are also appropriate. In addition, the GAL should seek orders requiring the department to search child support and other appropriate records.

b. No appropriate treatment plan: The circumstances under which a court may order termination of the parent-child legal relationship based on a finding that no appropriate treatment plan can be devised to address the unfitness of the parent are narrowly defined by statute. Whether an appropriate treatment plan can be devised must be measured against the factors existing at the time of the court's determination. *See People in the Interest of C.S.M.*, 805 P.2d 1129, 1130 (Colo. App. 1990).

Specifically, the court must find one of the following as the basis for unfitness:

i. The parent has an emotional illness, mental illness, or mental deficiency of such duration or nature as to render the parent unlikely within a reasonable time to care for the ongoing physical, mental, and emotional needs and conditions of the child. § 19-3-604(1)(b)(I).

The Colorado Court of Appeals has upheld the termination of the parent-child legal relationship under this ground for a parent who was diagnosed with antisocial personality disorder and for whom "the unanimous professional evidence" was that the parent "is presently unfit to be a parent and there is virtually no likelihood that this condition will change." *People in the Interest of N.F.*, 820 P.2d 1128, 1132 (Colo. App. 1991). The Court of Appeals has also upheld a court's finding that no appropriate treatment plan could be devised based on evidence that previous outpatient treatment had not been successful and that an inpatient treatment program for the parent's particular illness was not available. *See C.S.M.*, 805 P.2d at 1131. Notably in *C.S.M.*, the nature of the parent's illness and not the parent's inability to pay was the reason for the lack of treatment availability. *Id.* Under this basis for termination, a finding of emotional illness does not require a showing that the parent has been diagnosed with a specific mental illness; evidence that the parent's "longstanding emotional conditions" render the parent unable to provide for the needs of the child is sufficient. *People ex rel. K.D.*, 155 P.3d 634, 638–39 (Colo. App. 2007).

ii. There was a single incident resulting in serious bodily injury or disfigurement of the child. § 19-3-604(1)(b)(II).

iii. The parent is incarcerated and not eligible for parole for at least six years after the date the child was adjudicated dependent or neglected, or if the child was under six years of age at the time of filing the petition, the parent is not eligible for parole for at least 36 months after the date of the adjudication. § 19-3-604(1)(b)(III). The 36-month time frame is limited to children under age six and cannot be expanded to include older children who are also the subject of the termination motion. *See People ex rel. T.M.*, 240 P.3d 542, 545–47 (Colo. App. 2010). If the child is over age six, parental incarceration must be at least six years. *Id.* The court does not need to wait for the parent's criminal appeal to be resolved to terminate

the parent-child legal relationship on this ground. *People in the Interest of T.T.*, 845 P.2d 539, 540 (Colo. App. 1992).

iv. The child's sibling suffered serious bodily injury or death resulting from proven parental abuse or neglect. C.R.S. § 19-3-604(1)(b)(IV); *see People in the Interest of T.W.*, 797 P.2d 821, 822–23 (Colo. App. 1990) (holding that the father's conviction of aggravated incest with respect to his stepdaughter supported a finding that no appropriate treatment plan could be devised pursuant to § 19-3-604(1)(b)(IV)).

v. The child or another child has been subjected to an identifiable pattern of habitual abuse, and as a result of that abuse, a court has adjudicated another child as neglected or dependent based on allegations of sexual or physical abuse or a court of competent jurisdiction has determined that such abuse has caused the death of another child. § 19-3-604(1)(b)(V).

vi. The child has been subjected to an identifiable pattern of sexual abuse. § 19-3-604(1)(b)(VI).

vii. The parent has engaged in torture of or extreme cruelty to the child, the child's sibling, or another child of that parent or another parent in the proceeding. § 19-3-604(1)(b)(VII).

The fact that a treatment plan was developed during the case does not preclude a later finding that no appropriate treatment plan can be devised to address the parent's unfitness. *See, e.g., People in the Interest of N.F.*, 820 P.2d 1128, 1130 (Colo. App. 1991). Additionally, the Court of Appeals has held that refusing to establish a treatment plan is consistent with ICWA's active efforts requirement if past efforts have not been successful. *K.D.*, 155 P.3d at 637 (upholding no appropriate treatment plan finding when the parent had received a treatment plan in two prior dependency cases and the department, through those cases, had "expended substantial, but unsuccessful efforts over several years to prevent the breakup of the family," leaving the court with "no reason to believe that additional treatment would prevent termination").

c. Lack of compliance or success with a treatment plan combined with continuing parental unfitness unlikely to change within a reasonable time: The court must make the following three findings to terminate the parent-child legal relationship under § 19-3-604(1)(c): (i) an appropriate treatment

plan, approved by the court, has not been reasonably complied with by the parent or has not been successful; (ii) the parent is unfit; and (iii) the parent's conduct or condition is unlikely to change within a reasonable time. Bases for these findings and related issues are summarized below.

i. **An appropriate treatment plan, approved by the court, has not been reasonably complied with by the parent or has not been successful:** This finding requires a two-part inquiry. First, the court must find that the treatment plan was appropriate. Second, the court must find that the treatment plan has not been reasonably complied with or has not been successful.

   The determination of whether the treatment plan was appropriate is evaluated in light of the factors existing at the time the plan was adopted. *People ex rel. J.M.B.*, 60 P.3d 790, 792 (Colo. App. 2002); *In the Interest of A.G.-G.*, 899 P.2d 319 (Colo. App. 1995); *People in the Interest of A.H.*, 736 P.2d 425, 427–28 (Colo. App. 1987). The appropriateness of the treatment plan is determined by the likelihood of its success in overcoming the problems that led to the adjudication of the child as neglected or dependent. *L.G.*, 737 P.2d at 433–34; *M.M.*, 726 P.2d at 1121. A treatment plan is appropriate if it is reasonably calculated to render the parent fit within a reasonable time and it relates to the child's needs. *People ex rel. T.D.*, 140 P.3d 205, 219 (Colo. App. 2006) (citing § 19-1-103(10)), *abrogated on other grounds by People ex rel. A.J.L.*, 140 P.3d 205 (Colo. 2010). The plan itself does not need to contain explicit measures of success. *People in the Interest of C.A.K.*, 652 P.2d 603, 610 (Colo. 1982). The fact that the plan was not successful does not mean that it was not appropriate. *A.H.*, 736 P.2d at 427–28; *L.G.*, 737 P.2d at 434; *M.M.*, 726 P.2d at 1121.

   ◆◆ **TIP:** The Court of Appeals has issued varying opinions about whether arguments regarding the appropriateness of the treatment plan and the reasonableness of the department's efforts are waived if not litigated prior to the hearing on the motion to terminate the parent-child relationship. *Compare People ex rel. M.S.*, 129 P.3d 1086 (Colo. App. 2005) (holding that the respondent parent had waived the issue of the appropriateness of the treatment plan by stipulating to the treatment plan at the dispositional hearing) *with People ex rel. S.N.-V.*, 2011 WL 6425577 at *2–3 (Colo. App. December 22, 2011) (disagreeing with *M.S.*'s application of the invited error doctrine)

The parent is responsible for ensuring compliance with and success of the treatment plan. *People ex rel. C.T.S.*, 140 P.3d 332, 335 (Colo. App. 2006). A treatment plan has been successful if it renders the parent fit or if it corrects the conduct or condition that led to intervention by the state in the parent-child legal relationship. *C.A.K.*, 652 P.2d at 611; *People in the Interest of M.P.*, 690 P.2d 1300, 1302 (Colo. App. 1984). Absolute and complete compliance with the treatment plan is not required. *People ex rel. D.L.C.*, 70 P.3d 584, 588 (Colo. App. 2003). Lack of complete compliance with a treatment plan may not support termination if the lack of compliance does not implicate safety concerns. *See, e.g., People in the Interest of C.L.I.*, 710 P.2d 1183, 1185 (Colo. App. 1985) (reversing termination based on incidents and reports that happened well before the mother's apparent improvement).

Conversely, even though a parent has substantially complied with a treatment plan, if the plan was not successful in correcting the conduct or condition that initially led to state intervention, termination of the parent-child legal relationship is proper. *See C.B.*, 740 P.2d 11, 16 (holding that even though treatment plan was largely complied with, because main objectives of stabilizing the parents' marriage and mental illness remained unrealized, termination was proper); *T.D.*, 140 P.3d at 220 (upholding termination of parent-child legal relationship for mother who substantially complied with many components of the treatment plan but maintained frequent contact with father who was not compliant with his treatment plan and who had not addressed his domestic violence issues); *People in the Interest of N.A.T.*, 134 P.3d 535, 537 (Colo. App. 2006) (upholding termination when mother did complete a three-week residential substance-abuse treatment program but tested positive for cocaine after completion of the program and did not follow through on a referral for a mental health evaluation, obtain employment, cooperate with her caseworker or treatment providers, or comply with recommended outpatient treatment); *A.N.W.*, 976 P.2d at 370 (upholding district court determination that the treatment plan was not successful because mother did not form an attachment to the child and was unable to provide for the child's emotional needs); *People in the Interest of D.M.W.*, 752 P.2d 587, 588 (Colo. App. 1987) (upholding termination when mother partially complied with certain provisions of the treatment plan and made progress in controlling and maintaining her long-standing mental illness but remained unable to recognize or meet the child's physical or emotional needs).

If the child was under six years of age when the petition was filed, the court may not find that a parent is in reasonable compliance with a treatment plan or has been successful with the plan if (1) the parent has not attended visits with the child as set forth in the treatment plan and there is not good cause for failing to visit; or (2) the parent exhibits the same problems addressed in the treatment plan without adequate improvement and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions despite intervention and treatment. §§ 19-3-604(1)(c)(I)(A), (B).

❖ **TIP:** Although the court may not delegate decisions about visits to third parties, *see People ex rel. B.C.*, 122 P.3d 1067, 1071 (Colo. App. 2005), this issue can be waived by not objecting at the time of such delegation. *T.D.*, 140 P.3d at 223. *See* **Visits fact sheet**.

ii. Parent is unfit: In determining unfitness pursuant to § 19-3-604(1)(c)(II), the court must find that continuation of the legal relationship between the parent and child is likely to result in grave risk of death or serious bodily injury to the child or that the conduct or condition of the parent renders the parent unable or unwilling to give the child reasonable parental care to include, at a minimum, nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions. In making such determinations, the court must consider, but is not limited to, the following:

- The unfitness findings allowing the court to make a finding that an appropriate treatment plan cannot be devised. § 19-3-604(2)(a). *See also* § 19-3-604(1)(b)(I); *see previous subsection, supra*.
- The parent's conduct toward the child has been of a physically or sexually abusive nature. § 19-3-604(2)(b).
- A history of violent behavior. **§ 19-3-604(2)(c)**.
- A single incident of life-threatening or serious bodily injury or disfigurement of the child. § 19-3-604(2)(d).
- Excessive use of intoxicating liquors or controlled substances affecting the parent's ability to care and provide for the child. § 19-3-604(2)(e).
- Neglect of the child. § 19-3-604(2)(f). Neglect is the failure or refusal to provide the child with proper or

necessary subsistence, education, medical care, or any other care necessary for the child's health, guidance, or well-being. § 19-3-604(2)(d).

- Injury or death of a sibling resulting from proven parental abuse or neglect, murder, voluntary manslaughter, or circumstances in which a parent has aided, abetted, or attempted the commission of, conspired, or solicited to commit murder of a child's sibling. § 19-3-604(2)(g).
- Reasonable efforts by child-caring agencies have been unable to rehabilitate the parent. § 19-3-604(2)(h). In *People ex rel. S.N.-V.*, a division of the Court of Appeals held that the party moving to terminate the parent-child legal relationship had the burden of proving this consideration by clear and convincing evidence. *S.N.-V.* 2011 WL 6425577 at *8.
- The parent has had prior involvement with the department concerning an abuse or neglect incident and a subsequent incident of abuse or neglect has occurred. § 19-3-604(2)(i).
- The parent has committed a felony assault that resulted in serious bodily injury to the child or to another child of the parent. § 19-3-604(2)(j).
- The child has been in the department's care for 15 of the last 22 months unless: the child is in relative care; the department has documented in a case plan available for court review that termination is not in the child's best interests; services necessary to the child's safe return have not been provided to the family consistent with the time period in the case plan (unless the court waived reasonable efforts); or the child's stay in care has been extended because of circumstances beyond the parent's control, such as incarceration, court delays, or continuances not requested by the parent. § 19-3-604(2)(k).
- On at least two prior occasions a child in the custody of the parent has been adjudicated dependent or neglected. § 19-3-604(2)(l).
- On at least one occasion the parent has had his or her parent-child legal relationship terminated. § 19-3-604(2)(m).

The list of factors the court must consider in determining fitness is not exclusive. The court may also consider other

factors that point to the parent's unfitness. § 19-3-604(2). For example, a parent may be found unfit when the parent chooses to remain in a relationship with a person who poses a threat to the welfare of the child. *C.T.S.*, 140 P.3d at 334.

iii. **Parent's conduct or condition is unlikely to change within a reasonable period of time**: In addition, the parent's conduct or condition must be unlikely to change within a reasonable period of time. The court must consider the same factors set forth for the unfitness finding in making this determination. § 19-3-604(2).

A trial court may consider whether any change has occurred during the pendency of the dependency and neglect proceeding, the parent's social history, and the chronic or long-term nature of the parent's conduct or condition. *B.C.*, 122 P.3d at 1072; *D.L.C.* 70 P.3d at 588–89; *see also A.N.W.*, 976 P.2d at 370. A reasonable time is not an indefinite time, and it must be determined by considering the physical, mental, and emotional conditions and needs of the child. *N.A.T.*, 134 P.3d at 537; *B.C.*, 122 P.3d at 170; *D.L.C.* 70 P.3d at 588–89.

Although the court has great discretion in determining the weight to be given to evidence, *A.J.L.*, 243 P.3d at 250, the Supreme Court has held that evidence was insufficient to support a finding that a parent was unlikely to become fit within a reasonable time in a case when the department's evidence dated back one full year prior to the hearing, the parents had presented evidence of changed condition and current fitness, and the department did not refute the parents' evidence. *C.L.I.*, 710 P.2d at 1185.

3. Termination of the Parent-Child Legal Relationship Is in the Child's Best Interests

The court must also find that termination is in the child's best interests. *C.H.*, 166 P.3d at 289.

❖ **TIP:** The Children's Code does not define "best interests." The GAL's determination of best interests should be based on developmentally appropriate consultation with the child, consideration of the child's position/wishes, the child's need for adequate permanence, and the present and future health, safety, emotional, and welfare needs of the child. In addition to the child, treatment providers, educators, and other individuals who know the child well may help inform the GAL's independent determination of the child's best interests.

4. Less Drastic Alternatives to Termination of the Parent-Child Legal Relationship Have Been Considered and Ruled Out

The requirement that the court consider and rule out less drastic alternatives to termination of the parent-child legal relationship is based on case law predating the enactment of the current version of the Children's Code; it is not set forth explicitly in the Children's Code. *See M.M.*, 726 P.2d at 1122–24. This requirement "gives due deference to the constitutional interest of the parent in preventing the irretrievable destruction of the parental relationship and ensures that the extreme remedy of termination will be reserved for those situations in which there are no other reasonable means of preserving the relationship." *Id.* at 1122, n. 9. Although the Colorado Supreme Court has "urged" trial courts to make a record of findings regarding less drastic alternatives, a reviewing court may presume that the trial court considered and eliminated less drastic alternatives if the trial court's findings "conform to the statutory criteria for termination and are adequately supported by evidence in the record." *Id.* at 1123; *see also C.S.*, 83 P.3d at 640–41 (upholding termination order although district court did not explicitly consider less drastic alternatives when the history of the case revealed a pattern of attempting alternatives to termination of the parent-child legal relationship).

> **TIP:** Even though a reviewing court may find a trial court has considered and ruled out less drastic alternatives to termination absent explicit findings in the record, if the GAL is pursuing or in support of the motion to terminate the parent-child legal relationship, the GAL should ensure that the court makes explicit findings in the record. Such advocacy will complete the evidence before the court and will facilitate appellate review.

In considering less drastic alternatives, the court must give primary consideration to the physical, mental, and emotional conditions and needs of the child. § 19-3-604(3); *People ex rel. M.T.*, 121 P.3d 309, 314 (Colo. App. 2005). A court may find that long-term foster care is not an appropriate alternative to termination. *See J.M.B.*, 60 P.3d at 793; *M.M.* at 1124. Similarly, the requirement that a court consider less drastic alternatives does not mean that a court must place a child with relatives instead of ordering termination of the parent-child legal relationship.

K.D., 155 P.3d at 640; *M.T.*, 121 P.3d at 314; *C.S.*, 83 P.3d at 640. Long-term permanent placement with relatives is not necessarily in a child's best interests, and a court may determine that such placement is not a viable less drastic alternative to termination. *See M.T.*, 121 P.3d at 314; *see also T.D.*, 140 P.3d at 223; *N.A.T.*, 134 P.3d at 538. Placement with a relative "is not a viable alternative to termination if the [relative] lacks appreciation of the parent's problems or the child's conditions or needs." *People ex rel. D.B-J.*, 89 P.3d 530, 531–32 (Colo. App. 2004). Permanently placing the child with a family member and placing the child in a foster home while allowing the parent to assume some parental responsibilities are not viable alternatives to termination if the child needs a stable, permanent home that can be ensured only by adoption. *People ex rel. T.E.M.*, 124 P.3d 905, 910 (Colo. App. 2005). Additionally, even though placement with a relative may be in a child's best interests, allocation of parental responsibilities or guardianship to the relative may not be an appropriate less drastic alternative if the relative wishes to adopt the child and adoption is in the child's best interests. *K.D.*, 155 P.3d at 640; *J.M.B.*, 60 P.3d at 793.

5. If ICWA Applies, Continued Custody of the Child by the Parent Is Likely to Result in Serious Emotional or Physical Damage to the Child

In cases involving an Indian child as defined by ICWA, *see* **ICWA fact sheet**, the court must find by proof beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f). The evidence supporting the finding must include the testimony of a qualified expert witness. *Id.* The Colorado Court of Appeals has held that although the federal guidelines suggest that a qualified expert witness would possess special knowledge of Indian culture and society, when termination is based on parental unfitness unrelated to Indian culture or society, it is sufficient for the qualified expert to have substantial education or experience in the expert's area of specialty. *A.N.W.*, 976 P.2d at 368 (99); *see also K.D.*, 155 P.3d at 638 (upholding termination based on testimony of a qualified expert witness who did not possess special knowledge of Indian culture and

society when termination was based on father's emotional illness, a "culturally neutral" consideration).

EVIDENTIARY ISSUES/CONSIDERATIONS

Hearings on motions to terminate the parent-child legal relationship are generally treated as trials, and courts tend to enforce strict adherence to the Rules of Evidence at such hearings. *See* **Hearsay in D&N Proceedings fact sheet**.

> **TIP:** Although technically a hearing on a motion, proceedings to terminate the parent-child relationship result in final and appealable orders impacting fundamental rights. Most counsel appropriately prepare for and litigate such hearings as they would prepare for and litigate a trial. Trial notebooks containing prepared opening statements, cross-examinations of opposing counsel's witnesses with relevant impeachment materials, direct examinations of counsel's witnesses with relevant refreshing recollection materials, and law relevant to any anticipated evidentiary issues serve as useful tools. Many districts also treat such hearings as trials, requiring, for example, parties to submit proposed trial management orders. Counsel should be familiar with the applicable procedures governing hearings on motions to terminate the parent-child legal relationship in their district, whether the source of those procedures is a case management order, district plan developed pursuant to CJD 98-02, or the Colorado Rules of Civil Procedure.
>
> Proper trial preparation is also necessary to increase RPC's chance of prevailing on appeal in that such preparation enables counsel to preserve legal issues for appeal and to make a thorough record of the relevant evidence necessary for appellate review.

There is one evidentiary consideration unique to the termination hearing. Pursuant to the termination statute, the court must give primary consideration to the physical, mental, and emotional conditions and needs of the child and must review and order, if necessary, an evaluation of the child's physical, mental, and emotional conditions. § 19-3-604(3). The court may receive and consider written reports and other materials relating to the child's mental, physical, and social history. *Id.* However, upon request by a party or on its own motion, the court must require

the person who wrote or prepared the material to be available as a witness subject to both direct and cross-examination. *Id.* Reports must be provided sufficiently in advance of the hearing so that counsel can compel the attendance of the reports' authors at the hearing. *A.M.D.*, 648 P.2d at 641.

- **TIP:** Counsel should conduct a detailed review of any materials that other parties intend to offer pursuant to § 19-3-604(3), examining the materials for accuracy, reliability, and evidentiary issues (e.g., hearsay). Counsel should strongly consider moving to redact information that appears unreliable and should subpoena the person who prepared the material as a witness when in-person testimony would protect or advance the interests of the parent or child. Additionally, § 19-3-604(3) does not address authentication and identification of documents relating to the child's physical, mental, and social history, and counsel seeking to introduce such evidence should prudently endorse and subpoena witnesses necessary to authenticate and identify such documents.

- **TIP:** In determining whether to share information contained in reports and other materials relating to the child's mental, physical, and social history, the GAL should be cognizant that the sharing of such information may result in a waiver of privileges protecting such information. The Court of Appeals has held that a GAL expressly waived the privilege associated with treatment records by submitting a letter from a therapist in advocating for the child's best interests. *People ex rel. L.A.N.*, 2011 WL 26580589 at *6–9 (Colo. App. July 7, 2011), *cert. granted sub nom., L.A.N. v. L.M.B.*, 2012 WL 59445 (Colo. 2012) (granting cert. on whether the GAL in a D&N proceeding can waive the child's psychotherapist-patient privilege and whether the Court of Appeals erred in determining that the privilege was waived with respect to certain materials in the therapist's file). The GAL must thoughtfully strategize whether disclosure of sensitive treatment records and information is necessary to the determination of the motion to terminate and should seek advance rulings from the court on the extent of the waiver any such disclosure might effectuate.

SPECIAL ISSUES/CONSIDERATIONS

1. Requests for Relative Placement. Grandparents, aunts, uncles, and siblings of the child must file a request for guardianship and legal custody of the child within 20 days of the termination motion's filing. § 19-3-602(2). The court shall consider, but is not bound by, a relative's request for guardianship or legal custody of the child. § 19-3-605(1). The department has no obligation to independently identify and evaluate other placement alternatives, although the department must evaluate a reasonable number of persons identified by the parents as possible placement alternatives. *People ex rel. Z.P.*, 167 P.3d 211, 214–15 (Colo. App. 2007) (citing *People ex rel. D.B.-J.*, 89 P.3d 530, 532 (2004)); *but see* 42 U.S.C. § 671(a)(28) (requiring the state plan to exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives, including relatives identified by the parent); 7.304.53(B)(2)(a) (requiring diligent search for all grandparents and other adult relatives to be completed within 30 days).

- **TIP:** Some trial courts have considered the failure of the listed relatives to file a request for guardianship or legal custody within 20 days of the filing of the termination motion as prohibiting the granting of the request, but other courts view themselves as having the discretion to consider the request.

- **TIP:** The GAL should conduct an independent investigation regarding possible relative placements pursuant to CJD 04-06(V)(D)(4)(g), keeping in mind that changed circumstances may make a relative who was not appropriate for placement a potentially appropriate placement option now.

2. The Uniform-Child Custody Jurisdiction and Enforcement Act (UCCJEA). Under the UCCJEA, when a child custody action is pending in another state at the time the D&N case is filed in Colorado, the juvenile court does not have continuing jurisdiction to hear the termination hearing in Colorado, unless the action in the other state ended or an exception to the UCCJEA applies. § 14-13-204(3); *In re State ex rel. M.C.*, 94 P.3d 1220, 1223 (Colo. App. 2004). *See* **Jurisdictional Issues fact sheet**.

3. Americans with Disabilities Act. Because the focus of the proceedings are the child's welfare and need for a basic level of care, the Americans with Disabilities Act does not offer a defense to a termination motion. *People in the Interest of T.B.*, 12 P.3d 1221, 1223–24 (Colo. App. 2000). *See* **Disabilities and Accommodations fact sheet**.

EFFECT OF TERMINATION OF PARENTAL RIGHTS

The order for the termination of the parent-child legal relationship divests the child and the parent of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other except the order does not modify the child's status as an heir at law, which ceases only upon a final decree of adoption. § 19-3-608(1). An order terminating parental rights does not disentitle a child to any benefit due from any third person, including, but not limited to, any Indian tribe, any agency, any state, or the United States. § 19-3-608(2).

An order terminating the parent-child legal relationship terminates the former parent's entitlement to any notice of proceedings for the child's adoption and terminates the former parent's right to object to the adoption or to otherwise participate in such proceedings. § 19-3-608(3). Termination of parental rights eliminates the right to continued visits between parent and child. *M.M.*, 726 P.2d at 1124–25. However, following the termination of the parent-child legal relationship, courts often allow the child and parents to have a "good-bye" visit.

Under the Children's Code, the sibling relationship remains intact after the termination of the parent-child legal relationship. § 19-5-101(3). The sibling placement preference set forth in § 19-3-605(2) applies post-termination. Similarly, the department's obligation to make thorough efforts to find an appropriate joint placement for children who are part of a sibling group as defined by § 19-1-103(98.5) and the presumption that joint placement is in the best interests of each child in the sibling group do not end upon the termination of the parent-child legal relationship. § 19-5-207.3(2). *See* **Siblings fact sheet**. The Children's Code further requires the department to include in its adoption report the names and current physical location and custody of

any siblings also available for adoption. § 19-5-207.3(1). However, efforts to pursue a joint placement may not delay expedited permanency planning efforts or permanency planning for any child who is a member of a sibling group. § 19-5-207.3(4).

- **TIP:** In determining whether to support or file a motion to terminate the parent-child legal relationship, the GAL should consider the importance of sibling relationships to the child and the potential impact termination may have on those relationships. *See* **Siblings fact sheet**.

- **TIP:** To avoid adoption delays, the parties and the court should make sure the termination motion includes both parents. This is especially important if the other parent is missing or unknown.

SETTING THE NEXT HEARING

1. Hearings Following Termination of the Parent-Child Legal Relationship

a. Post-termination review hearing: After termination of the parent-child legal relationship, the court must hold a review hearing within 90 days to review efforts to place the child for adoption. § 19-3-606(1).

b. Appeals of termination of parental rights orders and review of magistrates' orders: C.A.R. 3.4 requires that a notice of appeal be submitted to the court of appeals within 21 days of the order terminating parental rights. *See* **Appeals fact sheet**.

Under § 19-1-108(5.5), a request for review of a magistrate's order is due within five days and is a prerequisite before an appeal may be filed with the Court of Appeals. *See* **Magistrates fact sheet**.

2. Proceedings Subsequent to a Court Order Denying the Motion to Terminate the Parent-Child Legal Relationship

If the court denies the motion to terminate parental rights, the dependency and neglect proceeding continues and the court will typically set the matter for an appearance review or permanency planning review.

❖ **TIP:** If the court denies the motion to terminate parental rights, counsel should consider whether a placement motion requesting reunification is appropriate.

VIII
Post-Termination Review Hearing

POST-TERMINATION REVIEW HEARING CHECKLIST—GAL

BEFORE

- ❑ Review updated family services plan.
- ❑ Investigate:
  - ❍ Proper disposition for the child at this stage.
  - ❍ Efforts toward establishing permanency for the child.
  - ❍ Efforts to establish or maintain joint sibling placement.
- ❑ Meet with the child.
  - ❍ Confer in a developmentally appropriate manner and obtain input and child's position regarding termination of parental rights.
  - ❍ Determine whether child wants position reported to court.
- ❑ File post-termination report pursuant to § 19-3-606 sufficiently in advance of hearing to ensure review by court and department.

DURING

- ❑ Ensure the court addresses specific, particular, and reasonable efforts to pursue permanency options for the child.
- ❑ In an EPP case, the court must determine by clear and convincing evidence:

- Whether any delay in placing the child in a permanent home no later than 12 months after removal is in the child's best interests.
- That reasonable efforts have been made to find the child an appropriate home.
- That an appropriate home is not currently available or that the child's mental or physical needs or conditions deem it improbable that a child would have a successful permanent placement.

- Ensure the court sets the next appropriate hearing. In EPP cases, the case must be reviewed every six months until the child is permanently placed.

AFTER

- Obtain court orders and review for accuracy and sufficiency.
- Visit and counsel child and explain court's findings and orders.

BLACK LETTER DISCUSSION AND TIPS

The statutory purpose of the post-termination review hearing is to determine what disposition of the child, if any, has occurred and to determine the best disposition for the child. § 19-3-606(1). The agency or individual vested with custody of the child submits a report indicating what disposition of the child has occurred and the GAL submits a report containing recommendations, based on the GAL's independent investigation, for the best disposition of the child. *Id.*

- **TIP:** Following the termination of the parent-child legal relationship, the child is now without parents and the need to find a permanent home for the child is more critical than ever. The GAL must be vigilant about making sure the child's immediate and long-term needs are adequately addressed. The child's long-term needs are not limited to permanence but may also include educational, dental, health, emancipation, and other needs. Additionally, because the child is now legally available for adoption, some placement opportunities that may not have been an option before may now be a possibility for the child. The GAL must ensure a comprehensive effort is being made to adequately address all of the child's needs and should proactively bring any pending/unresolved issues to the court's attention at the post-termination review hearing.

TIMING OF HEARING

The post-termination review hearing must occur no later than 90 days after the initial order for termination of parental rights. *Id.*

NOTICE

After termination of the parent-child relationship, respondent parents are no longer entitled to notice of proceedings. § 19-3-608(3). All other parties are entitled to notice of the hearing. § 19-3-502(7). In addition, anyone with whom the child is placed is also entitled to notice. *Id.* Upon the written request of a foster parent, pre-adoptive parent, or relative, notice of the hearing must be provided in written form and may be provided through the caseworker at the usual periodic meetings with the person providing

care for the child. § 19-3-507(5)(c). The person with whom the child is placed shall also give notice to the child of any hearings regarding the child. § 19-3-502(7). A CASA volunteer appointed to the case must be notified of the hearing. § 19-1-209(3).

PROCEDURAL ISSUES/CONSIDERATIONS

1. Report from Agency/Individual Vested with Custody of the Child

Section 19-3-606(1) requires the agency or individual vested with custody of the child to report on what disposition of the child, if any, has occurred. The report is subject to the requirements of § 19-1-309 regarding the confidentiality of adoption records and the court's obligation to act in a manner preserving the anonymity of the biological parents, the adoptive parents, and the child from the general public. §§ 19-3-606(1), 19-1-309. If the department is the agency responsible for filing the report, the court should order the report to be filed and served at least five days in advance of the hearing. CJD 96-08(3)(c).

2. Report from GAL

The GAL must submit a written report stating the GAL's recommendation, based on an independent investigation, for the best disposition for the child. § 19-3-606(1). As with the department's report, the GAL's report is subject to the requirements of § 19-1-309 regarding the confidentiality of adoption records and the court's obligation to act in a manner preserving the anonymity of the biological parents, the adoptive parents, and the child from the general public. § 19-3-606(1).

- **TIP:** Although the statute does not set forth a specific time frame for filing this report, time frames for filing reports may be addressed in a specific judicial district plan, developed pursuant to CJD 98-02. GALs should check their district's plan for timelines and content requirements unique to the district in which they are practicing.

- **TIP:** The Colorado Juvenile Benchbook sets forth a number of questions the court should ask at the post-termination review hearing. These questions largely focus on what efforts have

been made to finalize adoption of the child, including but not limited to identification of prospective adoptive parents, placement of the child in an adoptive home, status of adoption subsidy agreements and negotiations regarding post-adoption services, and status of adoption proceedings. These are important considerations for the post-termination review hearing, and the GAL should address these considerations in his or her report. Because the GAL is required to conduct an independent investigation, the GAL is entitled to information regarding potential adoptive homes. *See People in the Interest of M.C.P.*, 768 P.2d 1253 (Colo. App. 1988) (holding GAL is entitled to name of adoptive parents). The GAL should ensure that the department is referencing the statewide adoption registry when seeking potential adoptive placements for clients. § 19-5-207.5(5). The GAL should also report to the court on whether an appeal is pending and the status of the appeal.

The GAL's report, however, should not be limited to an update on adoption efforts. The GAL's report should also provide placement recommendations and a comprehensive description of the immediate and long-term needs of the child and the status of the department's efforts to address those needs.

In providing information to the court on the child's current placement and any placement recommendations, the GAL's report should include information regarding requests for placement by family members, including whether the request was made in a timely manner pursuant to § 19-3-605(1), and the GAL's recommendations regarding placement with family members based on the GAL's independent investigation. In addition, the report should include the GAL's position regarding joint placement of siblings. § 19-3-605(2).

Considerations to be addressed in the GAL's report regarding the immediate and long-term needs of the child include, but are not limited to, the child's relationships with siblings and relatives and the status of visits with those individuals (even if they are not placement options); the child's educational needs and efforts to address those needs; emancipation/transition needs for older youth; the child's views regarding adoption, particularly if the child is older than 12; and immediate and long-term medical, mental health, and dental needs. The GAL can also use KIDs (the OCR's online case management system) to emphasize the urgency of the need for permanency for a child whose parental rights have been terminated (e.g., the GAL can run a report on total number of days child has been in out-of-home placement and/or the number of changes

in placement a child has undergone). The GAL's report should also identify any barriers to achieving permanency for the child and suggest strategies for overcoming/addressing those barriers.

In determining what is in the best interests of the child, the GAL must consult with the child in a developmentally appropriate manner. CJD 04-06(V)(B). The GAL must also report to the court the child's position regarding the matters the court is deciding, unless the child's position cannot be ascertained because of the child's developmental level or the child has informed the GAL that he or she does not want this information shared with the court. CJD 04-06(V)(D)(1).

3. Contemporaneous Hearings

The post-termination review hearing may be combined with other hearings, such as a placement review hearing or a permanency planning hearing.

❖ **TIP:** If such hearings are combined, counsel should ensure that any notice or other requirements unique to those hearing types are followed. *See* **Placement Review Hearing chapter**; **Permanency Hearing chapter**. For example, if the hearing involves a review of the child's permanency goal, the court must consult with the child in an age-appropriate manner regarding the child's permanency plan. *See* § 19-3-702(3.7); **Children in Court fact sheet**.

4. Simultaneous Adoption Proceedings

In the 90 days between the order of termination and the post-termination review hearing, an adoption petition may be filed and a date for adoption finalization may be set. *See* § 19-5-208; **Adoption fact sheet**. Although filed separately, the adoption proceeding does not deprive the juvenile court of jurisdiction to make decisions in the D&N proceeding. §§ 19-1-104(1)(b), (g).

BURDENS OF PROOF/REQUIRED FINDINGS

The post-termination review hearing does not require the court to make any specific findings. § 19-3-606(1). At the hearing, the court reviews what disposition, if any, has occurred for the child

and considers the reports concerning the disposition that will serve the best interests of the child. § 19-3-606(1).

If an adoption has not taken place and the court determines that an adoption is not immediately feasible or appropriate, the court may order plans for an alternative long-term placement. § 19-3-606(2).

> **TIP:** The GAL should not hesitate to bring all relevant information to the court's attention at this hearing and, if necessary, request the court to rule on issues impacting the best interests of the child or permanence for the child. Some courts may allow oral motions to be made at the hearing; however, when a GAL knows in advance that he or she intends to ask the court to rule on a motion at the hearing, the GAL should place the court and other parties on notice by filing a written and signed motion in compliance with time frames set by the Rules of Civil Procedure and/or the individual judicial district's plan for processing D&N cases developed pursuant to CJD 98-02.

SPECIAL CONSIDERATIONS

1. Requests for Relative Placement

Following an order of termination, the court shall consider the timely request of a relative for guardianship and legal custody of the child. § 19-3-605(1). A timely request is one submitted no later than 20 days after a party files the motion for termination. § 19-3-605(1); *see also* § 19-3-602(1.5)(a)(I.5). Although the statute does not require the court to consider untimely filed requests, it also does not forbid the court from doing so. In practice, many courts will grant a hearing for a relative pursuing placement under § 19-3-605, even if the request was not timely. Although relative placements are generally preferred, *see*, *e.g.*, § 19-3-403(3.6)(a)(V) (temporary custody hearings statute), the court is not bound by a relative's request for placement. § 19-3-605(1) (appearing to limit the court's ability to give preference to relative placement at post-termination hearings to requests that are filed in a timely manner).

Volume 7 requires the department to engage in a diligent search for relatives at least every six months throughout the life of the case until permanency is achieved, unless specific circum-

stances exist. *See* 7.304.52(D); **Family Finding and Diligent Search fact sheet**. Such efforts must be documented in the family services plan and contact notes. 7.304.52(E). It is possible that relatives may also be identified as a potential placement for a child as a result of these efforts.

> **TIP:** Particularly in cases in which "APPLA"/"OPPLA" has been entered as the child's permanency goal, *see* **Permanency Hearing chapter**, The GAL should be open to exploring potential relative and kin requests for placement. Even if the relative is not an appropriate placement option for the child, that relative may be an appropriate long-term contact/support. Additionally, engaging with that relative/kin may lead to other relatives/kin who may be an appropriate placement option for a child who would otherwise linger in care. Changed circumstances may also mean that a relative who was not an appropriate placement for the child at the beginning of a case may now be an appropriate placement/support for that child. *See* **Family Finding/Diligent Search fact sheet**.

2. Siblings

If siblings are separated, the department and GAL should report on sibling visits and ongoing efforts to reunify the siblings. *See* **Siblings fact sheet**.

3. Timely Placement in Permanent Home for Children in EPP Cases

In cases in which the child is under six years at the time of the petition's filing, the child shall be in a "permanent home" (as defined to include reunification, relative placement, placement with potential adoptive parent, permanent custody allocated to another, or placement in least restrictive level of care if child cannot be returned home) no later than 12 months after the original placement out of the home, unless such placement is not in the child's best interests. § 19-3-703. In determining whether any delays in placement are in the best interests of the child, the court must find by clear and convincing evidence that reasonable efforts have been made to find the child an appropriate home and that one is not currently available or that the child's mental or physical needs or conditions deem it improbable that

the child would have a successful permanent placement. *Id.* The GAL and caseworker must provide the court with a report specifying what services are being given to the child to remedy the problems. The case must be reviewed every six months until the child is permanently placed, and the clear and convincing burden of proof applies at these hearings. *Id.* If appropriate, the court shall include in this hearing all other children residing in the same household, even if they are older than six. § 19-3-104; *People ex rel. T.M.*, 240 P.3d 542, 546 (Colo. App. 2010).

NEXT STEPS/SETTING THE NEXT HEARING

Periodic reviews should be scheduled until the case is closed as a result of adoption or some other manner serving the best interests of the child. *See* §§ 19-3-702(6)(a), 19-3-703. Such reviews may be in the form of placement reviews, which must occur at least every six months. *See* §§ 19-3-702(6), (8)(a). Depending on the case, the next hearing may be a permanency hearing. *See* **Permanency Hearing chapter**.

- **TIP:** The Children's Code does not preclude more frequent setting of reviews. If barriers to permanency exist or the GAL is concerned about delays in permanency for a child, the GAL should request that the court hold more frequent reviews. If the GAL believes a different permanency goal serves the best interests of the child, the GAL should request the setting of a permanency planning hearing. *See* **Permanency Hearing chapter**. If issues arise between reviews and cannot be resolved to the GAL's satisfaction, the GAL should file a motion to bring the matter to the court's attention and request a prompt hearing. The GAL must play an active role in emphasizing the urgency of the child's needs.

Contents: Fact Sheets

Adoption[1] Fact Sheet

PLACEMENT FOR ADOPTION

Placement for purposes of adoption may be made only by the court, the department, or a licensed child placement agency. § 19-5-206(1). The child's best interests shall be the primary consideration in making placement determinations. § 19-5-206(2)(a). Section 19-5-210(1.5) requires the court to issue a certificate of approval of placement upon the filing of the petition pending final hearing on the adoption petition.

1. ICWA Priorities for Adoptive Placement

In the absence of good cause to the contrary, ICWA sets forth the following preferences for placement of Indian children for adoption: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a). Although ICWA does not define good cause to the contrary, the Bureau of Indian Affairs ICWA Guidelines provide guidance on what constitutes good cause. *See* 44 Fed. Reg. 67,584 at 67,594 (1979); *People ex rel. A.N.W.*, 976 P.2d 365, 369 (Colo. App. 1999) (relying on the guidelines to define good cause to include "extraordinary physical or emotional needs of the child

1. This fact sheet summarizes adoption proceedings for children who have been the subject of D&N proceedings and does not apply to private adoptions.

as established by testimony of a qualified expert witness"). A court may also consider "the certainty of emotional or psychological damage to the child if removed from the primary caretaker" in making its good cause determination. *Id.*

❖ **TIP:** ICWA notice provisions apply to adoption proceedings, and counsel should ensure compliance with applicable notice requirements. *See* § 19-1-126(1)(b); **ICWA fact sheet**.

2. Siblings

The Children's Code recognizes that children placed for adoption benefit from being able to continue relationships with their siblings and that siblings constitute one another's biological family when parents or relatives are no longer available to care for them. § 19-5-200.2(2)(a)(b). If a child is part of a sibling group, the department or child placement agency must make thorough efforts to locate a joint placement for all children in the sibling group who are available for adoption. §§ 19-5-207.3(2), (3). If an appropriate, capable, willing, and available joint placement is located, that placement is presumed to be in the best interests of the children. §§ 19-5-207.3(2), (3). This presumption may be rebutted by a preponderance of the evidence. *Id.* Permanency planning must not be delayed by consideration of placing all children as a sibling group. § 19-5-207.3(4). "Sibling group" is defined as "biological siblings who have been raised together or who have lived together." § 19-1-103(98.5).

❖ **TIP:** Children who may not meet the Children's Code definition of being in a sibling group may still have significant attachments to one another and may benefit from joint placement.

3. Relative Placement Preference

The court must consider, but is not bound by, a request for placement with a grandparent, aunt, uncle, brother, or sister of the child or a foster parent. §§ 19-5-206(1), 19-5-104(2)(a). If a timely request is made for placement, the court must give preference to a grandparent, aunt, uncle, brother, or sister of the child if the court determines that such a placement is in the best interests of the child. § 19-5-104(2)(a) (defining a timely request in relinquishment cases as a request submitted prior

to the commencement of the hearing on relinquishment). *See also* § 19-3-605(1) (defining a timely request in termination proceedings as within 20 days of the filing of the motion to terminate the parent-child relationship). This relative placement preference in relinquishment cases does not apply if the birth parents are proposing a particular adoptive family or have designated that they do not want to have the child placed with a relative and the child has been in the legal custody of a relative requesting guardianship or the physical custody of the relatives for a specified time period. § 19-5-104(2)(a).

> **TIP:** Although a relative may have a preference in a post-termination proceeding, the criteria as set forth in § 19-3-605(3) will apply and the court can reject a relative placement in favor of foster parents. *See, e.g., People ex rel. D.B.J.* 89 P.3d 530 (Colo. App. 2004); *People ex rel. E.C.,* 47 P.3d 707 (Colo. App. 2002).

4. Multi-Ethnic Placement Act

An adoptive placement of a child shall not be delayed or denied as a result of the racial or ethnic background, color, or national origin of the child or the prospective adoptive family. §§ 19-5-206(2)(e)(I), (II); 42 U.S.C. § 671(a)(1)(18). Under extraordinary circumstances, the placement of a child for purposes of adoption may involve consideration of racial or ethnic background, color, or national origin of the child or the prospective adoptive family. §§ 19-5-206(2)(d)(I), (II).

PROCEDURAL CONSIDERATIONS

1. Venue

Adoption proceedings are filed in the petitioner's county of residence or the county in which the placement agency is located. § 19-5-204.

2. Timing of Hearing

The hearing shall be no sooner than six months after the child begins to live with the prospective adoptive parents; the court may shorten or extend this time period for good cause

shown. § 19-5-210(2). A hearing concerning an adoption shall be given priority on the court's docket. § 19-5-202.5(1).

> **TIP:** For adoptions by unmarried couples, who cannot adopt together in one proceeding, *see Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996), jurisdictions vary in their interpretation of the six-month requirement. Courts in many jurisdictions allow the adoptions to proceed sequentially on the same day, whereas courts in other jurisdictions require six months to elapse after the adoption by the first parent before proceeding with adoption by the second parent. A jurisdiction's interpretation of the six-month requirement may be a relevant consideration in a case that presents a choice in venue.

3. Closed Nature of Proceedings

An adoption hearing is closed to the public unless the court finds an open hearing is in the best interests of the child and the prospective adoptive parents consent to an open hearing. §§ 19-5-210(5)(a), (b). The court must preserve the anonymity of the biological and adoptive parents unless the court finds good cause to the contrary. § 19-1-309.

4. Attendance of Child at Hearing

The adoption proceeding is open to children ages 12 and over. § 19-5-210(5)(a). The court, at its discretion, may close the adoption proceeding to a child who is under 12; to open the proceeding to the child, the court should make findings that the opening of the adoptive proceeding is in the best interests of the child and that the adoptive parents consent. §§ 19-5-210(5)(a), (b). The court may interview any child whenever it deems proper. § 19-5-210(5)(a).

5. Continuation of GAL Appointment

The GAL appointed in the D&N proceeding continues to represent the child's interests until an appropriate permanent placement of the child is ordered or until the court's jurisdiction is terminated. § 19-3-602(3); *People in the Interest of M.C.P.*, 768 P.2d 1253, 1255 (Colo. App. 1988) (finding that entry of a final decree of adoption is a form of permanent placement contem-

plated by § 19-3-602). The GAL may have access to confidential adoption information, including the names of the prospective adoptive parents, to independently investigate the suitability of the proposed placement. *Id.*

PETITION TO ADOPT

The petition to adopt is filed by the prospective adoptive parents. § 19-5-208(2)(a). The petition to adopt should be filed no later than 30 days after the placement of the child in the home for the purpose of adoption, unless the court finds reasonable cause or excusable neglect. § 19-5-208(1).

❖ **TIP:** The Colorado Courts website provides electronic forms to assist compliance with completion of the petition and other requirements set forth in Article V of the Children's Code. *See* **http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=146.**

Required contents of the petition are detailed in §§ 19-5-208(2), (5)–(6). The following additional documents must accompany the petition:

- ❑ The department's written, verified consent to adoption. § 19-5-207(1).
- ❑ A standardized affidavit disclosing all fees, costs, or expenses in connection with the adoption. § 19-5-208(4).
- ❑ Any notices received or sent pursuant to the Interstate Compact on the Placement of Children. § 19-5-207(1).
- ❑ Postal receipts for any notices sent to the parent or Indian custodian or to the tribe. § 19-5-208(2.5)(b) (also allowing such receipts to be filed with the court within ten days after filing the petition).
- ❑ The home study report. § 19-5-207(1). If the home study report does not accompany the petition, the court must order its completion and filing. § 19-5-209(1). The form of the home study report is outlined in § 19-5-207(2). *See also* § 19-5-208(3) (setting forth additional information to be included in the home study); § 19-5-207(2.5) (setting forth procedure for criminal background check); § 19-5-207(c) (requiring a background check for confirmed reports of abuse or neglect in the previous five years); § 19-5-207.3(1) (requiring the county's adop-

tion report regarding a child who is a member of a sibling group to include the names and current physical custody and location of any siblings who are available for adoption).

REQUIRED FINDINGS FOR ADOPTION

To enter a decree approving the adoption, the court must make the following findings:

- ✓ The child is available for adoption. §§ 19-5-210(2)(a), 19-5-203(1). If the child is 12 years of age or older, the child must provide written consent to the proposed adoption. § 19-5-203(2).
- ✓ The person adopting the child is of good moral character, has the ability to support and educate the child, and has a suitable home. § 19-5-210(2)(b). *See also* § 19-5-202 (identifying individuals eligible to petition to adopt a child).
- ✓ The criminal background check does not reveal any proscribed criminal history. *See* § 19-5-207(2.5) (setting forth procedure for completing criminal background check); §§ 19-5-207(2.5)(a)(IV)(A)–(G) (requiring department to report to the court, for the adoptive parent(s) and any adults residing in the home, specified convictions); § 19-5-207(2.5)(b) (setting forth specific felony convictions barring an adoption and other convictions requiring specific findings for completion of the adoption).
- ✓ The child's mental and physical condition makes the child a proper subject for adoption in the adoptive home. § 19-5-210(2)(c).
- ✓ The best interests of the child will be served by the adoption. § 19-5-210(2)(d).
- ✓ If the child is part of a sibling group, whether it is in the best interests of the child to remain in an intact sibling group. § 19-5-210(2)(e). If the adoptive placement does not involve joint placement, the court must make findings by a preponderance of the evidence to overcome the presumption that joint placement is in the best interests of the child. *Id.*

  ❖ **TIP:** When the adoption does not involve a joint placement of siblings in a sibling group, the court may encourage reasonable visitation of siblings. It must also review the record and inquire whether the adoptive parents have received counseling regarding children in sibling groups

maintaining or developing ties with each other. § 19-5-210(7). The court, however, cannot enter orders that would deprive adoptive parents of their parental rights to make decisions regarding the child's contact with his or her biological family. *See In the Interest of M.M.*, 726 P.2d 1108, 1125 (Colo. 1986).

POST-ADOPTION AGREEMENTS AND FINANCIAL SUPPORT

Adoption subsidies and Medicaid may be available for families who adopt children with special needs and are based on the needs of the child, not the income of the family. § 26-7-102. "Special needs" are defined to include "unusual, or significant physical or mental disability, or emotional disturbance, or such other condition which acts as a serious barrier to the child's adoption." § 26-7-101. A totality of the circumstances test, which takes into account both subjective and objective factors, should be applied to determine whether serious barriers to adoption exist. *Sapp v. El Paso County Department of Human Services*, 181 P.3d 1179, 1186 (Colo. 2008).

Entitlement to an adoption subsidy requires that all conditions defined in C.R.S. § 26-7-103(1)(a)–(f) are met. *See also* 7.306.4 (describing process and criteria for determining adoption subsidies).

LEGAL EFFECT OF FINAL DECREE OF ADOPTION

Once adopted, the child is the child of the adoptive parents, entitled to all rights and privileges and subject to all obligations as a child born to the adoptive parents. § 19-5-211(1). The adoptive parents are entitled to maternity/paternity leave from their employers on an equal basis to the leave granted to biological parents. § 19-5-211(1.5). The child is eligible for enrollment in medical or dental insurance coverage on an equal basis of coverage available to a naturally born child. § 19-5-211(2.5). Further, the child can be added to the prospective adoptive family's private health insurance from the date of placement for purposes of adoption. § 10-16-104(6.5).

ADOPTION OF AN INDIVIDUAL WHO IS 18 OR OLDER

Upon approval of the court, individuals ages 18 to 21 may be adopted as a child pursuant to the provisions of Article V of the Children's Code. § 19-5-201. Section 14-1-101 also sets forth a procedure for the adoption of individuals over the age of 18. In adoptions pursuant to § 14-1-101, the court does not have discretion to deny the adoption; it must grant the petition if the individual consents to the adoption and it must dismiss the petition if the individual does not consent. § 14-1-101(2); *In re P.A.L.*, 5 P.3d 390, 391 (Colo. App. 2000) (authorizing the adoption of adults for purposes of giving the status of an heir at law with no requirement of minimum age difference or prohibition against adopting one's own sibling).

NECESSARY FOLLOW-UP

Certified copies of the order of adoption shall be given to the adopting parents, the department, and the state registrar. § 19-5-212(1). The final decree of adoption should also be filed with the court in which the relinquishment, if any, took place with the adoptive parent's names redacted. 7.710.61(C).

Application for a new birth certificate signed by the adopting parents shall be sent to the state registrar by the court, the adopting parents, or their legal representative. § 19-5-212(2). For a child born in another state, the application for a new birth certificate shall be sent to the registrar of the birth state. If that state's registrar fails to issue a new birth certificate, the state registrar for Colorado will issue a new birth certificate. § 19-5-212(3).

Within 30 days after entry of a final decree or adoption order for an Indian child, the court shall provide a copy of the decree to the Bureau of Indian Affairs, together with information to show the Indian child's name, birth date, and tribal affiliation pursuant to 25 U.S.C. § 1951; the names and addresses of the biological and adoptive parents; and the department having relevant information relating to the adoptive placement. 25 C.F.R. § 23.71(a)(1)(i)–(iii).

Allocation of Parental Responsibilities/Guardianship Fact Sheet

Allocation of parental responsibilities (APR) and guardianship have the common goal of providing for the child's permanency, but important differences exist in the required findings for each, the rights and responsibilities attached to each, the manner in which each is ordered, and the standards for modifying and terminating each arrangement. Provisions of both the Children's Code and the Colorado Uniform Guardianship and Protective Proceedings Act (Guardianship Act), § 15-14-201, *et. seq.*, are relevant to the establishment of a guardianship of a child in a D&N proceeding. A motion seeking APR in a D&N proceeding is governed by the Children's Code. *See L.A.G. v. People in the Interest of A.A.G.*, 912 P.2d 1385 (Colo. 1996). The Uniform Dissolution of Marriage Act (UDMA), § 14-10-101 *et seq.*, is relevant to determinations made regarding child support and later modification decisions.

AUTHORITY OF D&N COURT TO ORDER GUARDIANSHIP OR APR

The D&N court has exclusive jurisdiction to appoint a guardian or determine APR regarding the child who is subject to a D&N proceeding. §§ 19-1-104(1)(c), (4)–(6); 15-14-106; 14-10-123(1). Any party to a D&N proceeding who becomes aware of any other proceeding in which the custody of the child is at issue must

file a notice in that proceeding that a D&N action is pending. C.R.J.P. 4.4 (a). The notice must include a request that the court certify the custody issue to the D&N court pursuant to §§ 19-1-104(4) and (5). C.R.J.P. 4.4(a).

❖ **TIP:** Jurisdictions vary in the manner in which petitions for guardianship and APR are considered. Despite the statutory provisions placing exclusive jurisdiction in the juvenile court, some jurisdictions permit the probate or domestic relations court to decide whether guardianship or APR should be granted. Counsel must be familiar with local practice; however, in light of the D&N court's extensive knowledge about the family, child, and prospective guardian/legal custodian, the GAL should urge the D&N court to exercise its exclusive jurisdiction to make the guardianship/APR decision regarding any child subject to a D&N proceeding.

GUARDIANSHIP

1. Qualifications of Guardian

The guardian must be an adult at least 21 years of age. § 15-14-102(4). The guardian may be a government entity. *In re J.C.T.,* 176 P.3d 726, 733 (Colo. 2007). If termination of parental rights has occurred, the Children's Code allows the court to give preference to certain relatives (grandparent, aunt, uncle, brother, sister, half-sibling, or first cousin of the child) when ordering guardianship. § 19-3-605(1). *See* **Relative and Kinship Placement fact sheet**. The Probate Code sets forth disclosure requirements regarding criminal convictions and civil actions involving the nominee guardian. § 15-14-110.

2. Child's Eligibility and Participation

The child subject to a petition for guardianship must be a minor, defined by the Guardianship Act as "an unemancipated individual who has not attained eighteen years of age." § 15-14-102(8). Minors ages 12 and older must consent to the appointment of the proposed guardian and have the right to nominate a proposed guardian. §§ 15-14-203(2), 15-14-206(1). The court must appoint the guardian nominated by the child, "unless the

court finds the appointment will be contrary to the best interest of the minor." § 15-14-206(1).

3. Petition for Appointment of Guardian

The petition for appointment of guardian may be filed by the minor or a person interested in the welfare of a minor. § 15-14-204(1). A copy of the petition and the notice of hearing on the petition must be served on all of the following:

- ❑ Minors ages 12 years and older, unless the minor is the petitioner.
- ❑ Any person alleged to have had the primary care and custody of the minor during the 60 days before the filing of the petition.
- ❑ Each living parent of the minor or, if there is none, the adult nearest in kinship that can be found.
- ❑ Any person nominated as guardian by the minor if the minor has attained 12 years of age.
- ❑ Any appointee of a parent/guardian.
- ❑ Any guardian or conservator currently acting for the minor in this state or elsewhere.

§ 15-14-205(1).

4. Hearing on Petition

a. Standard of proof. The standard of proof in a guardianship hearing is preponderance of the evidence. *L.L. v. People*, 10 P.3d 1271, 1273 (Colo. 2000).

b. Required findings. The court must give primary consideration to the welfare of the child and take into consideration the religious preferences of the child or of his or her parents whenever practicable. § 19-3-508(5)(a). To enter an order granting guardianship, the court must make the following findings:

- ✓ Appointment of the guardian is in the child's best interests.
- ✓ The parents have given their consent, parental rights have been terminated, the parents are unwilling or unable to exercise their parental rights, or the guardian has died or become incapacitated without making provision for a successor guardian.

§ 15-14-204(2).

5. Legal Effect of Appointment of Guardian

The guardian has the duties and responsibilities of a parent regarding the child's support, care, education, health, and welfare. § 15-14-207(1). The Children's Code specifically provides that a guardian has the duty and authority vested by court action to make major decisions affecting a child, including, but not limited to:

- The authority to consent to marriage, to enlistment in the armed forces, and to medical or surgical treatment.
- The authority to represent a child in legal actions and to make other decisions of substantial legal significance concerning the child.
- The authority to consent to the adoption of a child when the parent-child legal relationship has been terminated by judicial decree. *But see* § 15-14-208(3) (stating that the court may specifically authorize the guardian to consent to the child's adoption).
- The rights and responsibilities of legal custody when legal custody has not been vested in another person, agency, or institution. *See* § 19-1-103(73)(a) (defining "legal custody" as the right to the care, custody, and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, and discipline for a child and, in an emergency, to authorize surgery or other extraordinary care).

§ 19-1-103(60); *see also* § 15-14-208 (Probate Code's enumeration of powers of a guardian).

> ❖❖ **TIP:** Counsel should consider whether to advocate for the guardianship order to address additional issues, such as visits by the parents if parental rights remain intact.

6. Financial Responsibility of Guardian

The guardian is responsible for the child's support, care, education, health, and welfare. § 15-14-207(1).

The guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room and board, as approved by the court. § 15-14-209. In addition, the Probate Code authorizes the guardian to apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian, such as statutory benefits or insur-

ance policy payments. § 15-14-208(2)(a). Colorado, pursuant to the Fostering Connections to Success and Increasing Adoptions Act of 2008, has established a guardianship assistance program for certain guardians defined as "relatives, persons ascribed by the family as having a family-like relationship with the child, or persons who have had a prior significant relationship with the child." § 26-5-110(1); 7.311, *et seq*. *See* **Relative and Kinship Placement fact sheet**.

7. Certification of Order to Probate Court

In cases in which the D&N court enters the guardianship order, the court requires the order to be certified into a probate matter, whether an existing or a new filing. C.R.J.P. 4.4.

> **TIP:** Counsel must be aware of the requirements of the jurisdiction or jurisdictions implicated by the guardianship order. Although the D&N court has jurisdiction to enter the order, the child may be residing in a different county or a previous probate court may have a case open in another county, requiring a certified copy of the guardianship order to be filed in that county.

Upon the filing of the certified guardianship order, the D&N is dismissed. All further action, whether modification or termination of the guardianship, is handled through the probate court.

8. Special Considerations

a. Letters of Guardianship. The nominee guardian must accept the appointment by filing an acceptance with the court. § 15-14-110.

b. Guardian's Report. Colorado Rule of Probate Procedure 31.2 requires that the guardian's report contain all significant information regarding the welfare and care of the minor.

c. Modification. Modification of the guardianship is through the probate court and may be sought by the minor or a person interested in the welfare of the minor. *See* § 15-14-210(2).

d. Termination. The guardianship terminates when the minor is adopted, emancipates, turns 18, or dies or as ordered by the court. § 15-14-210.

> **TIP:** The court must give "special weight" to a parent's decision to terminate the guardianship if the parent's parental rights have not been terminated and the parent consented to the guardianship. *In re D.I.S.*, 249 P.3d 775, 787 (Colo. 2011). In such circumstances, the guardian has the burden to show by a preponderance of the evidence that terminating the guardianship is not in the child's best interests. *Id.*

ALLOCATION OF PARENTAL RESPONSIBILITIES

The D&N court has jurisdiction to allocate parental responsibilities and order parenting time and child support between parents and/or other persons. §§ 19-1-104(4), (6); 19-3-508(1)(a). If a petition involving the same child is currently pending in juvenile court or if the juvenile court has continuing jurisdiction, the issue of legal custody shall be certified to the juvenile court. § 19-1-104(4)(a); *L.A.G.* 912 P.2d at 1390. If a custody order has been previously entered through a domestic relations or other proceeding and that court maintains jurisdiction, the juvenile court may take jurisdiction of the matter. § 19-1-104(4)(b).

1. Required Findings

A custody order may not be made until the child is adjudicated dependent or neglected. § 19-3-507(1)(a); *People in the interest of C.M.*, 116 P.3d 1278, 1283 (Colo. App. 2005). The court must find a compelling reason why it is not in the child's best interests to return home prior to awarding custody to a nonparent. § 19-3-702(4). Parental deficiencies less serious than unfitness may give rise to a compelling reason. *C.M.*, 116 P.3d at 1284. An award of APR to a nonparent does not require a finding that the parent is unfit. *Id.* at 1284.

Under the Children's Code, the juvenile court must fashion a custodial arrangement that serves the best interests of the child and the public. *L.A.G.* 912 P.2d at 1391. The UMDA's goals of encouraging frequent and continuing contact between parents

and child and the sharing of rights and responsibilities by parents are inapplicable in D&N custodial determinations. *Id.* at 1388–1390. The D&N court may, however, consider the best interest factors listed in § 14-10-124(a) as long as the court's determination is focused on the protection and safety of the child and not the "custodial interests" of the parents. *Id.* at 1391–92; *C.M.*, 116 P.3d at 1282 (citation omitted).

2. Legal Effect of Order

The APR order specifies the parties' rights and responsibilities and allocates parenting time and child support. §§ 19-1-104(4), (6).

3. Certification of APR

The APR order must be certified into a domestic relations case by the person with whom the child lives the majority of the time. §§ 19-1-104(6), 14-10-123(1)(d). The order must be filed in the county in which "the child is permanently resident." §§ 19-1-104(6), 14-10-123(1)(d). The certified copy of the order is filed in the existing case involving the child or, if no such case exists, a newly created case. § 14-10-123(1)(d).

4. Special Considerations

a. Grandparent preference. The Children's Code creates a permissive custodial preference in favor of a grandparent if in the best interests of the child and no suitable parent is available. § 19-1-115(1)(a); *C.M.*, 116 P.2d at 1281. The court must consider any "credible evidence" of a grandparent's past conduct of child abuse and neglect. § 19-1-117.7. Such evidence includes medical, school, and police records. *Id. See also* **Relative and Kinship Placement fact sheet**.

b. Modification. Modification of APR is governed by the UMDA, *see* § 14-10-131, and the nuances found therein are beyond the scope of this guide. However, counsel should be aware that statutory presumptions against modifications in parenting time and parental responsibilities may make APR a more stable permanency option than guardianship. *See* §§ 14-10-129, 14-10-131(1).

Appeals
Fact Sheet

Appeals and other forms of review are an important part of dependency and neglect proceedings, with significant implications for due process rights of parties and permanency for children. This fact sheet provides a brief overview of appellate processes and trial-level considerations regarding making and preserving the record for appeal.

- **TIP:** Effective appellate representation is critical for children and parents. GALs may obtain litigation support from the OCR, and the OCR also maintains a list of specialized appellate attorneys for those cases in which the trial-level GAL seeks substitute counsel.

PRESERVING THE RECORD FOR APPEAL

It is essential to make a record in the trial court for purposes of appeal via pleadings, objections, or reports. The general rule is that the appellate court will not entertain arguments presented for the first time on appeal. *See, e.g., Matthews v. Tri-County Water Conservancy District*, 613 P.2d 889, 892 (Colo. 1980); *In re N.A.T.*, 134 P.3d 535, 537 (Colo. App. 2006) (regarding failure to object to allocation of permanent parental responsibilities); *In re M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005); *In re D.P.*, 160 P.3d 351, 354 (Colo. App. 2007) (regarding failure to object to treatment plans).

Certain issues may be raised for the first time during the

appellate process. A party may raise the issue of another party's standing to argue an issue on appeal. *In re J.C.S.*, 169 P.3d 240, 244 (Colo. App. 2007). A trial court's subject-matter jurisdiction over proceedings may also be raised during the appellate process, even if not raised in the trial court. *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986); *In re Marriage of Aikens*, 932 P.2d 863, 866 (Colo. App. 1997). Similarly, a trial court's personal jurisdiction over an appellant may be raised for the first time on appeal. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

Occasionally, the appellate court will consider a non-preserved issue if the error is fundamental or one causing a miscarriage of justice. C.R.E. 103(d)(court is not precluded from taking notice of plain errors affecting substantial rights not brought to the attention of the court); C.A.R. 1(d)(allowing appellate court to take notice of any error in the record); *People ex rel. S.N-V.*, 2011 WL 6425577 at *1 (Colo. App. December 22, 2011)(holding that parent's failure to object to provision of services during dispositional phase did not alter department's burden at termination hearing to prove by clear and convincing evidence that reasonable efforts were unsuccessful at rehabilitating parent); *In re A.E.*, 914 P.2d 534, 539 (Colo. App. 1996)(holding that fundamental error of untimeliness of motion for summary judgment could be raised on appeal despite lack of preservation of issue in trial court).

❖ **TIP:** Counsel should ensure that all orders are drafted with specificity, particularly any order that may be appealed.

FINALITY OF JUDGMENT

An appeal to the Colorado Court of Appeals may only be taken from a final judgment of any district or juvenile court. § 13-4-102; C.A.R. 1(a). The Colorado Supreme Court defines a final judgment as one "that ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding." *Scott v. Scott*, 136 P.3d 892, 895 (Colo. 2006); *People ex rel. E.A.*, 638 P.2d 278, 282 (Colo. 1981).

The following orders have been held to not be final orders:

- A temporary custody order. *People ex rel. M.W.*, 140 P.3d 231, 233 (Colo. App. 2006).
- An adjudication of dependency or neglect without a disposition. *E.A.*, 638 P.2d at 282; *People ex rel. J.M.*, 74 P.3d 475, 477 (Colo. App. 2003).
- An order modifying a treatment plan. *People in the Interest of C.O.A.*, 854 P.2d 797, 801 (Colo. 1993).
- An order determining a child is available for adoption. *People in the Interest of S.M.O.*, 931 P.2d 572, 573 (Colo. App. 1996).
- A permanency plan that did not effectuate a change in permanent custody or guardianship or terminate parental rights. *People in the Interest of H.R.*, 883 P.2d 619, 620 (Colo. App. 1994).
- An order modifying child's out-of-home placement. *People in the Interest of P.L.B.*, 743 P.2d 980, 981 (Colo. App. 1987).
- Orders entered during the temporary protective or shelter stage. *People ex rel. A.E.L.*, 181 P.3d 1186, 1191 (Colo. App. 2008).

C.R.C.P. 54(b) provides an exception to the requirement of a final judgment whereby a trial court may direct the entry of judgment as to one or more, but fewer than all, of the claims or parties. This can be done only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment. This is sometimes referred to "as certifying the order under Rule 54(b)." *See Harding v. Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982)(specifying criteria trial court must consider before case can be certified).

PETITIONS FOR REVIEW OF MAGISTRATE'S ORDERS IN D&N PROCEEDINGS

A petition for review of a magistrate's order must be filed and ruled on by the juvenile court or district court before an appeal may be filed with the Colorado Court of Appeals. The petition for review must be filed within five days after the parties have received notice of the magistrate's ruling. § 19-1-108(5.5). A district or juvenile court may forgive a party's delay in filing the petition

for review upon a showing of excusable neglect. *People in the Interest of I.S.*, 83 P.3d 627, 635–36 (Colo. 2004).

The petition must clearly set forth the grounds relied upon. § 19-1-108(5.5). Once the district or juvenile court has entered an order on the petition for review, the district court's order may be appealed to the Colorado Court of Appeals pursuant to C.A.R. 3.4.

APPEALS TO THE COLORADO COURT OF APPEALS

To appeal a district or juvenile court order in a dependency and neglect proceeding, a notice of appeal and designation of record must be filed with the clerk of the Court of Appeals and an advisory copy served on the clerk of the trial court. C.A.R. 3.4(b)(1).

- **TIP:** The forms for filing an appeal from an order in a dependency and neglect proceeding are available in Word, Excel, and PDF formats at **http://www.courts.state.co.us/Forms**. These forms are only for appeals under C.A.R. 3.4 filed in the Colorado Court of Appeals.

- **TIP:** To protect the confidentiality of children and families, counsel should use initials rather than names of parties in all documents submitted to the Court of Appeals and Colorado Supreme Court. *See* § 19-1-109(1); *Court of Appeals 2008 Policy on the Use of Names of Children and Sexual Assault Victims*.

1. Notice of Appeal (Cross-Appeal) and Designation of Record (Form JDF 545)

The original and five copies of the notice of appeal (cross-appeal) and designation of record (hereafter referred to as "notice/designation") must be filed within 21 days after entry (signing) of the order being appealed. If a motion for post-trial relief is timely filed pursuant to C.R.C.P. 59, the time for filing the notice/designation begins to run upon the entry of an order denying the motion or upon the date the motion is deemed denied under C.R.C.P. 59(j), whichever occurs first. C.A.R. 3.4(b)(1). If the order being appealed is mailed to the parties, then the time for filing the notice/designation runs from the date of mailing. *Id.* The notice/designation must be filed and signed by trial counsel or the pro se appellant. C.A.R. 3.4(d).

The appellant must sign the notice of appeal stating he or she authorized the appeal unless counsel states in the notice/designation that the appellant has specifically authorized the filing of the appeal. *Id.* Counsel unable to file an appeal because appellant is unavailable may file a certificate of diligent search (Form JDF 546) with the trial court clerk. *Id.*

- **TIP:** Rule 3.4(g)(s)(G) requires a copy of adjudication and termination orders.

The record on appeal will include the district court file, all exhibits, and any transcripts ordered by the parties. C.A.R. 3.4(e). The transcripts, including dates, and the identity of the court reporter(s) must be included in the notice/designation. The trial court clerk will prepare the record pursuant to the notice, and the record is due at the Court of Appeals within 42 days of filing of the notice. C.A.R. 3.4(f). Appellant may request an extension of 14 days for good cause. *Id.* If the court reporter cannot prepare the transcripts in a timely manner, the request for extension must include an affidavit by the court reporter stating the reasons for the delay.

- **TIP:** It is appellant's responsibility to ensure that a sufficient record is provided for the appellate court's review. *Nutter v. Wright*, 287 P.2d 655, 655 (Colo. 1955). The record should include transcripts of proceedings, exhibits, jury instructions, and other relevant documents considered by the trial court. Counsel should also attach any documents necessary to show timeliness of appeal.

- **TIP:** In light of the expedited guidelines, counsel should arrange for the preparation of transcripts while waiting for the appealable order to be filed. This gives the court reporter/transcriptionist additional time to prepare the transcripts, which may then be available to appellate counsel prior to filing the petition on appeal.

The party ordering transcripts must serve the court reporter/transcriptionist with the notice/designation and arrange payment with the court reporter/transcriptionist within seven days. C.A.R. 3.4(e)(2), (5). Once a transcript has been ordered, any party may request a copy of the unedited transcript. The unedited transcript may be in electronic form. *Id.*

TIP: If a party is indigent, counsel should file a motion for free transcript to obtain an order granting transcripts paid at state expense from the trial court. Most court reporters will not begin preparing transcripts without payment or an order authorizing state payment. (Check local rules.) State-paid transcripts are all transcripts requested by the district attorney, alternate defense counsel, Office of the Child's Representative, and state-paid respondent's attorneys. CJD 05-03(IV)(B)(2)(a).

Within seven days after service of a notice/designation, any appellee may file a supplemental designation of record (JDF 547) with the Court of Appeals and the trial court clerk. C.A.R 3.4(e)(4). The supplemental designation of record must be served on the court reporter. C.A.R. 3.4(e)(4).

TIP: If a transcript of a hearing is unavailable, a party may prepare the statement of evidence from the best available means, including recollection. Other parties will have 14 days after service of the statement to object or propose amendments. The statement will then be submitted to the trial court for settlement or approval. The trial court clerk then includes the agreement in record. Any party can seek, through the Court of Appeals, to supplement the record. The Court of Appeals can remand to the trial court to hold a hearing to settle the record. C.A.R. 10(c)–(e).

Once a timely appeal has been filed, other parties may file a notice of cross-appeal and designation of record (JDF 545) within seven days of the date on which the notice of appeal was filed or within the 21 days for filing of the notice of appeal, whichever period expires last. C.A.R. 3.4(b)(2).

2. Petition on Appeal (Form JDF 548)

The petition on appeal (hereafter "petition") is filed within 21 days after filing the notice/designation; a seven-day extension may be obtained upon a showing of manifest injustice. C.A.R. 3.4(g)(1), (2). The petition must be no longer than 20 pages or 6,300 words. C.A.R. 3.4(g)(3). It must be in 14-point or larger typeface (captions may be in 12-point). C.A.R. 32(a). The typeface must be plain, roman style, although italics and boldface can be used for emphasis. *Id.* C.A.R. 3.4(g) sets forth the content requirements for the petition, which include a cover page containing the information in C.A.R. 32(d); a statement of the

nature of the case and relief sought; the date the trial court order was entered; a concise statement of material facts (references to page and line numbers in the record are not required); a concise statement of legal issues presented (general conclusory statements are not acceptable); and supporting statutes, case law, or other legal authority, together with a statement of the legal proposition for which the authority stands and applicability to issue presented. Copies of the petition in dependency or neglect, motion to terminate, trial court's order, and rulings on post-trial motions must be attached, along with a certificate of service and a certification of word count by attorney. C.A.R. 3.4(g), 25(e), 32(a)(3).

The appellant must file the signed original in paper form, along with a CD-ROM containing an electronic copy of the petition. C.A.R. 3.4(g)(1); *Colorado Court of Appeals Interim Policy Regarding Electronic Records and Briefs Version 1.0*.

❖ **TIP:** Given the interim nature of the current policy regarding electronic records, counsel should verify current filing requirements.

3. Response to Petition on Appeal (Cross-Appeal) (Form JDF 549)

Appellee has 21 days to file a response to the petition on appeal (cross-appeal) (hereafter, "response"); a seven-day extension may be obtained upon a showing of manifest injustice. C.A.R. 3.4(h)(1), (2). The response must be no longer than 20 pages or 6,300 words. C.A.R. 3.4(h)(3).

The same rules regarding typeface and font that apply to the petition apply to the response. *Id. See also* C.A.R. 23(a), 32(a). Required contents of the response are set forth in C.A.R. 3.4(h) and include a cover page containing the information in C.A.R. 32(d); a concise statement of material facts (references to page and line numbers in record are not necessary); a concise response to legal issues presented in the petition (general conclusory statements are not acceptable); and supporting statutes, case law, or other legal authority in support of response with statement of legal proposition for which authority stands and explanation of its applicability to issues presented. As with the petition, a certificate of service and a certification of word count by attorney are also required. C.A.R. 25(e), 32(a)(3).

If appellee is filing a cross-appeal, copies of petition in dependency or neglect, motion to terminate, trial court's appealable order, and order ruling on post-trial motions must also be attached. C.A.R. 3.4(h)(1)(E).

Appellee must file the signed original in paper form, C.A.R. 3.4(g)(1), along with a CD-ROM containing an electronic copy of the response. C.A.R. 3.4(g)(1); *Colorado Court of Appeals Interim Policy Regarding Electronic Records and Briefs Version 1.0*.

- **TIP:** Given the interim nature of the current policy regarding electronic records, counsel should verify current filing requirements.

4. Supplemental Briefing

C.A.R. 3.4 does not provide appellant the opportunity to reply to responses. However, the Court of Appeals may order supplemental briefing on issues raised by the parties or noticed by the court. C.A.R. 3.4(j)(2). If supplemental briefing is ordered, new counsel may be substituted if requested within seven days after the case is set for supplemental briefing and upon a showing of good cause. C.A.R. 3.4(j)(2).

- **TIP:** Counsel should request supplemental briefing on any novel issues presented by the appeal or other issues requiring thorough legal analysis.

5. Oral Argument

A request for oral argument must be submitted in a separate, appropriately titled document and filed with the Court of Appeals no later than the date on which the party's petition or response is due. C.A.R. 3.4(i). The rule allows 15 minutes each for appellant(s) and appellee(s). The court can order argument on its own motion or dispense with oral argument. *Id.* Although not specified in the rules, additional time for oral argument may be requested and the GAL may request his or her own time.

- **TIP:** When entering the courtroom, counsel should check in with the clerk at the back of the courtroom. Argument is routinely before a three-judge panel and there may be some brief introductory remarks from the bench. The Court of Appeals has timers and warning lights to help counsel keep track of

time. Appellant's counsel may reserve argument time for rebuttal. There is no rebuttal for the appellee. However, the judges may extend the time for argument if they have questions. Since oral argument is recorded and made available online, it is important for counsel to avoid reference to the child or parties by name.

6. Petition for Rehearing

A petition for rehearing must be filed within 14 days after entry of judgment by the Court of Appeals. C.A.R. 3.4(k)(1). A petition for rehearing is not required before filing a petition for writ of certiorari to the Colorado Supreme Court. C.A.R. 3.4(k)(2). The form of the petition for rehearing is governed by C.A.R. 40; specifically, it must comply with C.A.R. 32, not exceed six pages or 1,900 words, and state with particularity the points of law or fact that appellate court has overlooked or misapprehended. A certification of word count and certificate of service are also required. C.A.R. 40(b), 25(e), 32(a). Oral argument will not be permitted on a petition for rehearing. C.A.R. 40(a).

❖ **TIP:** Although neither C.A.R. 3.4(k)(1) nor C.A.R. 40(b) specifies the number of copies to file, counsel should be prepared to file five copies with the Court of Appeals. *See* C.A.R. 27(d) and C.A.R. 31(c).

7. Mandate

A mandate will issue from the Colorado Court of Appeals within 22 days after entry of judgment. C.A.R. 3.4(l). The mandate is stayed pending determination of any petition for rehearing and petition for writ of *certiorari*. *Id.*

WRITS OF *CERTIORARI* TO COLORADO SUPREME COURT

1. Petition for Writ of *Certiorari*

A petition for writ of *certiorari* to the Colorado Supreme Court must be filed within 14 days after the expiration of the time for filing a petition for rehearing or the date of denial of the petition for rehearing. C.A.R. 3.4(k)(2).

The following standards apply to the form, content, and filing of the petition. The petition must not exceed 12 pages or 3,800 words. C.A.R. 53(a). It must comply with the formatting and font requirements set forth in C.A.R. 32. An original and ten copies must be filed, along with certification of service upon all parties and the clerk of the Court of Appeals. C.A.R. 25, 51(a). In addition to service of the petition, counsel must provide notice to parties of the Supreme Court case number. C.A.R. 51(c).

Required contents of the petition are set forth in C.A.R. 53(a) and include an advisory list of issues presented for review; reference to the judgment and decree of the court; a concise statement of grounds for invoking Supreme Court jurisdiction; a concise statement of the case containing matters material to consideration of the issues presented; and a concise and direct argument amplifying the reasons for allowing the writ. The petition must also contain an appendix including the judgment/opinion of the Court of Appeals, as well as the text of any pertinent statute or ordinance. *Id.*

❖ **TIP:** C.A.R. 49 sets forth a list of reasons characteristic of the types of questions on which certiorari will be granted. Although these reasons are neither exclusive nor controlling, counsel should consult with this rule in framing proposed issues for certiorari.

2. Cross-Petition

The cross-petition may be filed by the respondent within 14 days after filing of petition for certiorari. C.A.R. 3.4(k)(2). It must not exceed 12 pages or 3,800 words. C.A.R. 53(b). The contents, font, and formatting requirements are the same as for the petition for certiorari. C.A.R. 3.4(k)(2).

3. Opposition Brief

The opposition brief to the petition for writ of certiorari may be filed by the respondent within 14 days after the filing of the petition for certiorari. C.A.R. 3.4(k)(2). It must not exceed 12 pages or 3,800 words. It must be formatted in compliance with C.A.R. 32. The Colorado Appellate Rules do not set forth any content requirements for the opposition brief.

4. Reply Brief

The petitioner or cross-petitioner may file the reply brief within seven days of service of the opposition brief. C.A.R. 53(d). This brief must not exceed ten pages or 3,150 words. *Id.* It must be formatted in compliance with C.A.R. 32.

TIP: A reply brief is not specifically authorized by C.A.R. 3.4(k)(2), nor does C.A.R. 3.4(k)(2) refer to the reply brief authorized by C.A.R. 53(d). Therefore, counsel should not assume that the Supreme Court will accept a reply brief.

5. Granting of Certiorari

If the petition for certiorari is granted, the Colorado Supreme Court will specify the issues to be briefed. C.A.R. 3.4 is no longer applicable and briefing will be in accordance with the appellate rules applying to any civil appeal.

INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 21

An order that is not final may be appealed to the Colorado Supreme Court when it appears the district court has proceeded without jurisdiction or in excess of its jurisdiction or has abused its discretion. C.A.R. 21(a); *Margolis v. District Court*, 638 P.2d 297, 301 (Colo. 1981); *Hayes v. District Court*, 854 P.2d 1240, 1244 (Colo. 1993). The petitioner can request writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and prohibition. Colo. Const., art. VI, § 3; C.A.R. 21. Rule 21 cannot be used when a direct appeal is available. *In re A.H.*, 216 P.3d 581 (Colo. 2009).

To request relief, a petitioner files a petition for a rule to show cause specifying the relief sought. C.A.R. 21(b). The petition must identify the parties and lower court, the lower court's ruling, why no other adequate remedy is available, issues presented, and necessary facts. C.A.R. 21(e). It must also include names, addresses, and telephone and fax numbers of all parties or their counsel. C.A.R. 21(e)(3). Supporting documents, including a transcript of the applicable proceedings, must be attached. C.A.R. 21(f).

TIP: These supporting documents are the only record the Supreme Court will have because no designation of record is filed in this type of proceeding.

Responsive pleadings are not allowed until the Colorado Supreme Court determines if it will issue a rule to show cause and orders responses. C.A.R. 21(h).

If the Supreme Court issues a rule to show cause, all proceedings in lower court are stayed and a briefing schedule is set, ordering designated parties to respond to the rule to show cause within a time fixed by the court. C.A.R. 21(g)(2). Parties may not request oral argument. C.A.R. 21(l).

After all responses to the rule to show cause are filed, the Supreme Court may discharge the rule or make it absolute in whole or part, with or without issuing an opinion. C.A.R. 21(m).

TIP: The following reference provides a more comprehensive overview of the appellate process: COLORADO APPELLATE HANDBOOK, 3rd ed. (Hon. Janice B. Davison ed., CLE in Colo., Inc., Supp. 2010).

Children in Court Fact Sheet

Across the nation, child welfare and court professionals are increasingly recognizing the importance of involving children and youth in the decision-making process, including encouraging their attendance, when appropriate, at court hearings.

Legal scholars and proponents of children's rights identify several benefits of the presence of children in court and the inclusion of their voice during proceedings, including but not limited to: greater breadth and depth of information; system transparency and accountability for all parties; improved quality of decisions; feelings of empowerment and an improved sense of control for the child; and increased understanding and "buy-in" from the child. *See generally* Jean Jenkins, *"Listen to Me!" Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings*, 46 Fam. Ct. Rev., Vol. 1, 163, 1–69 (2008) (citing Miriam Krinsky, *The Effect of Youth Presence in Dependency Hearings,* Juv. & Fam. Just. Today at 18 (Fall 2006)); Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, ABA Child Law Practice, December 2006; Colorado Judicial Institute, *A Voice of Their Own*, November 2007, *available at* **http://www.coloradojudicialinstitute.org/index.php?s=41**). Consensus is emerging around the principle that "[y]outh must be afforded much greater involvement in the decisions being made about them by judges, attorneys, and agencies." American Bar Association Commission on Youth at Risk, *Chartering a Better Future for Transitioning Foster Youth:*

Report from a National Summit on the Fostering Connections to Success Act, Executive Summary at 5 (2010).

- **TIP:** The GAL must promote a child's voice in court. The appropriateness and extent of child participation must be decided on a case-by-case basis and include the developmentally appropriate consultation with the child and consideration of the child's wishes. CJD 04-06(V)(B). The GAL should also proactively identify and address any barriers to appropriate youth participation in court.

COLORADO LAW REGARDING CHILDREN IN COURT

The Children's Code does not preclude children from participating in D&N proceedings, and it specifically provides that a child may be heard separately when deemed necessary by the court. § 19-1-106(5). Additionally, it provides for notice to children of court hearings and requires the notice of the permanency hearing to set forth the constitutional and legal rights of the child. §§ 19-3-502(7), 19-3-702(2). When appropriate, children must be given an opportunity to participate in permanency planning hearings, and the court at a permanency hearing must consult with the child in an age-appropriate manner. §§ 19-3-702(2), (3.7).

The Children's Code also requires the participation and consent of a child over 12 years of age in matters concerning the child's adoption. *See* § 19-5-203(2). Similarly, the Children's Code creates a rebuttable presumption that relinquishment is not in the best interests of a child 12 and older if the child objects. § 19-5-103(7)(b).

NATIONAL SUPPORT FOR YOUTH INVOLVEMENT IN COURT

Guidelines published by the National Council of Juvenile and Family Court Judges specifically provide that children should be present at all review hearings, permanency hearings, and uncontested adoption hearings. The guidelines indicate that children may be present at all other court hearings. Resource Guidelines: Improving Court Practice in Child Abuse and Neglect

Cases, Guideline 5 VI(D) at 68, VII(D) at 80, and IX(C) at 102 (National Council of Juvenile and Family Court Judges, Reno, Nevada 1995), *available at* **http://www.ncjfcj.org/sites/default/files/resguide.pdf**.

Similarly, American Bar Association (ABA) approved standards for representing children in abuse and neglect cases suggest that children should be present at significant court hearings. *See* Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (approved by the ABA House of Delegates on Feb. 5, 1996), *available at* **http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf**. The National Association of Counsel for Children (NACC) also recognizes the value of youth participation in court proceedings. The NACC recommendations provide that the child should be physically present at court proceedings, noting that although the child's presence may not be required at every hearing, it should not be waived by the child's representative unless the child has already been introduced to the court and his or her presence is not required by law, custom, or practice in that jurisdiction. National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases, Recommendation III(A)(6), commentary (2001), *available at* **http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf**.

SPECIAL CONSIDERATIONS

1. Determining Whether and the Extent to Which Youth Participation Is Appropriate

The following questions can help inform the decision of whether a child should attend court:

a. What are the child's wishes about attending court? Many children will have a definite opinion about whether they want to attend court. As part of their representation, GALs should maintain contact with each child and advise the child about upcoming court proceedings and the opportunity to attend court. *See* CJD 04-06(V)(D)(4)(a) and (5)(b) (regarding GAL's duty to personally interview child and maintain contact with

child); C.J.D. 04-06(V)(B) (regarding GAL's obligation to ascertain child's position); C.R.P.C. 2.1 (regarding attorney's role as advisor).

> **TIP:** If the child or youth does not wish to attend the court hearing, the GAL should encourage him or her to consider writing the court regarding his or her needs and desires. The child or youth must be cautioned that the letter will be provided to all parties.

b. How old is the child? What is the child's developmental level? GALs should determine whether the child will be able to understand information presented during the hearing.

c. Will attending court be harmful to the child? GALs should determine whether the information presented at the hearing will be harmful to the child and whether procedures can be used to minimize the harm. GALs should also consider whether attending court will substantially interfere with the child's important activities or routines and whether any accommodations can be made to minimize the disruption.

d. Who will transport the child? Transportation of the child to and from court may require advance planning and collaboration. However, there are generally many individuals involved in D&N cases, including caseworkers, foster parents, facility staff, and placement agency staff, who are capable of providing transportation. Also, the travel time to and from court can be an excellent opportunity for the GAL to meet with the child and discuss the case and how the child is doing.

2. Preparing the Youth for Court Participation

Proper preparation for court may increase the benefits and impact of youth participation. Such preparation must involve discussion in advance of court about what will happen at the hearing, who will be present at the hearing, and what may be asked of the youth at the hearing. For many children and youth, the opportunity to see the courtroom before the hearing is also important. The child may be brought to court when the courtroom is empty for a tour and an explanation of who will sit where and what will be done. This may also spark the child's

curiosity and lead to a more meaningful discussion about what will occur in court. Introducing the child to the judge may also minimize any anxiety or trepidation the child is experiencing about coming to court.

- **TIP:** Even when it is determined that it is not appropriate for a child to attend court, the opportunity to tour the courthouse and see the courtroom may enhance the child's understanding of the proceeding and the quality of the discussions between the GAL and the child.

3. Protecting and Empowering Youth during the Court Experience

a. Minimizing the discomfort and potential harm of participation. Sometimes it is appropriate to include the child in only specific segments of a court proceeding, allowing the child's voice to be heard without exposing the child to information that would be detrimental to the child's progress in a case or overall best interests. Finding a comfortable waiting area and support person for the child during the time he or she is not in court is important when the child will not attend the entire hearing.

- **TIP:** All parties should have the opportunity to be heard on whether specific information would be harmful to the youth.

b. Maximizing youth empowerment and understanding. Attorneys, judges, and other stakeholders may forget how confusing the terminology and procedures in court may seem to children and families less familiar with the legal process. In the 2007 Colorado Judicial Institute study *A Voice of Their Own* (CJI Study), youth indicated that they could not understand or use "lawyer talk" or "court legal language" and that such language should be simplified for youth. CJI Study at 11. Youth also reported a complete lack of understanding of the placement decision-making process. *Id.* Additionally, youth expressed disappointment in the unpredictability and unreliability of court dates. They discussed planning ahead to miss school or work to attend a court date that eventually was postponed or moved to another date. *Id.* at 13.

- **TIP:** Ask the court to take breaks during the proceeding so the GAL or court can check in with the child to make sure that he

or she understands what is happening. The GAL should also talk to the child after court to ensure he or she understands what happened and to answer questions.

4. *In Camera* Interviews of Children

Section 19-1-106(5) provides that a child may be heard separately when deemed necessary by the court. Section 19-3-702(3.7) requires that the court consult with the child in an age-appropriate manner regarding the child's permanency plan. Colorado case law does not interpret the extent to which these statutes allow *in camera* interviews of children in D&N cases.

In domestic relations proceedings, the court has explicit authority to conduct *in camera* interviews of children to ascertain the child's wishes as to the allocation of parental responsibilities. § 14-10-126(1). The court may permit counsel to be present, and it is directed to record the interview and make it part of the record in the case. *Id.* However, the requirement that the interview be recorded may be waived, either expressly or implicitly. *In re Marriage of Armbeck*, 518 P.2d 300, 361 (Colo. App. 1974).

Some jurisdictions permit *in camera* interviews of children in child protection cases so long as adequate safeguards are in place to preserve the parents' due process protections, such as those found in § 14-10-126. For example, in California a child may testify in chambers if parents' counsel is present and the court finds that the testimony in chambers is necessary to ensure truthfulness, the child is likely to be intimidated in the courtroom, or the child is afraid to testify in the presence of a parent. California Welfare and Institutions Code § 366.26(h)(3)(A). The Michigan Court of Appeals has held that a trial court may not rely on an unrecorded *in camera* interview of a child when considering whether termination of parental rights is in the child's best interests because the procedure violated parents' due process rights, distinguishing the state's Child Custody Act, which permits the use of *in camera* interviews to determine a child's parental preferences in custody disputes, from the juvenile code. *See In re HRC*, 781 N.W.2d 105, 113 (2009).

❖ **TIP:** Section 19-1-106(3) requires that a verbatim record be taken of all proceedings. *In camera* interviews should be recorded. A GAL advocating for an *in camera* interview should seek per-

mission from the other parties prior to the interview and state on the record that the other parties have no objection. If the parties do not consent, the judge should make a record unless waived.

- **TIP:** The GAL should prepare the child for an *in camera* interview and discuss with the child the purpose, use, and any limits on the confidentiality of the interview.

- **TIP:** Both GALs and RPC have an interest in ensuring that the procedures used during the D&N proceeding are consistent with due process principles. Protecting the due process rights of the parent is the ethical obligation of the RPC. The GAL is also bound by ethical restrictions on *ex parte* communications and respecting the rights of others. *See* C.R.P.C. 3.5, 4.4. Further, errors impacting the due process rights of parents during the proceedings may lead to appellate issues, ultimately delaying or disrupting permanency for the children.

Children's Rights Fact Sheet

Children in D&N proceedings are entitled to a number of rights and protections. Even though the child is not a named party on the petition, the D&N proceeding subjects the child to significant limitations on the child's liberty, and the rights and protections applicable to children in D&N proceedings serve as a check and balance on the state's exercise of its *parens patriae* power over the child.

> **TIP:** As attorney for the child's best interests, the GAL must ensure the advancement of the child's rights and fulfillment of protections for the child throughout every phase of the proceeding. The GAL should explain the child's rights and applicable protections to the child in a developmentally appropriate manner.

STATUTORY RIGHTS OF DEPENDENT CHILDREN

1. Representation

The court is required to appoint a GAL in all D&N cases to represent the child's interests. §§ 19-1-111(1), 19-3-203(1). The GAL has the right to participate in all proceedings as a party. § 19-1-111(3). The GAL's determination of what is in a child's best interests must include consultation with the child in a developmentally appropriate manner, and the GAL must inform the court of the child's position on all matters before the court

unless specifically directed not to do so by the child or the child's position is not ascertainable due to the child's developmental level. CJD 04-06(V)(B), (D)(1). Additionally, the court has the discretion to appoint counsel if deemed necessary to protect the interests of the child. § 19-1-105(2).

2. Notice

Notice of all hearings and reviews must be provided to foster parents, pre-adoptive parents, or relatives with whom a child is placed. § 19-3-502(7). That person is required to provide notice to the child of all hearings and reviews. *Id.*

3. Participation

The child may be heard separately when deemed necessary by the court. § 19-1-106(5). If appropriate, a child may participate in a permanency hearing or action. § 19-3-702(1.5). The notice of a permanency hearing shall set forth the constitutional and legal rights of the child. § 19-3-702(2). Additionally, the court is directed to consult with the child in an age-appropriate manner. § 19-3-702(3.7). *See* **Children in Court fact sheet**.

4. Object to Relinquishment, Termination, and Adoption

A child in a relinquishment proceeding is entitled to counseling if deemed appropriate by the court. § 19-5-103(1)(a). An objection to relinquishment by a child 12 years or older creates a rebuttable presumption that relinquishment is not in the child's best interests. § 19-5-103(7)(b).

An objection to termination of parental rights by a child who is 12 years of age or older may provide cause for failure to file a termination motion. § 19-3-702(5)(a)(II).

A child who is 12 years of age or older may prevent his or her adoption by objecting to the adoption. § 19-5-203(2).

5. Hearing Procedures

The child is entitled to have persons he or she wishes to be present at hearings, including those hearings in which the public is excluded. § 19-1-106(2). The child is entitled to have the author of the dispositional report "appear as a witness and

be subject to both direct and cross-examination." § 19-1-107(2). The court shall inform the child of the right of cross-examination concerning any written report or other material relating to the child's metal, physical, and social history. § 19-1-107(4).

6. Treatment Plan

In EPP cases, the child is entitled to a list of services that are specific to the child's needs and the needs of the child's family. § 19-1-107(2.5). The family is entitled to provide input or participate in the development of an individual case plan; family participation should include participation by the child. *See* § 19-3-209; *see also* 7.301.22 (requiring youth involvement in case planning or documentation of efforts to include youth in planning and reasons for inability to do so).

7. Confidentiality

The name and address or any other identifying information of any child in reports of child abuse or neglect shall be confidential and shall not be public information. § 19-1-307(1)(a). Disclosure of such information may be authorized by a court for good cause. § 19-1-307(1)(a).

8. Visits with Siblings

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 the visit within a reasonable amount of time and document the visit. § 19-1-128(1). The department is required to arrange regular visits with sufficient frequency and duration to promote continuity in the siblings' relationship. § 19-1-128(2). The department may deny a visit if it is not in the best interests of one or all siblings. § 19-1-128(3). However, the department must document the reasons for making the determination that visitation is not in the best interests of one or all siblings. § 19-1-128(3).

9. Remain under the Jurisdiction of the Court until Age 21

Jurisdiction over a dependent or neglected child continues until the child becomes 21 years of age unless terminated ear-

lier by court order. § 19-3-205(1). The determination to maintain jurisdiction is made based on careful consideration of all circumstances of the case. The court must consider individual circumstances of the youth, including the youth's mental condition and whether the youth is engaged in any of the following activities:

- Completing secondary education or enrolled in a program leading to an equivalent credential.
- Enrolled in a postsecondary or vocational education institution.
- Participating in a program or activity designed to promote or remove barriers to employment.
- Employed for at least eight hours per month.

§ 19-3-205(2)(a), (b).

10. Medicaid

Under the federal Chafee Foster Care Independence Act, states have the option to expand Medicaid eligibility to transitioning youth who were in foster care on their 18th birthday, are under age 21, and do not exceed income and asset levels as determined by the state. In Colorado, youth in foster care on their 18th birthday are entitled to Medicaid coverage until their 21st birthday. If the case is closed prior to the youth's 18th birthday, the youth must be advised that he or she will lose this eligibility. § 25.5-5-201(1)(n).

11. Protections against Identity Theft

Youth ages 16 to 18 in foster care are entitled to a free credit report. § 19-7-102(1). If the credit report shows evidence of possible identity theft, it must be reported to the court and the matter must be referred to an agency on the DHS's referral list for remedial action. If the credit report shows evidence of possible identity theft, the GAL must advise the youth of possible consequences and options to address the possible identity theft. The GAL's advisement must include the youth's right to report the matter to law enforcement and seek possible prosecution of the offender.

PROTECTIONS FOR DEPENDENT OR NEGLECTED CHILDREN IN FOSTER CARE

In 2011, the General Assembly set forth a legislative declaration enumerating a number of protections for children in foster care, the custody of the division of youth corrections, or a state mental hospital. *See* SB 11-120. These protections are codified in § 19-7-101:

a) To receive appropriate and reasonable adult guidance, support, and supervision in a safe, healthy, and comfortable environment where he or she is treated with respect and dignity. *See also* 7.708.33(A).

b) To be free from physical, sexual, emotional, or other abuse or corporal punishment. *See also* 7.708.33(A)(5).

c) To receive adequate and healthy food, adequate clothing, and an adequate allowance, as appropriate. *See also* 7.708.33(A), 7.708.42, 7.708.68.

d) To receive medical, dental, vision, and mental health services as needed. *See also* 7.708.41, 7.708.63.

e) To be free of the administration of prescription medication or other chemical substances, unless authorized by a physician. *See also* 7.708.34, 7.708.41.

f) To be free to contact those persons working on his or her behalf, including but not limited to case workers, attorneys, foster youth advocates and supporters, court-appointed special advocates, and probation officers. *See also* 7.708.33.

g) To be free to contact the child protection ombudsman, county department of social services, or the department of human services regarding any questions, concerns, or violations of the rights set forth in this article; to speak to representatives of those offices privately; and to be free from threats or punishment for making complaints.

h) As appropriate, to make and receive confidential telephone calls and to send and receive unopened mail in accordance with his or her permanency goals. *See also* 7.708.33.

i) To be free to attend religious services and activities. *See also* 7.708.37.

j) To be allowed to maintain an emancipation bank account and manage personal income, consistent with the youth's age and developmental level, unless prohibited by his or her case plan.

k) To be free from being abandoned or locked in a room. *See also* 7.708.35(F)(18).

l) To receive an appropriate education, have access to transportation, and participate in extracurricular, cultural, and personal enrichment activities consistent with the youth's age and developmental level. *See also* 7.708.38, 7.708.39, 7.708.46.

m) As appropriate, to be free to work and develop job skills that are in accordance with the youth's permanency goals. *See also* 7.708.68.

n) As appropriate, to be free to have social contacts with people outside the foster care system, such as teachers, church members, mentors, and friends, in accordance with the youth's permanency goals. *See also* 7.708.39.

o) To be free to attend independent living classes if he or she meets program and age requirements.

p) To consult with the court conducting the youth's permanency hearing, in an age-appropriate manner, regarding the youth's permanency plan, pursuant to § 19-3-702 (3.7). *See also* **Permanency Hearing chapter; Children in Court fact sheet**.

q) To have a safe place to store personal belongings.

r) As appropriate to his or her age and developmental level, to be allowed to participate in and review his or her own case plan, if he or she is 12 years of age or older, and to receive information about his or her out-of-home placement and case plan, including being informed of any changes to the case plan. *See also* 7.301.22.

s) To confidentiality of all juvenile court records, consistent with existing law. *See also* 7.708.69.

t) To have fair and equal access to available services, placement, care, treatment, and benefits based on his or her treatment plan and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group, national origin, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. *See also* 7.708.39.

u) At 16 years of age or older, to have access to existing information regarding the educational options available to him or her, including, but not limited to, the course work necessary for vocational and postsecondary educational programs and information regarding financial aid available for postsecondary education.

v) To have school stability that presumes the youth will remain in the school in which he or she is enrolled at the time of placement, unless remaining in that school is not in his or her best interests. *See also* **Education Law: Rights and Issues fact sheet**.

w) To remain in the custody of his or her parent or legal guardian unless his or her welfare and safety or the protection of the public would be otherwise endangered, and the right that the court proceed with all possible speed to a legal determination that will serve his or her best interests pursuant to § 19-1-102.

x) To be placed in a home where the foster caregiver is aware of and understands the youth's unique history as it relates to his or her care.

y) To receive effective case management and planning that will prioritize the safe return of the youth to his or her family or move the youth on to other forms of permanent placement.

z) As appropriate to the youth's developmental level and if he or she is 12 years of age or older, to be involved in meetings at which decisions are made about his or her future and to have the child welfare agency bring together his or her family group and other supporters to decision-making meetings at which the group creates a plan for the youth's future.

aa) To placement in the least restrictive setting appropriate to the youth's needs.

ab) To have a GAL appointed to represent the youth's best interests.

ac) To live with or be visited by his or her siblings.

In addition, the Children's Code promotes participation in extracurricular activities by foster care youth by requiring foster parents and group home parents or group center administrators to make a reasonable effort to allow a youth in their care to participate in extracurricular, cultural, educational, work-related, and personal enrichment activities. § 19-7-103(1).

Crossover Youth: Children Involved in Both the D&N and Delinquency Systems Fact Sheet

When a dependent or neglected child crosses over into the delinquency system by being formally accused of a crime, the legislative intent of how the child—now "juvenile"—is treated changes. Protection of the child and preservation of the family unit are primary goals in the dependency and neglect system. § 19-3-100.5(1). The juvenile justice system holds paramount public safety and requires consideration of the best interests of the juvenile, the victim, and the community and the provision of appropriate treatment to reduce the recidivism rate and assist the juvenile in becoming a productive member of society. § 19-2-102(1).

> **TIP:** A child in the delinquency system has expanded constitutional rights and is subjected to a formalized process with severe consequences, which the GAL needs to be able to explain to the child and take into consideration when acting and making recommendations in the child's best interests. The GAL's responsibility, as the legal representative of the child's best interests, is to ensure consideration of those interests throughout the proceeding.

APPOINTMENT, ROLE, AND RESPONSIBILITIES OF THE GAL

Appointment of a GAL in a delinquency case is discretionary. § 19-1-111(2). The bases for appointment of a GAL include: (1)

failure to appear by a parent or legal guardian of the child; (2) conflict of interest between the child and the parent or guardian; and (3) the appointment is necessary to serve the best interests of the child. Such findings are included in the court's order of appointment. *Id.* Unlike the GAL in the D&N case, the GAL in the delinquency case does not have the right to participate as a party in the proceedings. § 19-1-111(3). As in the D&N, the GAL advocates for the child's best interests.

- **TIP:** Whether the delinquency court will appoint the D&N GAL to the delinquency matters varies throughout the state. A GAL appointed in a D&N proceeding, as appropriate, should provide current information and input to the delinquency court. The D&N GAL should stay informed of the delinquency proceedings.

- **TIP:** Jurisdictions vary in how they seek recommendations and input from the GAL. Although some jurisdictions view the lack of party status as an absolute preclusion to filing any motion, other jurisdictions allow the GAL to file motions concerning treatment issues, such as motions for protective orders or evaluations. The GAL also has a role in making recommendations regarding placement and raising any questions concerning the juvenile's competency to proceed. The GAL is not defense counsel, and the GAL must ensure the juvenile understands the GAL's unique role and the corresponding limitations on confidentiality. *People v. Gabriesheski*, 262 P.3d 653, 660 (Colo. 2011); CJD 04-06 (V)(B). Given recent case law holding that the GAL in a D&N case can effectuate a waiver of the therapist-patient privilege, the GAL should be extremely cautious about disclosing any information obtained from the child's therapist. *See People ex rel. L.A.N.* (Colo. App. 2011), *petition for certiorari granted, L.A.N. v. L.M.B.* (Colo. 2012). The GAL should always keep in mind that advocating for the child's best interests includes ensuring the protection of his or her legal and constitutional rights.

CONFESSIONS, SEARCH, AND SEIZURE ISSUES

Juveniles accused of crimes are afforded the protections of the Fourth, Fifth, and Sixth Amendments of the United States Constitution. The Children's Code additionally provides them with special statutory safeguards.

Pursuant to § 19-2-511, no statement or admission of a juvenile obtained as a result of custodial interrogation by law enforcement officers is admissible in court against the juvenile unless the juvenile's parent, guardian, or legal custodian is present during the interrogation and the juvenile and the parent, guardian, or legal custodian are advised of the juvenile's right to remain silent and be represented by an attorney during the interrogation. Case law establishes that "mere presence" does not meet the statutory provisions; § 19-2-511 requires that a juvenile is advised and counseled concerning the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel by someone whose interests are consistent with those of the child. *People v. S.M.D.,* 864 P.2d 1103, 1106 (Colo. 1994). A violation of the statutory protections of § 19-2-511 trigger the Fourth Amendment protections against unlawful searches. *See People in the Interest of R.A.,* 937 P.2d 731, 737–38 (Colo. 1997); *People in the Interest of S.J.*, 778 P.2d 1384, 1387 (Colo. 1989). *See also* § 19-2-506.

The adult present with the juvenile during the § 19-2-511 advisement and any questioning is expected to act "on the side" of the juvenile and have the juvenile's best interests uppermost in mind; if such person is neutral or hostile, the juvenile is deprived of the protection afforded by the statute. *People v. Maes*, 571 P.2d 305, 306 (Colo. 1977); *People v. Legler*, 969 P.2d 691, 695–96 (Colo. 1998). The GAL is sometimes called on to act in place of a parent in these situations and may act in this representative capacity contemplated by the statute. *S.M.D.*, 864 P.2d at 1106.

❖ **TIP:** The GAL should not waive the juvenile's right to consent or not consent to a search; nor should the GAL waive the juvenile's right to remain silent or to have an attorney present during questioning. Although the Colorado Supreme Court in *S.M.D.*, 864 P.2d at 1108 n.8, held that the GAL could act in the place of a parent as contemplated by § 19-2-511, the court did not address whether the GAL had provided effective representation to the best interests of the 14-year-old by allowing him to be questioned regarding a murder for which he was the prime suspect.

BASICS OF THE DELINQUENCY PROCESS

1. Temporary Custody Procedures and Detention Hearing

A juvenile may be taken into temporary custody by (1) a law enforcement officer executing a warrant or having reasonable grounds to believe the juvenile has committed a delinquent act or (2) a probation officer who has reasonable grounds to believe the juvenile has committed a delinquent act or violated the terms and conditions of probation. §§ 19-2-502, 503. Once the juvenile is taken into temporary custody, a parent, guardian, or legal custodian must be notified. § 19-2-507(1). When the juvenile is subject to an ongoing D&N case, the GAL should also be apprised of the temporary custody. *See* § 19-3-203(2).

If the juvenile is placed in detention or a shelter facility, the juvenile is entitled to a detention hearing within 48 working hours to determine whether further detention is warranted and to define the conditions of release, if appropriate. §§ 19-2-508(2), (3). The detention hearing is a two-part process. First, the court must determine whether there is reason to hold or detain the juvenile. If reason to hold is established, the court must address whether the juvenile should be detained further based on whether the court is satisfied, from the information provided, that the juvenile is a danger to him- or herself or the community. Pursuant to § 19-2-508(3)(a)(III), there is a rebuttable presumption that the juvenile is a danger to him- or herself or the community if (1) the juvenile is alleged to have committed a crime of violence; (2) the juvenile is alleged to have used, possessed, or threatened to use a firearm during the commission of a felony against a person; or (3) the juvenile is alleged to have possessed a dangerous or illegal weapon. Provisions regarding bail are set forth at § 19-2-509.

❖ **TIP:** The determinations made at a detention hearing may impact placement, treatment, and reunification goals set in the D&N proceeding. It is helpful for the D&N GAL to appear at the detention hearing to ensure that consideration of the D&N case informs the court's determination of appropriate pretrial release conditions. The GAL can and should make recommendations regarding detention, placement, and conditions of release, as well as treatment modalities and safety plans reflective of those being utilized in the D&N case. In

presenting any recommendations, the GAL must be cognizant of limitations on confidentiality and take care not to disclose information that is not in the best interests of the juvenile or that could open the door to disclosure of such information. *See Gabriesheski*, 262 P.3d at 660; CJD 04-06(V)(B). The GAL also must be careful not to effectuate a waiver of the patient-therapist privilege or any other privileges. *See People ex rel. L.A.N.* (Colo. App. 2011), *petition for certiorari granted, L.A.N. v. L.M.B.* (Colo. 2012).

Although some districts have allowed detention hearings to proceed without representation by defense counsel, the United States Supreme Court has raised a significant question regarding the constitutionality of this practice. *See Rothgery v. Gillespie County, TX*, 544 U.S. 191, 213, 128 S.Ct. 2578, 2592 (2008) (finding the initial appearance of a defendant before a judicial officer, in which the defendant is advised of charges and subject to potential restrictions on liberty, marks the initiation of adversary judicial proceedings and triggers attachment of the Sixth Amendment right to counsel). Although the GAL should ensure that the juvenile is represented by counsel at the detention hearing, the GAL cannot act as defense counsel at this hearing.

- **TIP:** It is helpful for the GAL to understand the filing deadlines for detained juveniles, particularly those who are not represented by counsel. When the court orders further detention or pretrial release, the petition in delinquency must be filed within 72 working hours. § 19-1-512; C.R.J.P. 3.1. If the petition is not timely filed, the remedy is release of the juvenile. C.R.J.P. 3.1(b). A petition to revoke or modify probation must be filed within five working days from the date the juvenile is taken into custody, although it is usually filed at the detention hearing. The hearing on the revocation petition must be set within 14 days from the filing of the petition if the juvenile is in custody. If a violation of probation is proven, the sentencing hearing must be held within seven working days. C.R.J.P. 3.6; C.R.Crim.P. 32(f); *People v. D.M.*, 650 P.2d 1350 (Colo. 1982). Further, any juvenile who is held without bail or whose bail is revoked or increased and who remains in custody or detention must be tried on the charges within 60 days after entry of such order or entry of the plea, whichever is earlier. § 19-2-509(4)(b).

Evaluations are often ordered as conditions of bond or release. Although the courts have authority to order some evaluations as

conditions of bond or release pursuant to the Children's Code, the juvenile cannot be compelled to submit to such evaluations in violation of the juvenile's Fifth Amendment rights against self-incrimination. *People in the Interest of A.D.G.*, 895 P.2d 1067, 1072–73 (Colo. App. 1994).

> **TIP:** When evaluations are ordered, the GAL should advocate for orders protecting statements made by the juvenile during such evaluations from being used against the juvenile in the delinquency proceeding or any other delinquency/criminal proceeding. Although § 19-3-207(2.5) applies to D&N proceedings, § 19-1-114 has been held to give the court authority to enter protective orders broader than those specifically enumerated in the statute. *See People v. District Court*, 731 P.2d 652, 657 (Colo. 1987). Additionally, a GAL who is also the D&N GAL can facilitate protection of the juvenile's statements by ensuring that the D&N court has ordered the requested evaluations, thus invoking the protection of § 19-3-207(2.5).
>
> Ultimately, it is the function of the defense attorney—not the GAL—to decide whether to consent to such evaluations in the first instance. Given the significant limitations of § 19-3-207, *see* **§ 19-3-207 fact sheet**, and the potential limitations on any other protective orders issued by the court, it may not be in the juvenile's legal interests to participate in an evaluation. Whether the benefits of an evaluation outweigh its potential negative consequences may require a confidential discussion regarding what statements might be shared during the evaluation and is ultimately a decision for the juvenile to make, in consultation with his or her defense counsel.

2. Plea and Pretrial Hearings

At the juvenile's plea hearing or first appearance, the juvenile is advised of his or her legal rights pursuant to C.R.J.P. 3 and § 19-2-706. At this hearing, the juvenile is asked if he or she wants the assistance of counsel. Counsel for the juvenile may be appointed if the family is without sufficient financial means pursuant to the Colorado Supreme Court guidelines. § 19-2-706(2)(a). Counsel for the juvenile also may be appointed for the juvenile if the juvenile requests the appointment of counsel and the juvenile's parents refuse to hire counsel. *Id.* Unless the parents establish good cause, the parents will be required to reimburse the state. § 19-2-706(2)(b). *See also* CJD 04-04 *for procedures relat-*

ing to appointments based on indigency/parental refusal. The court also has discretion to appoint counsel absent a request from the juvenile if the court deems such representation necessary to protect the juvenile's interests. § 19-2-706(2)(c).

- **TIP:** Some juveniles waive counsel without understanding the role of counsel or what an attorney can do for them and without consulting with an informed adult. It is questionable whether under these circumstances the waiver is knowingly and intelligently made, and the GAL should request appointment of counsel to protect the juvenile's legal interests.

At the pretrial hearing, the juvenile has a number of options: (1) accept a plea bargain; (2) set the case for preliminary hearing if eligible pursuant to § 19-2-705; or (3) plead not guilty and set the case for trial. Issues regarding competency, developmental disability, and mental illness may also be raised at this stage. *See* **Special Considerations section**, *infra*.

- **TIP:** Before the juvenile accepts the plea bargain, the GAL must determine whether the juvenile understands his or her rights and options, as well as the possible consequences of the plea. Many courts will ask the GAL whether the GAL believes the plea agreement serves the best interests of the juvenile, and the GAL must bring any issues regarding the knowingness/voluntariness of the agreement to the court's attention. It is not the role of the GAL to discuss the facts of the case or analyze the merits of the plea bargain from the perspective of defense counsel, and the GAL should not question or discuss the facts of the case with the juvenile. However, consideration of whether a factual basis exists for the plea is part of the GAL's assessment of whether a plea bargain is in a juvenile's best interests, and the GAL does have the ability to review the discovery to make this determination. Consideration of whether the plea bargain is in the juvenile's best interests and is knowingly and voluntarily made also requires a determination that the juvenile understands the long-term consequences of the plea agreement. This is particularly true in cases involving sex offenses and registration on the sex offender registry, drug or gun charges potentially impacting eligibility for student loans or housing assistance, offenses with potential impact on immigration status, and charges requiring mandatory sentences.

3. Adjudicatory Trial

It is at the adjudicatory trial that the determination is made whether the allegations against the juvenile are supported by evidence beyond a reasonable doubt. § 19-2-804(1). The majority of adjudicatory trials in a delinquency proceeding are held in front of a judge or magistrate; however, the juvenile or district attorney may demand a trial by a jury of six peers if the juvenile is being charged as an aggravated juvenile offender pursuant to § 19-2-516 or with a crime of violence as defined in § 18-1.3-406. *See* § 19-2-107(1). The court also has discretion to order a jury trial for any felony charges in a juvenile delinquency proceeding. §§ 19-2-107(1), (2). A jury trial must be demanded, or else it is deemed waived. § 19-2-107(3).

TIP: The GAL does not participate in the adjudicatory hearing. However, because a parent is allowed to sit with the juvenile during the trial, the GAL may also sit at counsel table as guardian for the purpose of the proceedings. At the adjudicatory hearing, the juvenile will be advised by the court regarding the right to testify or not to testify. § 19-2-802(3). The GAL may be called upon by the court to affirm that the juvenile understands these rights and is making a knowing, intelligent, and voluntary decision. Although the GAL should discuss with the juvenile the decision to testify and ensure the juvenile's decision is knowing and voluntary, no matter what the GAL or defense counsel advises, the choice to testify or remain silent is always that of the juvenile.

4. Sentencing, Special Offenders, Transfer, and Direct Filing

The juvenile may be sentenced directly after pleading or being found guilty or within 45 days thereafter. § 19-2-804(3). Pursuant to § 19-2-905, the probation officer does an investigation and makes recommendations via written pre-sentence investigation report (PSI) after considering a number of factors, including but not limited to the nature of the offense; the victim impact statement; the juvenile's home, school, and community adjustment; and the juvenile's prior record. The GAL may be called on to make sentencing recommendations and provide information regarding the status of the D&N proceeding. The GAL should be provided a copy of the PSI.

Section 19-2-907 sets forth a number of sentencing options for the court, ranging from probation for up to two years to commitment to the Division of Youth Corrections (DYC) of the Department of Human Services for a determinate period of two years. Conditions of probation may include a detention sentence not to exceed 45 days, § 19-2-911; restitution, § 19-2-918; community service, § 19-2-914; anger management or therapy, § 19-2-918.5(4); placement with a relative, § 19-2-912; placement in the custody of the department or a child placement agency, § 19-2-915; or placement in a hospital or other suitable facility, § 19-2-916. §§ 19-2-907, 19-2-913. The following special offender sentencing categories may enhance the juvenile's sentence: (1) mandatory sentence offender or three adjudications, § 19-2-516(1)(a); (2) repeat juvenile offender for at least one prior adjudication and a subsequent adjudication for a felony, § 19-2-516(2); and (3) violent juvenile offender or an adjudication for a crime of violence, § 19-2-515(3). *See* § 19-2-908. The Children's Code provides for placement out of the home or commitment for not less than one year unless the court finds that an alternative or shorter sentence would be more appropriate; specific circumstances will preclude the court from making such a determination. *See id.* The district attorney does not have to plead and prove the special offender status. *People v. J.J.H.*, 17 P.3d 159, 164 (Colo. 2001).

❖ **TIP:** Depending on the circumstances specific to the case, the GAL may request that the D&N remain open and be held in abeyance while the juvenile serves his or her commitment through DYC. Further reviews are conducted administratively in the delinquency case by DYC, which must provide the court with information concerning the committed youth. *See* §§ 19-2-921(1)(b), (3.5), and (5)(a). The GAL may request that DYC provide notice to the department when the juvenile's commitment is nearing completion to ensure appropriate placement planning.

SPECIAL CONSIDERATIONS

1. Competency

Concerns about a juvenile's competency to proceed should be raised at the earliest possible time in the proceedings. § 19-2-

1301 *et seq*. "Competency" is defined as whether the juvenile has a mental or developmental disability that prevents the juvenile from having (1) sufficient present ability to consult with his or her attorney to assist in the defense or (2) a rational and factual understanding of the proceedings. § 16-8.5-101(4). A juvenile who is not competent to proceed may not be tried or sentenced. § 19-2-1301(2).

A prosecutor, probation officer, GAL, defense attorney, parent, or legal guardian who has reason to believe the juvenile is incompetent to proceed must raise the question of the juvenile's competency. § 19-2-1301(3). The court may also initiate competency proceedings upon its own motion. § 19-2-1301(3)(a).

Once the issue of the juvenile's competency is raised, the court must make a preliminary determination regarding whether the juvenile is competent to proceed. § 19-2-1302(1). If the court believes it has inadequate information to make that determination, it must order a competency evaluation. *Id.* The prosecuting attorney and defense counsel must be immediately notified of the court's preliminary determination, and either attorney may request a hearing on the preliminary finding. § 19-2-1302(2). If the request for the hearing is timely (i.e., filed within ten days or within a time period extended by the court for good cause), the court must hold a competency hearing at which it will make a final determination regarding the juvenile's competency to proceed. *Id.* If a competency evaluation has not previously been ordered and the court determines that adequate mental health information is not available, it must order a competency evaluation. *Id.* The burden of proof is on the party asserting incompetency. *Id.*

Any competency evaluation of the juvenile must be done in the least restrictive environment; considerations of public safety and the best interests of the juvenile inform this determination. § 19-2-1302(4)(a). Specific requirements govern which psychiatrists and psychologists are eligible to perform competency evaluations. § 19-2-1302(4)(b). The evaluation must contain an opinion on whether the juvenile is competent to proceed and, if not, whether the juvenile may be restored to competency. § 19-2-1302(4)(c).

If the juvenile is found not competent to proceed, the court must stay the proceedings and order competency restoration

services unless the court makes specific findings that recommended restoration services are not justified. § 19-2-1303(2). If restoration services are not justified, the court must determine whether a management plan is necessary, taking into account the public safety and the best interests of the juvenile. § 19-2-1303(3)(a). If a management plan is unnecessary, the court may continue any treatment or plan already in place for the juvenile. *Id.* If a management plan is necessary, the plan may include placement, treatment, informed supervision, institution of a guardianship petition, or any other appropriate remedy. *Id.* The management plan may not last longer than the maximum possible sentence or, if good cause is found to extend the management plan, beyond the date the juvenile reaches the age of 21. § 19-2-1303(3). As with the competency examination, the management plan involving placement of the juvenile must be in the least restrictive environment. *Id.*

If the court finds that the juvenile's competency is restorable, progress toward competency must be reviewed every 90 days, and the court may not retain jurisdiction longer than the maximum possible sentence for the offense charged. *Id.* Although the court may find good cause to retain jurisdiction for a longer period of time, it may not retain jurisdiction once the juvenile reaches the age of 21. *Id.* A restoration hearing may be ordered pursuant to § 19-2-1304. At the restoration hearing, the burden of proof is on the party asserting that the juvenile is competent. § 19-2-1304. If the juvenile is deemed incompetent, the court may continue restoration efforts, if appropriate, or order a management plan. § 19-2-1305(2). If the juvenile is deemed restored to competency, the court shall resume the proceedings. § 19-2-1305(1).

When competency is raised and the juvenile is not represented by counsel, the court may appoint both counsel and a GAL for the juvenile. § 19-2-1301(4).

> **TIP:** The GAL plays an important role in identifying any issues regarding the juvenile's competency to proceed, raising such issues in front of the court, and advocating for placement of the juvenile in the least restrictive environment. The GAL must also be vigilant in protecting the confidentiality of the juvenile's mental health and treatment records and should be cautious to not effectuate any waivers of treatment records in

the D&N case that would compromise the juvenile's privacy interests or be harmful to the juvenile's defense in the delinquency proceedings.

2. Juveniles with Developmental Disabilities

Any juvenile being held in a detention or shelter that appears to be developmentally disabled must be referred to the nearest community-centered board for an eligibility determination. § 19-2-508(3)(b)(I).

TIP: The GAL should inform the court of any issues regarding a juvenile's potential developmental disability as soon as possible. Nothing in the statute precludes the court from making a referral to the community-centered board for juveniles who are not in detention. Services offered through the community-centered board for eligible juveniles may play a critical role in promoting safe placement in the community and assist juveniles in the successful transition to adulthood.

3. Juveniles with Mental Illness or Who Would Benefit from Mental Health Services

A juvenile being held in detention who may have a mental illness must be referred for a mental health prescreening. § 19-2-508(3)(b)(I). Any screening that takes place in a mental health hospital must be completed within the time frames for a detention hearing. *Id.* Similarly, a juvenile detained pursuant to court order who appears to have a mental illness must receive a prescreening in a timely manner. § 19-2-508(3)(b)(II).

A juvenile also can be referred for mental health services pursuant to § 19-2-710.

4. Sex Offenses

If the juvenile is adjudicated for a sex offense, the juvenile will be required to register as a sex offender and participate in treatment and follow probationary conditions applicable to sex offenders. § 16-22-101 *et seq*.

TIP: Juvenile proceedings involving allegations of sex offenses, possibly more so than any other juvenile proceeding, present lifelong consequences for a juvenile and serious potential ramifications for future employment, housing, and other

opportunities. The GAL must be vigilant in such cases to make sure that the juvenile's best interests are protected at each and every stage of the proceedings. Information shared by the GAL about the juvenile and the D&N proceeding may be pivotal in resolving the charges in a manner that will allow a juvenile to receive needed treatment without facing registration as a sex offender. *See, e.g.,* § 19-2-703 (regarding informal adjustment). The GAL must also be sure that the juvenile fully understands the consequences of any plea agreement; for example, although a deferred adjudication may sound like a good alternative to a trial on the merits, the juvenile is subject to registration as a sex offender, *see* § 16-22-103(4), and must understand that a technical violation of one of the conditions of the deferred adjudication will result in an adjudication of the juvenile as a sex offender without an opportunity for a trial on the merits of the case, affecting the time frames and eligibility to petition to remove his or her name from the sex offender registry. *See* §§ 16-22-104(1)(d), (e), (1.3); 19-2-709(4).

Although § 19-3-207 protections should apply as long as the juvenile is involved in a court-ordered treatment plan through the D&N, the GAL should consider requesting protective orders in the delinquency case if the D&N may close before the juvenile successfully completes treatment. Although the statute on its face does not specifically apply to delinquency proceedings, some courts will issue such orders, which may allow the juvenile to more freely disclose in treatment without the risk of self-incrimination. The GAL should make sure the juvenile understands the protections and limitations of any protective orders. *See* **§ 19-3-207 fact sheet**.

With regard to sentencing in such cases, the GAL should advocate for a sentence that promotes successful participation in treatment. Given that successful completion of a sentence is a prerequisite to petitioning the court for removal from the registry, *see* § 16-22-113(e), it is important that the terms and conditions of the sentence do not set up the juvenile for failure. The GAL should also make sure that the juvenile understands the possibility of petitioning the court to deregister as a sex offender upon successful completion of treatment. *See id.* If a D&N case remains open when the juvenile is eligible to petition to deregister, the GAL may wish to file a motion in the D&N proceeding requesting the appointment of an attorney to assist the juvenile with this process.

5. Prosecution of the Juvenile in Adult Court

a. Direct file. Section 19-2-517 sets forth the district attorney's authority to file directly in adult court; this ability is limited to specific alleged offenses and age restrictions.

- **TIP:** There is no direct statutory guidance or authority regarding the responsibilities of the GAL in adult district court; further, the presence of a parent for a juvenile is not required in adult district court. The GAL may have the authority to release privileged information to the defense attorney pursuant to federal and state confidentiality laws, particularly if no parent is available or parental rights have been terminated. The GAL can also be of valuable assistance to the juvenile and the court if juvenile sentencing is an option for the court, because the GAL has the expertise to provide background information on the juvenile as well as residential treatment facilities or other treatment options in the juvenile system that may address the juvenile's needs and interests while protecting the community.

Under § 19-2-517(4)(a), if after or contemporaneously with the filing of a delinquency petition and after initial consideration of certain mandatory factors the district attorney believes the case may be appropriate for charging by direct filing, the district attorney shall file with the juvenile court and the juvenile or the juvenile's counsel a notification of consideration of direct file. No later than 48 hours after filing of the notice of consideration, the court shall re-advise the juvenile of the right to counsel. The juvenile has 14 days after the filing of the notice to provide the district attorney any and all information that the juvenile would like the district attorney to consider regarding the mandatory factors in the filing decision.

- **TIP:** It is critical that a juvenile facing adult criminal charges be appointed counsel as soon as possible in order to have a meaningful opportunity to provide information to the district attorney on the direct-filing decision. Further, the GAL in the D&N may play a pivotal role in presenting information in the D&N case, especially given the time constraints that may mitigate against direct filing of the juvenile. In presenting such information, the GAL must take care to not effectuate any waivers of privilege contrary to the best interests of the juvenile or to

open the door to the release of confidential information contrary to the juvenile's best interests.

HB 12-1271, enacted during the 2012-13 legislative session, limits direct-file eligibility and provides youth the right to seek judicial review of the direct-file determination. Prosecution of juveniles ages 14 and 15 years must begin in juvenile court and a transfer hearing held before the juvenile may be prosecuted in adult court. Specified juveniles ages 16 and 17 years subject to specified direct-file indictment are provided an opportunity to challenge their prosecution in adult court at a "reverse-transfer" hearing. Additionally, if the district court in a direct file case does not find probable cause for the direct-file-eligible offenses(s), the case must be remanded to juvenile court. The bill also amends current sentencing options. These changes will be codified in § 19-2-517.

b. Pretrial detention of juveniles tried as adults. Section 19-2-508 prohibits direct-filed juveniles from being held in an adult jail unless the judge, after a hearing, finds that detention in an adult jail is appropriate. The statute sets forth a number of factors centering on the juvenile's needs and the safety of the community. The court must consider all relevant factors in making its decision, including the juvenile's age, emotional state, intelligence, developmental stage, and treatment and educational needs. § 19-2-508(3)(c)(III). The court may order mental health or psychological assessments or screenings, which will be made available to the district attorney and defense counsel. § 19-2-508(3)(c)(III)(C).

c. Transfer proceedings. A juvenile also may be prosecuted as an adult in district court through a transfer proceeding. § 19-2-518.

TIP: As with direct-file proceedings or any juvenile case, the GAL representing the best interests of a child in a transfer proceeding must strike a careful balance between sharing information that would serve the child's best interests and not effectuating waivers requiring the release of information that would be harmful to the privacy or other interests of the juvenile.

Disabilities and Accommodations Fact Sheet

Several disability rights laws protect the rights of parents and children in D&N cases. The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, provides protection against discrimination by public and private agencies and also protects against employment discrimination. The Rehabilitation Act, 29 U.S.C. § 794(a), prohibits discrimination by any agency receiving any stream of federal funding. The Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*, protects disabled individuals and families from discrimination in the provision of housing. Each of these laws prohibits discrimination and requires various forms of accommodations and modifications to ensure equal access for the individual with a disability.

DEFINITION OF DISABILITY

The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A). Positive effects of assistive devices such as medications, prosthetics, mobility equipment, assistive technology, and the like are not to

be considered when determining whether an impairment substantially limits a major life activity. 42 U.S.C. § 12102(4)(E)(i). Although the FHA uses the term "handicap" rather than "disability," *see* 42 U.S.C. § 3602(h)(1), the terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631, 118 S.Ct. 2196, 141 L.E.2d 540 (1998).

Past drug and alcohol dependence may be considered an impairment under the ADA if the past use resulted in a substantial limitation on a major life activity. 42 U.S.C. § 12210(b). Current alcohol or drug use is not an impairment or disability. 42 U.S.C. § 12210(a).

PROTECTIONS AGAINST DISCRIMINATION

The ADA requires state and local governments to ensure that a person with a disability is not excluded from participation in or denied the benefits of the services, programs, or activities. 42 U.S.C. § 12132. Similarly, any person owning, leasing, or operating a public accommodation must ensure that a person with a disability is provided full and equal enjoyment of the goods, services, facilities, privileges, advantages, or the accommodation. 42 U.S.C. § 12182(a).

❖ **TIP:** Law offices are public accommodations under the ADA. 42 U.S.C. § 12181(7)(F).

The FHA prohibits housing providers from refusing to rent or sell any housing unit on the basis of race, color, religion, familial status (applying to individuals with or expecting children), national origin, or disability. 42 U.S.C. § 3604.

REASONABLE ACCOMMODATIONS AND MODIFICATIONS

Under the ADA, a person owning, operating, or leasing a public accommodation must make reasonable modifications in policies, practices, and procedures when necessary to ensure equal access. 42 U.S.C. § 12182(b)(2)(A)(ii). Such modifications are not required if the individual can demonstrate that making such modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. *Id.*

- **TIP:** The following are some examples of reasonable modifications to rules, policies, and practices of public accommodations. A business that has a "no pets" policy is required to modify the policy to allow service animals in the business. Similarly, a drug-testing company that requires samples to be provided under supervision in a specific, but inaccessible, restroom must modify the policy to monitor the sample provision in an accessible restroom in another location.

- **TIP:** People with disabilities should make modification and accommodation requests in writing. The request need not disclose the disability of the individual but must state why the modification is necessary and how it is related to the disability.

Public accommodations must also take steps to ensure that access is not denied based on the absence of auxiliary aids and services or because of readily removable architectural, communication, and transportation barriers. 42 U.S.C. §§ 12182(b)(2)(A)(iii)–(v). Auxiliary aids and services may not be required if they would cause an undue burden or fundamentally alter the nature of the goods, services, facilities, or accommodations. 42 U.S.C. § 12182(b)(2)(A)(iii). The public accommodation has the burden of demonstrating that a barrier is not readily removable, that a modification constitutes an undue burden, or that a modification would result in a fundamental alteration. *See* 42 U.S.C. §§ 12182(b)(2)(A)(iii)–(v). If it is established that an architectural, communication, or transportation barrier is not readily removable, the goods or services must be delivered through alternative methods if such methods are readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v).

- **TIP:** The fact that an accommodation may cause an entity to expend more funds does not in and of itself cause an undue burden. Undue burden is defined by the Code of Federal Regulations as a "significant difficulty or expense," and a number of factors must be considered in determining whether an accommodation constitutes an undue burden. *See* 28 C.F.R. § 36.104.

State and local governments are required to ensure that people with disabilities have equal access to programs, activities, and services. 42 U.S.C. § 12132.

- **TIP:** The following are some examples illustrating government obligations to ensure equal access. A court hearing scheduled to be held on the second floor of a building without an elevator must be moved to an accessible courtroom for a person unable to use the stairs. A county that provides supervised visitation only at 9:00 a.m. must schedule visits at another time to accommodate the dialysis schedule of a parent who has a dialysis appointment at that time every week. A county department that only provides classroom-based parenting education may be required to accommodate a parent with an intellectual disability by providing one-on-one parenting education.

- **TIP:** The Colorado Court of Appeals has said that a failure to comply with the ADA is not a defense to termination of parental rights. *People ex rel. T.B.*, 12 P.3d 1221 (Colo. App. 2000). This ruling does not preclude counsel from arguing for reasonable accommodations in treatment and services throughout the proceeding.

Housing providers are required to provide both reasonable accommodations and reasonable modifications to facilities. Prohibited discrimination under the FHA includes refusal to make reasonable accommodations to rules, policies, and services or to allow individuals to make reasonable accommodations to existing dwellings at their own expense. 42 U.S.C. §§ 3604(f)(3)(A), (B). Specified multifamily dwellings built after a specified date must meet higher reasonable accommodations standards. *See* 42 U.S.C. § 3604(f)(3)(C).

- **TIP:** The following is an example of a reasonable accommodation under the FHA. A child with autism joins the household of a foster family, and the family needs to build a fence to protect the child from eloping. The homeowners' association must provide a reasonable modification to their "no fences" policy and allow the family to build a fence at the family's expense.

AUXILIARY AIDS AND SERVICES

Auxiliary aids and services include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments, as well as qualified readers, taped texts, or other effective methods of making

visually delivered materials available to individuals with visual impairments. 42 U.S.C. §§ 12103(1)(A), (B). Auxiliary aids and services also include acquisition or modification of equipment or devices, as well as other similar services and actions. 42 U.S.C. §§ 12103(1)(C), (D). The obligation to provide such services applies not only to courts but also to individuals providing public accommodations, including attorneys. *See* **Reasonable Accommodations and Modifications section**, *supra.*

Attorneys and clients may request sign language interpreters, CART (real-time reporting), and other auxiliary aids and services for court hearings through the State Judicial Branch website: **http://www.courts.state.co.us/**.

Colorado Bar Association members may receive reimbursement, up to $250 per client, for providing sign language interpreters for meetings with clients. *See* **www.cobar.org**.

Attorneys can obtain a list of legal-qualified sign language interpreters from the Colorado Commission for the Deaf and Hard of Hearing. *See* **http://www.ccdhh.com/**.

Education Law: Rights and Issues Fact Sheet

Foster children and youth often have unmet educational needs that can be exacerbated by confusion about decision-making authority, placement moves and resulting school instability, delays in school enrollment, and special education needs. A number of federal and state laws provide a framework to meet the educational needs of children involved in the child welfare system.

TIP: The need to effectively address educational needs is not limited to children who are the age of compulsory school attendance. The GAL should be vigilant in ensuring that the developmental needs of infants and preschool-aged children, as well as the educational goals of older children, are adequately assessed and addressed.

EDUCATION DECISION-MAKING AUTHORITY

1. Parents or Legal Guardians

Parents or legal guardians have the authority to make education decisions for their children unless their authority is limited by a court. The Children's Code defines "legal custody" as the right to the care, custody, and control of the child and the duty to provide, among other things, education. § 19-1-107(73). Such custody may be taken from a parent only by a court order. *Id.*

In cases involving the Individuals with Disabilities Education Act (IDEA), a parent is a biological or adoptive parent; a foster parent, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent; an individual acting in the place of a biological or adoptive parent with whom the child lives; an individual legally responsible for the child's welfare; or an educational surrogate parent. *See* 34 C.F.R. § 300.30(a); Rules for the Administration of the Exceptional Children's Act, 2.33(1), 1 CCR § 301–8 (hereafter cited by reference to rule number only). If the biological or adoptive parent is attempting to act as the parent, that person is presumed to be the parent unless a court has limited his or her rights. 34 C.F.R. §§ 300.30(b)(1)–(2); 2.33(2)(a)–(b). Colorado regulations implementing the IDEA recognize that education decision making may be vested in someone other than a parent by a court order identifying that person as a parent or responsible for making educational decisions on behalf of a child. 2.33(2)(b).

- **TIP:** Keeping a parent's right to make education decisions intact can be an important part of the reunification process. Parents are an important source of information regarding the child's educational history and needs. Educational decision making presents an opportunity for the parent to remain involved in important decisions regarding the child's welfare.

- **TIP:** If a parent's whereabouts are unknown, a restraining order has been issued against the parent, or the parent is unwilling or unable to make education decisions, the GAL should consider asking the court to limit the parent's education decision-making authority. A request to limit decision-making authority might also be appropriate when a parent's problems (such as mental health or substance abuse issues) are so severe that the parent is unable to make responsible decisions. Each situation should be evaluated on a case-by-case basis.

2. Educational Surrogate Parent

Each child with special education needs must have a designated person who can make decisions on his or her behalf. Knowing which adult has the legal authority to make decisions is especially important for children in foster care who are eligible for (or need to be assessed for) special education services.

Different people can serve in this capacity and the juvenile court can play a role in determining who should do so. 34 C.F.R. §§ 300.519(a), (c).

An educational surrogate parent (ESP) acts on behalf of the child in all matters relating to the identification, evaluation, and educational placement of the child and ensures the child is provided a free, appropriate public education. 2.13. An ESP may be assigned by the administrative unit or a state-operated program for a child with a disability when the parents of the child are not known or cannot be located, the child is a ward of the state, or the child is an unaccompanied homeless youth under the McKinney-Vento Homeless Assistance Act. 34 C.F.R. § 300.519(a)(4); 6.02(8). For children placed in the legal custody of the department, the educational surrogate parent may be appointed by the court overseeing the child's case. 34 C.F.R. § 300.519(c); 6.02(8)(d).

In Colorado, an ESP is defined as a person who (1) is *not* an employee of the Department of Education or any other public agency involved in the education or care of the child; (2) has no personal or professional interests that conflict with the interests of the child; and (3) has knowledge and skills to ensure adequate representation. 6.02(8)(e)(iii). A caseworker or social worker employed by the department may not be an ESP. 6.02(8)(e)(iii)(A).

The state educational agency is required to make reasonable efforts to assign an ESP within 30 days of a determination that a child needs an ESP. 6.02(8)(j). Because school districts are controlled locally, the specific rules for appointing an ESP may vary from district to district. *Serving Children with Disabilities under the Jurisdiction of the Juvenile Court*, Theresa Lynn Sidebotham (Feb. 2011), *available at* **http://www.rothgerber.com/files/10027_ServingChildrenWithDisabilities1.pdf**, citing Kathleen McNaught, Learning Curves: Education Advocacy for Children in Foster Care 24 (ABA Center on Children and the Law, 2004).

> **TIP:** In some cases, the GAL may wish to seek assignment as a child's ESP. Ideally, the ESP is someone who has an ongoing relationship with the child and who knows the child's educational needs.

The Colorado Department of Education provides training for ESPs on understanding their responsibilities, the relevant laws,

the special education process, and how to communicate with schools.

ADVOCATING FOR SCHOOL STABILITY

On average, foster youth change schools approximately once every six months. *See* Thomas R. Wolanin, *Higher Education Opportunities for Foster Youth: A Primer for Policymaker* at vi, 8 (The Institute for Higher Education Policy, Washington, DC, 2005), *available at* **http://www.ihep.org/assets/files/publications/m-r/OpportunitiesFosterYouth.pdf**. Research suggests that each time a child changes school, the child loses four to six months of educational attainment. *Id.* Furthermore, students who are highly mobile have lower standardized test scores than children with stable housing. *See Education Is the Lifeline for Youth in Foster Care: Research Highlights on Education and Foster Care* (July 2011), *available at* **http://www.casey.org/Resources/Publications/pdf/EducationalOutcomesFactSheet.pdf**. Changing schools also affects a child's ability to form supportive relationships with teachers and classmates. *Id.*

❖ **TIP:** The GAL should be vigilant in ensuring that school stability is a primary consideration in placement decisions. Changes in school settings should only occur when they serve the child's best interests.

1. The Presumption against Changes in Educational Placement

Under Colorado law, any out-of-home placement in the D&N proceeding must take into consideration the child's educational needs, the ability of the school district of the proposed placement to meet those needs, and whether the proposed placement is in the same school district as the district of the child's parent's home. § 19-1-115.5(2)(b). The case plan must contain assurances that the placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement. 7.301.241(B)(2)(a).

Determining Whether Maintaining a Child in the Same School Is in His or Her Best Interests

- ❑ How long is the child's current placement expected to last?
- ❑ What is the child's permanency plan?
- ❑ How many schools has the child attended over the past few years? How many schools has the child attended this year? How have the school transfers affected the child emotionally, academically, and physically?
- ❑ How strong is the child academically?
- ❑ To what extent are the programs and activities at the potential new school comparable to or better than those at the current school?
- ❑ Does one school have programs and activities that address the unique needs or interests of the student that the other school does not have?
- ❑ Is this child on an IEP (individualized education program)? What is the nature of the disability? How does the school accommodate that disability and how would it compare to the other school?
- ❑ Which school does the student prefer?
- ❑ How strong are the child's ties to his or her current school?
- ❑ Would the timing of the school transfer coincide with a logical juncture, such as after testing, after an event that is significant to the child, or at the end of the school year?
- ❑ How would changing schools affect the student's ability to earn full academic credit, participate in sports or other extracurricular activities, proceed to the next grade, or graduate on time?
- ❑ How would the length of the commute to the school of origin affect the child?
- ❑ How anxious is the child about having been removed from the home and/or any upcoming moves?
- ❑ What school do the child's siblings attend?
- ❑ Are there any safety issues to consider?

School Selection for Students in Out-of-Home Care (The Legal Center for Foster Care and the National Center for Homeless Education, 2009), *available at* **http://center.serve.org/nche/downloads/briefs/school_sel_in_care.pdf**.

The Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections Act) requires child welfare agencies to collaborate with local education agencies to ensure that children remain in the schools they were attending at the time of placement unless to do so is not in their best interests. *See* Pub. L. 110, 351, 122 Stat. 3949, *codified at* 42 U.S.C. § 675(1)(G)(ii). Child welfare agencies must include in the case plan a plan for ensuring the educational stability of the child while in foster care. 42 U.S.C. § 675(1)(G). Colorado regulations provide that the department must coordinate with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement and to document its efforts to do so, along with reasons for any change of educational placement and why remaining in the same school is not in the best interests of the child. 7.301.241(B)(2)(b).

Federal legislation enacted by the McKinney-Vento Act requires schools to allow homeless children to remain in the school they attended prior to becoming homeless (their school of origin) until the end of the school year and for the duration of their homelessness. 42 U.S.C. § 11432(g)(3)(A)(i). A child who is "awaiting foster care placement" is defined as homeless. 42 U.S.C. § 11434a(2)(B)(i).

2. Transportation to School of Origin

The Fostering Connections Act revisions allow foster care maintenance payments for "reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." 42 U.S.C. § 675(4)(A). Several state regulations address transportation to promote school stability. The family service plan must document how the placement is in reasonable proximity to the home of parents or relatives and to the school the child has attended. 7.301.24(E). Additionally, it must document provider responsibilities and information related to appropriateness of out-of-home placement in relation to the educational placement, including efforts such as providing transportation to maintain the child in the same school. 7.301.241(A), (B). Reimbursement for reasonable transportation (to provider and county) is allowed. *See* 7.418.1(A). McKinney-Vento can be an alternate source of transportation funding; children who meet the definition of "homeless child" under the act are entitled

to transportation to and from their school of origin. 42 U.S.C. § 11432(g)(1)(J)(iii). *See generally Foster Care and Education Issue Brief: When School Stability Requires Transportation: State Considerations* (ABA Center on Children and the Law, Education Law Center, and Juvenile Law Center; Legal Center for Foster Care and Education, 2011), *available at* **http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/transportation_brief_final_revised.authcheckdam.pdf**.

❖ **TIP:** As appropriate, counsel should advocate for transportation reimbursement to include bus passes, reimbursement to caregivers for mileage, supplements for school districts to reroute or add bus routes, or payments to a private transportation provider. Additionally, some foster children may be able to remain in their school of origin without transportation costs. Counsel should review the school district's existing transportation policy or consider other adults in the child's life who may be able to provide transportation.

SCHOOL ENROLLMENT AND TRANSFER ISSUES

1. Enrollment

In Colorado, children have a statutory right to enroll in a school in the district in which they reside. *See* § 22-1-102(2). The Children's Code provides that for determining residence for school enrollment purposes, guardianship shall be in the person to whom legal custody has been granted by the court. § 19-1-103(73)(b). Once a child's residence is in the district, the district can deny enrollment only for specifically enumerated reasons. *See* § 22-33-106.

Under the Fostering Connections Act, if remaining in the same school is not in a child's best interests, the child must be immediately enrolled in an appropriate new school. 42 U.S.C. § 675(1)(G)(ii)(II). Colorado law requires timely enrollment for children in out-of-home placement. § 22-32-138(3). If a change in school is required for a child in out-of-home placement, the sending school must transfer records within five days and the new school must enroll the child within five days of receiving records. §§ 22-32-138(3), (4). *See also* 7.301.241(B)(2)(b) (requir-

ing the case plan to document efforts made to coordinate immediate and appropriate enrollment in a new school and provide all of the child's educational records to the school when remaining in a school is not in a child's best interests).

Under McKinney-Vento legislation, children meeting the definition of "homeless" according to the McKinney-Vento Act are eligible for immediate enrollment, even if lacking documents that are normally required, such as birth certificates, proof of guardianship, school or immunization records, and proof of residency. 42 U.S.C. §§ 11432(g)(3)(E)(i), (ii). If there is a dispute regarding enrollment, the child must be immediately enrolled in the school selected by the child or his or her parents and remain enrolled until the dispute is resolved. 42 U.S.C. § 11432(g)(2)(E)(i); § 22-33-103.5(4)(a).

TIP: In Colorado, all school districts and state charter school institutes must designate a child welfare education liaison. § 22-32-138(2)(a). The child welfare education liaisons collaborate with child placement agencies, county departments, the state department, and schools to ensure the proper school placement, transfer, and enrollment of foster children. *Id.* The GAL should contact the child welfare educational liaison at the school to resolve issues in enrolling students.

2. Transfer of Records

If a change in school is required for a child in out-of-home placement, the sending school must transfer records within five days, and the new school must enroll the child within five days of receiving records. § 22-32-138(3)(a). A problem such as unpaid fees or lack of immunizations does not relieve the schools of this mandate to send records or enroll within five days. § 22-32-138(4)(a).

MAINTAINING AND ACCESSING EDUCATIONAL RECORDS

1. Department's Obligations Regarding Educational Records

The department is directed to document educational information in TRAILS, CDHS's automated system, and to update the information, including addresses and contact information for

the child's current education providers, at the time of each case review. 7.301.24(G). The department must also maintain records within the case file or TRAILS that include contact information for the child's current school, grade or classroom designation, annual grades, educational needs, IEP or other educational plans, and any educationally based evaluations. 7.301.242.

2. Confidentiality of Educational Records

Access to education records is critical to ensuring appropriate services and placements for youth in care. Confidentiality concerns can contribute to delays in enrollment and difficulty accessing records.

The purpose of the Family Educational Rights and Privacy Act (FERPA) is to protect the privacy of students and parents by prohibiting the improper disclosure of personally identifiable information derived from educational records. 20 U.S.C. § 1232g. Personally identifiable information includes, but is not limited to, the student's name; the name of the student's parent or other family member; the address of student or student's family; a personal identifier, such as the student's social security number or student number; and personal characteristics that would make the student's identity easily traceable. 20 U.S.C. § 1232g(a). FERPA gives custodial and noncustodial parents certain rights with respect to their children's educational records, unless a school is provided with evidence that there is a court order or state law that specifically provides to the contrary. Otherwise, both custodial and noncustodial parents have the right to inspect and review the educational records of their children and children over 18 have the right to review their own records, and procedures must be in place allowing parents and eligible students inspection/review within 45 days of a request or in a reasonable period of time. 20 U.S.C. § 1232g(a)(1)(A). A parent or eligible student also has the right to challenge what is in the student's record. 20 U.S.C. § 1232g(a)(2). A parent or eligible student may request amendment of an educational record if that person believes the records are inaccurate, misleading, or in violation of the student's right to privacy. *Id.*

Several exceptions permit schools to release information without parental consent, including disclosure to other school officials with legitimate educational interest in the child, when

necessary to protect the child's health and safety, when the student is transferring schools, and when the information is needed to comply with a judicial order or subpoena. 20 U.S.C. § 1232g(b)(1) *et seq.*

EXTRACURRICULAR ACTIVITIES

Participating in extracurricular activities is an important part of the school experience for many students. Foster youth benefit from extracurricular activities because these activities promote school engagement, academic achievement, and positive behavior. Stephanie Klitsch, *Beyond the Basics: How Extracurricular Activities Can Benefit Foster Youth* (National Center on Youth Law 2010), *available at* **http://www.youthlaw.org/publications/yln/2010/oct_dec_2010/beyond_the_basics_how_extracurricular_activities_can_benefit_foster_youth/**. Research indicates that youth benefit from structured, voluntary after-school activities. *Id.,* citing Joseph L. Mahoney and Hakan Stattin, *Leisure Activities and Adolescent Antisocial Behavior: The Role of Structure and Social Context*, 23 J. ADOLESCENCE 113, 122 (2000).

Colorado promotes foster youth participation in extracurricular activities by requiring school districts or schools to waive fees for children in out-of-home placement to participate in extracurricular activities, as well as all fees for other school activities and materials (e.g., art materials, school uniforms, field trips). § 22-32-138(7). The statute also forbids schools from limiting the opportunity of students in out-of-home placement to participate because of fee waivers. *Id.*

EDUCATION SERVICES FOR CHILDREN WITH SPECIAL NEEDS

1. Individuals with Disabilities Education Act

a. Child Find. The Individuals with Disabilities Education Act of 2004 (IDEA) requires school districts to identify, locate, and evaluate all children with disabilities, including children who are homeschooled, homeless, or wards of the state or who attend private schools. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i).

A "child with a disability" means a child with mental retardation, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disability **and** who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3).

> **TIP:** A child with a disability is not automatically eligible for special education and related services under IDEA. The key phrase is "who, by reason thereof, needs special education and related services." If the child needs only related services, the child is not eligible under IDEA. If a child has a disability but does not need special education services, the child may be eligible for protection under Section 504 of the Rehabilitation Act of 1973. *See* W.D. Wright and Pamela Darr Wright, WRIGHTSLAW: SPECIAL EDUCATION LAW (2d ed. 2007); **Section 504 section**, *infra*. All children with disabilities are entitled to receive a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1)(A) (IDEA); 34 C.F.R. Part 104.33(a), (b).

Educational services are available to children and youth in Colorado from birth to age 21. Every school district and Board of Cooperative Educational Services (BOCES) has a Child Find team, who are professionals trained to evaluate children in cognitive functioning, physical functioning, hearing and vision, speech and language, and social and emotional development. Children under the age of six may be referred to early intervention services (birth to age three) or preschool special education services (ages three through five). *See* **Meeting the Educational Needs of Infants and Toddlers section**, *infra*. Child Find also applies to students ages 17 to 21 who are out of school and who may have a disability. 4.02(2)(c)(iv).

b. Assessment. Under IDEA, various people can request an initial evaluation to determine if a child has a disability, including a parent, a state educational agency, another state agency, or a local educational agency. 4.02(3)(a) The person or entity initiating the referral must work with the parent or the appropriate administrative unit or state-operated program. 20 U.S.C. § 1414(a)(1)(D)(i). The school must obtain informed parental consent before conducting an initial evaluation. *Id.* If the parents do not provide consent for the initial evaluation, the district may request a due process hearing. 20 U.S.C. § 1414(a)(1)(D)(ii).

If the child is a ward of the state, the agency is required to make reasonable efforts to obtain the informed consent of the child's parent prior to an evaluation. 20 U.S.C. § 1414(a)(1)(D)(iii)(I). Informed consent is not required if the parents cannot be located, parental rights have been terminated, or there is a court order removing the parent's right to make educational decisions. 20 U.S.C. § 1414 (a)(1)(D)(iii)(II).

c. Individualized Education Program. If a child is deemed eligible for special education services under IDEA, the school district must offer the student special education and related services in an IEP. *See* 42 U.S.C. § 1412(a)(4). An IEP is a contract between the school district and the family that describes what services the child will receive. A meeting to develop a child's IEP must be conducted within 30 days of a determination that the child is eligible for special education and related services. 34 C.F.R. § 300.323(c)(2).

The child's IEP should include information about the child's academic and functional levels, the type and amount of services the child needs, the child's educational goals for the year, and how to measure progress toward those goals. 34 C.F.R. § 300.320 *et seq*. The person with educational decision-making authority for a child must be invited to the IEP meeting and treated as a partner in developing the child's IEP. 34 C.F.R. § 300.321.

When a child with an IEP enrolls in a new school during the academic year, the IDEA mandates that the new school provide at least comparable services to those described in the child's IEP until it is either adopted by the school district or a new one is agreed upon. 34 C.F.R. §§ 300.323(e)(transfer within the state), (f)(transfer from another state).

❖ **TIP:** Advocates should use the child's IEP document to memorialize promises made by the school to meet a child's needs.

d. Least Restrictive Environment. A student's IEP must indicate the extent to which he or she can participate in regular classroom activities with students who do not have disabilities; this is considered the least restrictive environment. 34 C.F.R. § 300.114. School districts have a duty to provide students with "supplementary aids and services" to enable students with an IEP to participate in regular classroom activities with other chil-

dren who do not have disabilities. 34 C.F.R. §§ 300.320(a)(5), 300.114–300.117. Students should remain in their classroom except when separation is necessary to achieve individual education goals.

2. Section 504

Public schools are also subject to the nondiscrimination requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), which requires the school to perform an evaluation and, if needed, develop a 504 plan. *See generally* 34 C.F.R. § 104.31 *et seq.* Under Section 504, a free, appropriate public education is "the provision of regular or special education and related aids and services . . . designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1).

Section 504 also addresses placing students with disabilities in the least restrictive environment. This includes access to nonacademic and extracurricular activities and services, such as meals, recess, recreational athletics, health services, counseling, clubs, and transportation. 34 C.F.R. §§ 104.34(b), 104.37(a).

3. Americans with Disabilities Act of 1990 (ADA)

The ADA also protects against discrimination on the basis of disability. 42 U.S.C. § 1201, *et seq*. Title II of the ADA prohibits public schools from discriminating against students with disabilities. It specifically requires schools to provide auxiliary aids and services necessary for nondiscriminatory treatment. 28 C.F.R. § 35.130(f). Although the ADA does not include specific requirements for school districts to provide students with disabilities a free, appropriate public education, it has been interpreted as having the same requirements for school districts as Section 504, that is, to provide students with a free, appropriate public education. Randy Chapman, The Everyday Guide to Special Education Law 89 (2d ed. 2008). The ADA also applies to private schools; Title III of the ADA prohibits private schools from discriminating against students with disabilities. *Id.*

MEETING THE EDUCATIONAL NEEDS OF INFANTS AND TODDLERS

Part C of IDEA applies to children birth through age two years who are at risk of or have disabilities. *See generally* 7.301.243(B). Early Intervention Colorado offers services to children birth through age two years who live in Colorado and have either a significant developmental delay or established physical or mental condition. Services are designed to enhance the capacity of a parent or other caregiver to support a child's well-being, development, and learning; to support full participation of a child in his or her community; and to meet a child's developmental needs within the context of the concerns and priorities of his or her family. *See* Early Intervention Program, 16.900, 2 CCR § 503-1; **http://www.eicolorado.org.**

- **TIP:** All infants and toddlers referred to Early Intervention Colorado are entitled to a free evaluation. Anyone involved in the child's life can request an evaluation to address questions about a child's development to determine whether the child may benefit from the early intervention services. There are 20 community-centered boards throughout Colorado responsible for coordinating the local early intervention system in their service areas. To request an evaluation, call 1-888-777-4041 or visit Early Intervention Colorado's website at **http://www.eicolorado.org.**

- **TIP:** Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) is a health care benefits package for all Medicaid-enrolled children and young people under the age of 21. *See* **Medical and Dental Needs fact sheet**. Some children may qualify for both IDEA and Medicaid financing, but not for the same services. It is important that Child Find is coordinated with EPSDT efforts to locate and identify children under the age of three who have delays in development or established conditions associated with disability. The department must also work with the school district and/or community-resource organization to develop a plan to address identified service and support needs for children under the age of three. 7.301.243.

CHILDREN PLACED IN FACILITIES

The Facility Schools Unit within the Colorado Department of Education is responsible for general oversight and monitoring of facility education programs (schools operated by residential child care programs, day treatment, etc.). §§ 22-2-403, 22-2-405.

The unit is responsible for developing and maintaining a list of approved facility schools, making recommendations for uniform curriculum and graduation requirements, maintaining information/records for students enrolled in facility schools, collaborating with other agencies concerning placement of students in schools, adopting data-reporting protocols and records-transfer procedures for use by approved facility schools, and purchasing and implementing data systems for student records. § 22-2-405.

Expedited Permanent Placement (EPP) Procedures Fact Sheet

In recognition of the research regarding the "critical bonding and attachment process" children undergo before they reach age of six, the Children's Code sets forth a series of procedures to ensure that children under age six "are placed in permanent homes as expeditiously as possible." § 19-1-102(1.6). Cases subject to these procedures are commonly referred to as expedited permanent placement (EPP) cases.

APPLICABILITY OF EPP

EPP procedures have been implemented throughout Colorado. *See* § 19-1-123(1)(a). Section 19-1-123(1)(a) requires implementation of EPP procedures for each D&N case that involves a child who is under the age of six at the time the petition is filed. Section 19-3-104 requires that any hearing conducted pursuant to § 19-1-123 must include, if appropriate, all other children residing in the same household whose placement is subject to determination in the D&N proceeding.

- **TIP:** The provisions regarding inclusion of older children in EPP procedures promote judicial efficiency and the preference for joint sibling placement. *See People ex rel. T.M.*, 240 P.3d 542, 546 (Colo. App. 2010). The Court of Appeals has held that these policy considerations do not permit the application of the expedited time frames for termination of the parent-child legal

relationship with an incarcerated parent that are set forth for children under the age of six, *see* **Termination of the Parent-Child Legal Relationship section,** *infra,* to older siblings in an EPP case and that the trial court had erred in applying the shortened time frames. *T.M.*, 240 P.3d at 546–47.

TIMING OF HEARINGS

EPP procedures specifically set forth expedited time frames for certain hearings:

- The adjudicatory hearing must be held within 60 days of service of the petition unless the court finds the delay will serve the best interests of the child. § 19-3-505(3).
- The court must enter a decree of disposition within 30 days of the adjudication in an EPP case unless good cause is shown and the court finds delay will serve the best interests of the child. § 19-3-508(1).
- Permanency hearings in EPP cases must be held no more than three months after the dispositional decree. § 19-3-702(1).
- At a permanency hearing, if the child has been placed out of the home for three months, the court must review the progress of the case and treatment plan and may order the department to show cause why it should not file a motion to terminate parental rights. § 19-3-702(2.5). What may constitute cause is set forth in § 19-3-702(2.5). *See also* **Permanency Hearing chapter.**
- The hearing on the motion to terminate the parent-child legal relationship must be held within 120 days of the filing of the motion unless good cause is shown and the court finds the best interests of the child will be served by granting a delay. *See* §§ 19-3-602(1), 19-3-104.

CONTINUANCES AND DELAYS

There is a strong presumption against delays and continuances in EPP cases. EPP cases may not be continued or delayed unless good cause is shown and unless the court finds the best interests of the child will be served by granting the delay or continuance.

§ 19-3-104. If the court grants a delay or continuance, the court must state the specific reasons making the delay or continuance necessary. *Id.* The court must schedule any delayed or continued hearing within 30 days of the delay/continuance. *Id.*

> **TIP:** CJD 96-08, applicable to all D&N proceedings, requires more stringent findings for continuances, providing that the court will grant a continuance only upon a finding that a manifest injustice would occur in the absence of a continuance. CJD 96-08(4).

For dispositional hearings in EPP cases, if the court grants a delay, the court must also set forth the minimum amount of time needed to resolve the reasons for the delay, and it must schedule the hearing at the earliest possible time following the delay. § 19-3-508(1). Section 19-3-505(3) also requires the adjudicatory hearing to be scheduled at the earliest possible time following the delay.

TIMELY PLACEMENT IN A PERMANENT HOME

In cases in which a child is under six years old at the time of the filing of a petition, the child must be in a "permanent home" (as defined to include reunification, relative placement, placement with potential adoptive parent, permanent custody allocated to another, or placement in least restrictive level of care if child cannot be returned home) no later than 12 months after the original placement out of the home, unless such placement is not in the child's best interests. § 19-3-703. In determining whether any delays in placement are in the best interests of the child, the court must find by clear and convincing evidence that reasonable efforts have been made to find the child an appropriate home and that one is not currently available or that the child's mental or physical needs or conditions deem it improbable that a child would have a successful permanent placement. *Id.* The GAL and caseworker must provide the court with a report specifying what services are being provided to the child to remedy the problems. *Id.* The case must be reviewed every six months until the child is permanently placed, and the clear and convincing burden of proof applies at these hearings. *Id.*

- **TIP:** The Court of Appeals has held that removal of a child from a presumptively permanent home in an EPP case effectuated a delay of placement as contemplated by § 19-3-703, and that the department attempting to change the placement was required to show by clear and convincing evidence that it was making reasonable efforts to find a permanent home and that concerns about the placement made it not currently available. *See People ex rel. A.C.*, 2011 WL 4089983 at 6–7 (Colo. App. Sept. 15, 2011), cert. granted on other grounds, *M.S., ex rel. People*, 2011 WL 5526462 (Colo. 2011).

- **TIP:** In submitting the report, the GAL should be careful not to waive any applicable privileges and not to acquiesce to the release of any privileged information in the department's report. *See People ex rel. L.A.N.*, 2011 WL 26580589 at 6–9 (holding that the GAL had waived patient-therapist privilege by submitting a letter from the therapist), *cert. granted sub. nom., L.A.N. v. L.M.B.*, 2012 WL 59445 (Colo. 2012) (granting cert. on whether the GAL in a D&N proceeding can waive the child's psychotherapist-patient privilege and whether the Court of Appeals erred in determining that the privilege was waived with respect to certain materials in the therapist's file).

SERVICES

The dispositional hearing report in EPP cases must include a list of services specific to the needs of the child and family and available in the community where the family resides. § 19-1-107(2.5). If multiple services are recommended, the report must prioritize the services. *Id.* If the child is in the care of a parent, the treatment plan must include a requirement that the family obtain services specific to the family's needs if available in the community where the family resides and based on the social study and reports provided pursuant to § 19-1-107(2.5). § 19-3-508(1)(a).

TERMINATION OF THE PARENT-CHILD LEGAL RELATIONSHIP

In addition to the expedited time frames for holding a hearing on the motion to terminate the parent-child legal relationship,

specific grounds for terminating the parent-child legal relationship apply in EPP cases:

- The time frame allowing termination of the parent-child legal relationship with an incarcerated parent is shortened. Specifically, termination is allowed when a parent is incarcerated and not eligible for parole for at least 36 months after the date of the adjudication and the court has found by clear and convincing evidence that no appropriate treatment plan can be devised (versus six years for non-EPP cases). § 19-3-604(1)(b)(III).

  ❖ **TIP:** The 36-month time frame is limited to children under the age of six and cannot be expanded to include older children who are also the subject of the termination motion. *See T.M.*, 240 P.3d at 545–47.

- The court may not find that a parent is in reasonable compliance with a treatment plan or has been successful with regard to the plan if: (1) the parent has not attended visits with the child as set forth in the treatment plan and there is not good cause for failing to visit; or (2) the parent exhibits the same problems addressed in the treatment plan without adequate improvement and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions despite intervention and treatment. §§ 19-3-604(1)(c)(I)(A), (B).

Family Finding/Diligent Search Fact Sheet

Federal and state law provisions regarding family finding and diligent search reflect an increasing recognition of the importance of family relationships to the success and well-being of children involved in D&N proceedings. Applicable statutes, regulations, and Chief Justice Directive provisions set forth a comprehensive scheme that involves not only the department but also respondent parents, the court, and the GAL in the effort to identify and locate relatives and kin of children early on and throughout the proceeding.

THE IMPORTANCE OF FAMILY FINDING AND DILIGENT SEARCH

Not only do relatives and kin serve as potential placements for children in need of out-of-home placement, but they also serve as a potential support for a child in need and a critical connection to that child's identity, past, and future. *See generally* Kelly Lynn Beck, *Family Finding Connections for Foster Youth*, 27 ABA Child Law Practice 117 (October 2008).

Information about relatives is gathered and acted on early in the life of a case with the purpose of finding family who may be willing to permanently care for the child. However, for a child in long-term foster care or for a young person aging out of the foster care system, the purpose of conducting a diligent search

can vary. Diligent searches on behalf of emancipating youth can occur to find a permanent home, but the search may occur to answer questions, initiate or reconnect family relationships, or to create a network of support for specific needs that a young person has to help them succeed in their transition to adulthood. *See* Beck, *supra*, at 119.

Diligent search is also consistent with the stated purpose of the Children's Code to strengthen family ties whenever possible and to ensure long-term permanency planning §§ 19-1-102(1)(b), (1.5)(a)(III).

DEFINITION OF DILIGENT SEARCH

Diligent search is the timely good-faith effort to locate and contact any noncustodial parent, all grandparents, and other adult relatives. 7.304.52(A). Diligent search shall extend beyond the United States, its territories, and Puerto Rico as appropriate. *Id.*

- **TIP:** Although the definition of diligent search does not reference kin, counsel should, consistent with the interests of the parent (for RPC) and the best interests of the child (for GALs), support and advocate for a diligent search that includes individuals who are not relatives but who may be eligible kinship caregivers. *See* 7.304.21(A) (defining kinship care to include care by relatives, persons ascribed by the family as having a family-like relationship, or individuals that have a prior significant relationship with the child or youth).

LEGAL REQUIREMENTS FOR DILIGENT SEARCH

1. Department Obligations

The department must conduct a diligent search for noncustodial parents within three working days. 7.304.52(B)(1). The noncustodial parent must be notified of the child's removal from the home and the option to participate in the care, treatment, and placement of the child. *Id.*

- **TIP:** Engaging noncustodial parents as early as possible in the proceedings helps promote permanency for the child, whether through reunification, adoption, or some other form of per-

manency. Inconsistent engagement of parents, particularly fathers, in case planning, visits, assessment of needs and services, and reunification efforts was a key finding of the 2009 Child and Family Services Review. *See* CHILD AND FAMILY SERVICES REVIEW FINAL REPORT: COLORADO, Executive Summary at 3–4 (2009), *available at* **http://library.childwelfare.gov/cwig/ws/cwmd/docs/cb_web/SearchForm**. Although these findings were not specific to noncustodial parents, significant national attention has been directed to the need to improve agency efforts in identifying and engaging noncustodial fathers. *See, e.g.,* K. Malm, J. Murray, and R. Geen, *What about the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers* (Washington, DC: The US Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2006), *available at* **http://aspe.hhs.gov/hsp/06/cw-involve-dads/report.pdf**. The Administration for Children and Family Services, American Humane Society, and the American Bar Association Center on Children and the Law have created the National Quality Improvement Center on Nonresident Fathers and the Child Welfare System; its online resources can be accessed through **http://www.americanhumane.org/children/programs/fatherhood-initiative/qic-fatherhood-toolkit/**. The GAL must ensure the department is meeting its obligation to conduct an immediate diligent search for noncustodial parents and to engage them as early in the process as possible.

A diligent search for all grandparents and other adult relatives must be completed by the department within 30 days of the child's removal from the home, unless the court has made a good cause finding not to contact or to delay contacting relatives. 42 U.S.C. § 671(a)(29); § 19-3-403(3.6)(a)(IV); 7.304.52(B)(2). The department must notify relatives of the child's removal from the home, options to participate in the care and placement of the child, options that may be lost by failing to respond, requirements to become a foster parent, and supports and assistance that may be available if the child is placed in their home. 42 U.S.C. § 671(a)(29); § 19-3-403(3.6)(a)(IV); 7.304.52(B)(2).

A diligent search must occur every six months throughout the life of the case until the child has achieved permanency, unless **all** of the following conditions are met: (1) the child's placement is stable and with a relative or kin for a minimum of six consecutive months; (2) this relative or kin has committed to the legal permanence of the child; and (3) all parties agree

that this relative or kin is the appropriate permanency option for the child and that it is in the best interests of the child to discontinue diligent search. 7.304.52(D). The department may also discontinue diligent search efforts when the court has made a good cause determination that diligent search be delayed or not conducted. 7.304.52(C)(3).

- **TIP:** Counsel should be extremely cautious about agreeing to the discontinuation of the department's diligent search obligation and should only do so when terminating diligent search truly serves the client's interests / child's best interests.

Parents and, when appropriate, children must be consulted regarding suggested relative caretakers. § 19-3-403(3.6)(a)(III); 7.304.52(C).

The department must document all diligent search efforts in the child's family services plan and must review and document diligent search results during 90-day supervisory reviews. 7.304.52(E).

2. Responsibilities of the Respondent Parent

Parents must provide the court with a completed relative affidavit form no later than seven business days after the date of the preliminary protective proceeding / temporary custody hearing or before the next hearing in the case, whichever comes sooner. §§ 19-3-403(3.6)(a)(I),(III). Parents must be advised by the court of potential penalties of perjury and contempt for failing to accurately complete the form, as well as the possibility that failure to provide timely identification of relatives may result in a permanent placement of the child outside the home of relatives. *Id.*

- **TIP:** Although parents are advised in court of the implications of inaccurate and incomplete completion of the relative affidavit, the level of anxiety parents may be feeling at the temporary custody hearing may prevent them from fully understanding the extensive amount of information provided at that hearing. RPC should discuss the importance of completing the affidavit in a less stressful environment and should address any concerns or questions parents may have regarding its completion.

3. Responsibilities of the GAL

The GAL must ensure that reasonable efforts are being made to facilitate reunification of the child with the child's family. § 19-3-203(3). The GAL is required by Chief Justice Directive to independently confirm the department has performed a diligent search or to personally conduct such an investigation. CJD 04-06 (V)(D)(4)(f). The GAL must also engage in and advocate for developmentally appropriate consultation with the child regarding any diligent search efforts. CJD 04-06 (V)(B); § 19-3-403(3.6)(a)(III); 7.304.52(C).

> **TIP:** Diligent search efforts do not always turn out the way children would like, and the GAL should ensure that adequate services and supports are in place to assist the child in coping with the disappointment, anger, and hurt the child may experience when a search fails to meet the child's expectations or when a relative/kin does not provide the support for which the child had hoped.

4. Court Oversight

The court must order the department to exercise due diligence to contact all grandparents and other adult relatives within 30 days of a child's removal from his or her parent and to inform the relatives about the placement possibilities for the child, unless the court determines that there is good cause not to contact or to delay contacting such relatives. § 19-3-403(3.6)(a)(IV). The court also oversees the issuance of a summons that must be served on all parents of the child who do not voluntarily appear in court or waive service. *See* §§ 19-3-503(1)–(3).

COMPONENTS OF EFFECTIVE FAMILY FINDING/DILIGENT SEARCH

Numerous publications exist regarding effective family finding processes. *See, e.g.,* Beck, *supra*, at 121, 123 (outlining family finding tools for identifying connections and engaging youth); Kara M. Clunk and Heidi Redlich Epstein, *Notifying Relatives in Child Welfare Cases: Tips for Attorneys,* 29 ABA Child Law Practice 117, 119–22 (providing sample questions and letters for commu-

nicating with parents, relatives, and youth); Mardith J. Lousell, *Six Steps to Find a Family: A Practice Guide to Family Search and Engagement* (published by the National Resource Center for Family-Centered Practice and Permanency Planning and the California Permanency for Youth Project). The following are some key components of effective family finding.

1. Communication

Not only is consultation with children and parents legally required; it is also a necessary component of effective family finding. Children and parents are key to identifying and locating family members. It is important to include them in the process and to answer any questions and address any concerns they have about contacting family.

2. "Mining" the File

Current and historical case files likely contain a wealth of information, including but not limited to placement history, family services plans, school records, and medical and mental health records. Any of these records may include family names and contact information.

3. Maximizing Available Resources to Locate and Contact Relatives and Kin

Departments may have access to high-tech search tools like Accurrint®. The Fostering Connections to Success and Increasing Adoptions Act also authorizes the use of the Federal Parent Locator Service for diligent search in child welfare cases. *See* Pub. L. 110-351 § 105, *codified at* 42 U.S.C. § 653(j). Web searches using social media, online directories, and other no-cost options may also lead to helpful information. Further, other agencies and nonprofits may host helpful websites geared toward family finding for children in D&N proceedings. *See, e.g.,* **www.senecacenter.org/familyconnectedness** (an online search tool provided by the National Institute for Permanent Family Connections). Foreign consulates and tribes may also be helpful in locating and identifying relatives.

4. Collaboration

Diligent search is the responsibility of everyone working to support the child or youth, and a collaborative approach will maximize the opportunity to locate relatives and minimize unnecessary duplication of efforts.

- **TIP:** Permanency roundtables, benchmark hearings, family engagement meetings, and family services plan meetings may provide an appropriate forum to discuss collaboration around family finding / diligent search.

- **TIP:** Court-appointed special advocates (CASAs) often serve as a significant resource in family finding efforts. Given the typical case load of one that most CASAs experience, CASAs are able to dedicate significant time and energy to family-finding efforts and should be included in collaborative efforts to identify and locate family.

5. Perseverance and "Follow Through"

Family finding cannot be accomplished in one day. Starting early and remaining persistent can produce results. Additionally, it is important to follow through and follow up on any commitments made to or by the child, parents, or family.

6. Documentation

Although the department is required to document its diligent search efforts, readily accessible documentation of contact information and contact logs should be practiced by each person involved in the family finding efforts.

7. Creativity and an Open Mind

It is important to think of the diligent search/family finding process as a process of "ruling in" instead of ruling out. Connections and relationships that may not seem significant to the professionals may be extremely important to the child. Additionally, it is important to keep in mind that the purpose of family finding extends beyond placement and therefore individuals unable to provide kinship placement for the child should not be immediately ruled out. Absent safety considerations, his-

toric information in the file should not deter a later effort to follow up with a contact that may have been ruled out in the past. Circumstances change, and an individual previously unable or uninterested in providing support to the child may now be able to do so.

Funding and Rate Issues Fact Sheet

An understanding of funding streams and their applicability and limits is essential to effective advocacy on behalf of children and parents. Access or lack of access to funding may affect what is presented as available service and placement options to families and children in D&N proceedings.

- **TIP:** Counsel should challenge and litigate, as necessary, department representations that a particular service or placement is not an option for a child or family because of lack of available funding. The GAL's duty of loyalty is to the best interests of the child and the RPC's duty of loyalty is to the interests of the parent—not to the department's budget.

- **TIP:** The topic of funding streams in child welfare is complex and constantly changing, subject to federal, state, and county budgets and policies. This fact sheet is intended only as a general overview of funding streams and issues that may arise in cases. When problems do arise, current policy should be clarified utilizing federal, state, and county websites and, when appropriate, discovery requests within the D&N proceeding. When access to public benefits presents an issue in D&N proceedings, legal assistance should be sought from local experts in public assistance law.

GENERAL OVERVIEW OF CHILD WELFARE FUNDING STREAMS

A combination of federal, state, and county funds are used to fund Colorado's child welfare program.

A variety of federal funding streams makes up a significant portion of Colorado's child welfare funding. Two significant pieces of federal legislation that established child welfare funding streams include the Child Abuse Prevention and Treatment Act (CAPTA) of 1974, Pub. L. 93-247, codified at 42 U.S.C. § 5101 *et seq.*, and the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, codified in part at 42 U.S.C. §§ 621 *et seq.*, 670 *et seq.,* which established Titles IV-E and IV-B of the Federal Social Security Act. *See* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 203–209 (Donald N. Duquette and Ann M. Haralambie, eds., Bradford Publishing Company, 2d ed., 2010) (hereafter, "NACC RED BOOK").

In general, Title IV-B funds child and family services and Title IV-E funds foster care and adoption assistance. IV-E has fairly rigid funding criteria and requirements, whereas IV-B is generally considered a more flexible source of funding. IV-E comprises a substantially larger portion of state federal funding than does IV-B.

These pieces of legislation have been significantly amended over the years. Most notably, Titles IV-E and IV-B have been amended through the Adoption and Safe Families Act (ASFA) in 1997, Pub. L. 105-89, and the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110-351. *See* NACC RED BOOK at 217–23.

The Colorado Department of Human Services is the entity responsible for receiving IV-E and IV-B funding, submitting an annual budget request to the Colorado General Assembly to fund the state portion of child welfare dollars, and allocating funds to the counties. *See generally* § 26-5-101 *et seq.*

Colorado law requires the Colorado Department of Human Services to develop formulas for capped and targeted allocations for reimbursing counties for delivery of child welfare services. § 26-5-104. A number of factors determine the formula for allocating the state's reimbursement of the county's child welfare expenses. *See generally* § 26-5-104.

In Colorado, counties are responsible for administering child welfare services. §§ 26-5-102(1)(a), 26-5-105. Counties also fund a portion of child welfare services. § 26-1-122. Counties are generally responsible for 20 percent of the social services budget. *See id.*

TITLE IV-E FUNDING

IV-E eligibility affects the state's ability to access federal IV-E dollars used to fund out-of-home placement. The state must submit a state plan to qualify for IV-E dollars. 42 U.S.C. § 674.

1. Eligibility Requirements

Generally, a child is IV-E eligible if he or she is in out-of-home placement and would have been eligible for Aid to Families with Dependent Children on July 16, 1996. *See* 42 U.S.C. § 672; 7.001.41(D). Out-of-home placement includes voluntary placement agreements (VPA) as well as placement orders entered in a D&N action. 7.001.41(B)(1).

In addition to establishing the child's eligibility as discussed above, the court must make one of the following findings at the initial hearing:

- ✓ Continuation in the home would be contrary to the welfare of the child.
- ✓ Out-of-home placement is in the best interests of the child.

7.001.41(B)(2).

Further, there must be an order of the court within 60 calendar days after the date the child is placed in out-of-home care with a finding of one of the following:

- ✓ Reasonable efforts have been made to prevent the removal of the child from the home.
- ✓ An emergency situation exists such that the lack of preventative services was reasonable.
- ✓ Reasonable efforts to prevent the removal of the child from the home were not required.

7.001.41(B)(3). *See* **Reasonable Efforts fact sheet**.

If the proper language does not appear in the minute order from the first hearing, federal funding will be denied. A deficiency may be cured if the transcript shows the words were in fact stated on the record but inadvertently left out of the minute order. However, an attempt to add the language at a later time with a nunc pro tunc order will not fix the problem. § 19-1-115(6.7). *See also* 7.001.41(B)(2), (3).

- **TIP:** If the child is initially removed on a VPA, the county social services agency must file a dependency petition or a petition to review the need for placement within 180 days of the date the VPA was signed for continued funding for children who are not returned to the parent's custody. 42 U.S.C. §§ 672(e), (f); 7.001.41(E)(4).

- **TIP:** The fact that a child may not be eligible for IV-E funding does not relieve the department of its obligation to provide placement and services to that child. *See In the Interest of City and County of Denver v. Juvenile Court*, 182 Colo. 157, 511 P.2d 898 (Colo. 1973) (court may order department to provide and pay for the services in the child's best interests). IV-E eligibility allows the state to collect federal funds for partial reimbursement of approved costs, but it does not alter whether a child is eligible for specific services or placement.

2. Disqualifying Criteria or Circumstances

Federal funding is *not* available if any of the following apply:

- The child's citizenship or alien status is not verified. 7.001.41(A).
- The parent from whom the child was removed resides in the same home. (However, when the parent is a minor and the minor parent has been determined eligible for Title IV-E foster care, the child's placement costs are reimbursable through Title IV-E foster funding as an extension of the minor parent's cost of care. 7.001.41(G).)
- The child has turned 18 years old. However, federal funding may be extended to age 19 if the child is a full-time student and is expected to graduate by his or her nineteenth birthday. 7.001.41(D)(4).

> **TIP:** Loss of federal funding is not a legitimate basis for terminating jurisdiction. The court maintains jurisdiction until a youth reaches age 21. § 19-3-205. A combination of state and county dollars will be used to fund any placement not eligible for federal funds. Jurisdiction may be terminated only when it is in the child's best interests; the county's fiscal concerns do not take precedence.

Title IV-E also allows states to seek reimbursement for a portion of administrative costs for eligible children who are placed with relatives or who are at risk of out-of-home placement. *See* 42 U.S.C. § 672(i).

> **TIP:** Although IV-E funding may not be available to support the maintenance costs of placement with unlicensed kin, other financial supports may be available to support the placement. *See* **Relative and Kinship Placement fact sheet**.

FUNDING FOR SERVICES

1. Medicaid

A portion of many of the services provided to children in D&N proceedings is covered by Colorado's Medicaid program. *See* **Medical and Dental Needs fact sheet**.

2. Core Services

Core Services is a component of Colorado's Family Preservation Program, which also includes Emergency Assistance for Families with Children at Imminent Risk of Out-of-Home Placement through Child Welfare. *See* §§ 26-5-101(f), 26-5.3-102, 26-5.5-102, 26-5.5-104. Core Services includes a broad array of services. *See* 7.303.1, 7.303.14. These include collateral services, concrete services, crisis intervention services, diagnostic and treatment planning services, hard services, and therapeutic services. 7.303.14.

Core Services must be made available to any client who meets criteria for services as documented in the family services plan. 7.303.12. Specifically, a child must meet all of the following:

- Meet the criteria for Program Area 4, 5, or 6 target group.
- Meet the Colorado out-of-home placement criteria at the time of each placement in any Core Services program.
- Require a more restrictive level of care but may be maintained at a less restrictive out-of-home placement or in his or her own home with Core Services.

7.303.13.

TIP: The state's Core Services program may be a funding support for a service not funded by Medicaid. Generally, any child in a D&N proceeding is considered to be at risk of a more restrictive level of care, satisfying the third eligibility requirement under 7.303.13.

Counties can purchase or directly provide services. 7.304.662. If services are purchased, counties must select contractors with skills and resources to deliver the services. 7.304.662(C).

Services may be provided for up to 18 months; however, one or more six-month extensions to the initial 18-month placement are optional if approved by an internal county department administrative review and documentation of approval is in the case record. *See* 7.303.15.

3. Colorado's Family Preservation Program

Colorado's Family Preservation Program allows county departments to utilize federal and state TANF funds to provide services to families when the children are at risk of out-of-home placement. *See* § 26-5.5-102 *et seq*. These services are designed to ensure that children can be cared for in their own homes or in the homes of caretaker relatives and include case planning, case management, counseling, family support programs, intensive family therapy, day treatment, home-based services, non-medical drug and alcohol treatment, and crisis intervention services. § 26-5.5-104.

The following eligibility criteria apply to Colorado's Family Preservation Program:

- The family's gross income must be less than $75,000 per year.
- The child must meet criteria for out-of-home placement.
- The child must have been living with a specified relative within the last six months.

9 CCR § 2503-1, 3.601.1.

The statewide Family Preservation Program is funded through a variety of funding streams, including but not limited to TANF funds and moneys realized from avoiding out-of-home placement costs. § 26-5.5-105.

4. Promoting Safe and Stable Families

The Promoting Safe and Stable Families (PSSF) program, funded under Title IV-B of the Social Security Act, provides a variety of family preservation and family support services to families in times of need or crisis. PSSF projects in Colorado provide services in 41 counties and one Indian reservation. Projects are operated by local community-based agencies. They are designed to address the needs of their particular communities; therefore, services vary from place to place in the state. *See* **http://www.colorado.gov/cs/Satellite/CDHS-ChildYouthFam/CBON/1251592218996**.

5. Colorado Works

Colorado Works, Colorado's Temporary Assistance for Needy Families (TANF) program, provides public assistance to families in need. § 26-2-701 *et seq*. Under Colorado Works, applicants who are pregnant or have at least one child, and who meet other eligibility requirements, may receive the following assistance:

- Ongoing assistance payments.
- Short-term assistance payments.
- Supportive services.
- Individual development accounts.
- Child care assistance.
- Substance abuse services.
- Job skills vouchers.

§ 26-2-706.6.

All aspects of the Colorado Works program are designed to assist individuals to become self-sufficient and terminate their dependence on government benefits by promoting job readiness, marriage, and work. § 26-2-705. The Colorado Works program operates in all 64 counties, and it is delivered locally through each county's department of human or social services. § 26-2-705.

A child living with a relative who does not have financial responsibility under the law to support that child is considered a "child only" case, in which the relative may choose not to be a member of the assistance unit for purposes of eligibility calculation and work participation requirements. 9 CCR §§ 2503-1, 3.603.1, 3.603.5.

- **TIP:** TANF / Colorado Works should be explored as a source of funding to support in-home and kinship placements.

- **TIP:** County departments of human/social services often provide other assistance beyond the monthly cash assistance grant. Programs vary by county. Examples include the Denver Human Services Department Grandparent and Kinship Program and Larimer County's Relative Caregiver Program and Grandparent Guardianship Eligibility Program. Counsel should be familiar with any such programs in their jurisdiction.

6. Supplemental Security Income (SSI)

SSI is a federal program administered through the Social Security Administration and designed to provide funding to low-income children (regardless of their dependency status) who suffer from strictly defined physical or mental disabilities. *See generally* 42 U.S.C. § 1381 *et seq.*

The county department must apply to the Social Security Administration for any child who is believed to meet Supplemental Security Income eligibility criteria within 45 days of the child's out-of-home placement. 7.001.44.

- **TIP:** For children with severe disabilities that are likely to persist into adulthood, it is very important to ensure that an SSI application and an evaluation have been completed before the child's eighteenth birthday, because lifelong eligibility is based on identification of the disability during childhood.

- **TIP:** Particularly in cases in which the department is acting as the child's representative payee, the GAL should ensure that all necessary notification and accounting procedures are followed. *See The Fleecing of Foster Children: How We Confiscate Their Assets and Undermine Their Financial Security* (published by First Star, The University of San Diego School of Law, and the Children's Advocacy Institute, 2011), *available at http://www.caichildlaw.org/fleecing.htm*.

7. Survivor's Benefits

This program is also administered by the Social Security Administration and is available regardless of dependency status. *See generally* 42 U.S.C. § 401. It provides funds for the children of deceased parents who paid Social Security taxes while alive. 42 U.S.C. § 402(d)(2).

8. Title XX

This funding stream is also referred to as the Social Services Block Grant. *See* Social Security Act, Title XX; 42 U.S.C. §§ 1397–1397f. It funds daycare for children and adults, protective services, case management, health-related services, transportation, and any other social services found necessary by the state for its population. 42 U.S.C. § 1397a(a)(2)(A).

These funds must be used to achieve the following goals:

- Preventing, reducing, or eliminating dependency.
- Achieving or maintaining self-sufficiency.
- Preventing neglect, abuse, or exploitation of children and adults.
- Preventing or reducing inappropriate institutional care.
- Securing institutional care when other forms of care are not appropriate.

42 U.S.C. § 1397.

FUNDING TO SUPPORT PERMANENCY AND SUCCESS FOR CHILDREN AFTER THE TERMINATION OF THE JUVENILE COURT'S JURISDICTION

1. Relative Guardianship Assistance Program (RGAP)

RGAP is a Colorado state program that provides funding for children in relative guardianships after dependency jurisdiction has been terminated and until their eighteenth birthday. 7.311.

Eligibility for RGAP is detailed in 7.311.1. Generally, the prospective guardian must be approved relative/kinship providers; the relative guardian must have been certified as a kinship family foster for at least six consecutive months while the youth or

child resided in the home; and reunification and adoption must be ruled out as permanency goal options for the child. 7.311.1(A), (C), (D).

Each county is responsible for establishing a policy regarding the criteria used for calculating the RGAP agreements. The agreements shall be established in accordance with the written policy. 7.311.63. The rate cannot exceed the current foster care maintenance rate that was reimbursed for the out-of-home care of the youth or that would have been reimbursed if the youth or child was currently in out-of-home care. 7.311.63(A)(7).

Relative guardians may receive reimbursement up to $2,000 per child for the costs incurred in establishing the guardianship, including but not limited to legal fees and required home studies. *See* 7.311.72.

2. Adoption Assistance Program

Adoption assistance is intended to help or remove financial or other barriers to the adoption of Colorado children with special needs by providing assistance to the parents in caring for and raising the child. It provides funding for qualifying foster children, regardless of whether any funding was previously available, from the time the prospective adoptive parents sign the adoptive placement agreement until the child's twenty-first birthday. The rate will be determined prior to finalization and should be the basic rate at a minimum and equivalent to the appropriate specialized-care increment if the child is disabled. *See generally* 7.306.4 *et seq*. Pathways to eligibility may vary depending on whether the child is IV-E eligible. *See id.*

3. Independent Living/Chafee Services

A variety of supports are available to youth emancipating from foster care into adulthood/independent living. *See* **Transition to Adulthood and Independent Living fact sheet**.

Hearsay in D&N Proceedings Fact Sheet

SOCIAL STUDY AND OTHER REPORTS' EXCEPTION TO HEARSAY

Section 19-1-107(2) provides that the court, for the purpose of determining proper disposition of a child in a D&N proceeding, may receive and consider, along with other evidence, written reports and other material relating to the child's mental, physical, and social history.

Although the statute allows receipt and consideration of the report without the requirements of testimony or cross-examination, the court must inform the child, the parent or legal guardian, or other interested party of the right of cross-examination concerning the written reports or other material. § 19-1-107(4). If the child, the parent or guardian, or other interested party requests that the person who wrote the report or prepared the material appear in court, the court must require the author/preparer of the report/material to appear as a witness and be subject to both direct and cross-examination. § 19-1-107(2). In the absence of such request, the court may on its own order the person who prepared the report or other material to appear if it finds that the interests of the child so require. *Id.*

- **TIP:** The Supreme Court has held that the introduction of reports through § 19-1-107(2) does not deny due process or violate the right of confrontation if the reports are made available to all interested parties sufficiently in advance of the hearing to

permit the parties to compel the attendance of the persons who wrote the reports or prepared the materials therein and to subject them to cross-examination under oath. *People in the Interest of A.M.D.*, 648 P.2d 625, 641 (Colo. 1982); *see also People in the Interest of A.R.S.*, 502 P.2d 92, 94–95 (Colo. App. 1972). If counsel does not receive the reports sufficiently in advance of the hearing, counsel should object to the introduction of the reports as a violation of the confrontation clause and the client's/child's due process rights.

- **TIP:** The fact that the social reports or other material may contain hearsay or are prepared by non-experts is a matter concerning the weight and probative value of the evidence and not its admissibility. *People in the Interest of R.D.H.*, 944 P.2d 660, 664 (Colo. App. 1997); *A.R.S.*, 502 P.2d at 95.

- **TIP:** Counsel should carefully scrutinize the content of the report and move to strike any information that is inaccurate, misleading, or unnecessarily prejudicial. Additionally, in districts in which counsel is asked to stipulate to the contents of the report, counsel should be cautious as to what, if any, contents of the report is stipulated. These cautionary steps are necessary to ensure that the court's decision at the hearing at which the report is being introduced is based on accurate and appropriate information, because the practice in some districts is for the court to take judicial notice of its file at future hearings. Furthermore, these steps are necessary to protect the integrity of the information upon which the court might base its decision at future hearings. Counsel must also be familiar with the applicability and limitations of judicial notice set forth by C.R.E. 201.

CHILD HEARSAY

Section 13-25-129 governs the admissibility of child hearsay statements. This statute requires an *in limine* admissibility hearing prior to the introduction of the child hearsay statements and sets forth explicit conditions of admissibility. The process set forth in this statute is the exclusive basis for admitting child hearsay statements if the hearsay statements are not otherwise admissible under any other specific hearsay exception created by statute or court rule.

TIP: The requirements of § 13-25-129 do not apply if the child hearsay statements are also admissible under a traditional hearsay exception set forth in C.R.E. 803. *People v. Diefenderfer*, 784 P.2d 741, 751–52 (Colo. 1989). However, if a child's hearsay statement would be admissible under § 13-25-129 and the residual hearsay exception, the Colorado Supreme Court has recognized that § 13-25-129 criteria/process governs the admissibility of the statements. *Id.* at 752; *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

1. Admissible Statements under § 13-25-129

The following statements are admissible in D&N proceedings under § 13-25-129:

- Statements that describe any act of sexual contact, intrusion, or penetration as defined in § 18-3-401 performed with, by, on, or in the presence of the child declarant.
- Statements that describe any act of child abuse, as defined in § 18-6-401, to which the child declarant was subjected or that the child declarant witnessed.
- Statements that describe any act of domestic violence, as defined in § 18-6-800.3(1), made by a child under age 13.
- Statements that describe any criminal offense against persons in part 1 of article 3 of title 18, C.R.S., made by a child under age 13.

2. Requirement of Reasonable Notice and an *in limine* Hearing

The proponent of any of these child hearsay statements must give the adverse party reasonable notice of the intention to offer the child hearsay statements. § 13-25-129(3). This notice must include the particulars of the child hearsay statements. *Id.*

The court must conduct an *in limine* hearing outside the presence of the jury prior to the introduction of the child hearsay statements to determine that the time, content, and circumstances of the statements provide sufficient safeguards of reliability. § 13-25-129(1)(a). The proponent of the statements has the burden of establishing the requirements for admission by a preponderance of the evidence. *Bowers*, 801 P.2d at 518.

3. Required Findings

The following requirements must be established for admission of the child hearsay statements:

- The time, content, and circumstances of the statements provide sufficient safeguards of reliability; and
- The child testifies at the proceedings.

OR

- The time, content, and circumstances of the statements provide sufficient safeguards of reliability; and
- The child is unavailable as a witness; and
- There is corroborative evidence of the acts described by the child's statements.

§§ 13-25-129(a), (b).

A trial court's decision to admit child hearsay statements will be overturned only upon a finding of an abuse of discretion. *People v. Underwood*, 53 P.3d 765, 768 (Colo. App. 2002). However, the trial court must make some record documenting the basis for its determination on reliability to allow review of its decision; a mere conclusory finding is not sufficient. *People v. Dist. Ct. of El Paso Cty*, 776 P.2d 1083, 1090 (Colo. 1989).

a. Safeguards of reliability. To determine whether the time, content, and circumstances of the child hearsay statements provide sufficient safeguards of reliability, the court should consider the following factors set forth in *People v. Dist. Ct.*, 776 P.2d at 1089–90:

- Whether the statements were made spontaneously.
- Whether the statements were made while the child was still upset or in pain from the alleged abuse.
- Whether the language of the statements was likely to have been used by a child the age of the declarant.
- Whether the allegations were made in response to leading questions.
- Whether the child or the hearsay witness had any bias against the person who is the subject of the statements or any motive for lying.

- Whether any other event occurred between the time of the abuse and the time of the statements that could account for the content of the statements.
- Whether more than one person heard the statements.
- The general character of the child.

These factors provide guidance and direction but are not an immutable set of standards for the trial court in determining whether the standard of "sufficient indicia of reliability" has been met. *Id.; see also People v. Serna*, 738 P.2d 802, 803–04 (Colo. App. 1987). The factors provide assistance and guidance to the trial judge and provide a basis for analysis but should not be used to foreclose admissibility on the basis that one factor has not been satisfied. *People v. Dist. Court* 776 P.2d at 1090.

TIP: Other factors that may be helpful to the trial court in determining whether the child hearsay statements are reliable include the consistency of the child's statements over time, the consistency of the child's statements to each person to whom the child made the statements, how detailed an account the child provides in his or her statements, whether the child describes unusual details, and whether the child describes details that are beyond the child's comprehension.

b. Child unavailability. The courts have recognized two distinct ways in which a child is determined to be unavailable. First, a child is unavailable to testify if the child is not competent to testify. *People v. District Court*, 776 P.2d at 1087. Section 13-90-106(b)(I) provides that children under the age of ten years who appear incapable of receiving just impressions of the facts respecting which they are examined or relating them truly are not competent as witnesses. However, this proscription does not apply to a child under ten years of age in any civil proceeding for child abuse, sexual abuse, or incest when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined. § 13-90-106(b)(II). The competency of children is addressed to the court's discretion. *People v. Seacrist*, 874 P.2d 438, 441 (Colo. App. 1993); *Hood v. People*, 277 P.2d 223, 224 (Colo. 1954). Notably, a finding that a child is incompetent does not automatically impair the guarantees of reliability of the child's hearsay statements and render the hearsay statements inadmissible. *Bowers*, 801 P.2d at 520–21.

TIP: A child competency hearing should be held prior to any hearing in which a child under the age of ten will be called to testify as a witness.

Second, a child is unavailable to testify if it is shown that the child's emotional or psychological health would be substantially impaired if the child is made to testify and the impairment will be long-standing rather than transitory in nature. *Diefenderfer*, 784 P.2d at 749–50. Although substantial traumatic effects of testifying in court can properly form the basis of a finding that a child victim is unavailable, mere inconvenience or discomfort at the prospect of testifying does not meet the statutory standard of unavailability. *Id.*

TIP: The United States Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004) that for "testimonial" hearsay statements of an unavailable witness to be admissible the accused must be afforded an opportunity to cross-examine the witness is based in the confrontation clause of the Sixth Amendment, which applies only to criminal prosecutions.

Colorado case law does not directly address whether *Crawford* is applicable to the introduction of child hearsay statements in dependency and neglect actions. However, courts in other states have ruled that *Crawford* did not alter the constitutional analysis for determining whether due process in a dependency proceeding is violated by the admission of child hearsay statements. *See, e.g., In re Tayler B.*, 995 A.2d 611, 632 (Conn. 2010) (citing *Cabinet for Family Services v. A.G.G.*, 190 S.W. 3d 338, 346–47 (Ky. 2006)). The pre-*Crawford* standard articulated by the United States Supreme Court requires (1) a demonstration of unavailability of the declarant and (2) adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980). In *District Court El Paso County*, 776 P.2d at 1087–88, the Colorado Supreme Court upheld the introduction of child hearsay statements as satisfying the constitutional requirements set forth by *Ohio v. Roberts*. In *Diefenderfer*, 784 P.2d at 748, the court noted that § 13-25-129 is in many ways more protective than the standard enunciated in *Ohio v. Roberts* because it requires a showing of "sufficient safeguards of reliability" and requires corroborative evidence of the act that is the subject of the statement if the declarant is unavailable.

c. Corroborative evidence. Once the trial court determines that a child is unavailable, for the child's hearsay statements to be admissible pursuant to § 13-25-129, the proponent of the hearsay statements must establish that there is corroborative evidence of the acts described by the child's statements. Corroborative evidence is "evidence, direct or circumstantial, that is independent of and supplementary to the child's statements and tends to confirm the acts described by the child." *Bowers*, 801 P.2d at 525. The quantum of corroborative evidence needed to support admission of a child's hearsay statement must be "enough to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the abuse that is the subject of the child's hearsay statement occurred." *Stevens v. People*, 796 P.2d 946, 953 (Colo. 1990).

- **TIP:** Corroborative evidence must be independent of the child's statements. In *Stevens*, 796 P.2d at 954–55, the Colorado Supreme Court held that age-appropriate sexual terminology and demonstrations with anatomically correct dolls were not corroborative evidence. The court in *Stevens* went on to find that typical behavioral changes of a child that social scientists have identified as associated with having been sexually abused are corroborative evidence. *Id.* at 956–57. Other types of corroboration of the abusive acts described by a child include testimony from an eyewitness that the abusive act occurred, physical or medical evidence indicating that the child was sexually assaulted, evidence of other similar acts perpetrated on other victims by the same perpetrator, and admissions by the perpetrator of the abuse. *Bowers*, 801 P.2d at 525.

4. Required Jury Instructions

When child hearsay statements are admitted into evidence in a jury trial, the jury must be instructed regarding the weight and credit to be given the statements in the final written instructions provided for the jury's deliberations. § 13-25-129(2). There is no requirement that this instruction must be given contemporaneous with the admission of the statements, and the 1993 amendment to § 13-25-129(2) eliminated the requirement of a contemporaneous instruction. S.B. 93-111.

- **TIP:** Whether § 13-25-129 allows the admission of child hearsay statements of similar transaction evidence under C.R.E.

404(b) is an unresolved area of the law. *Compare People in the Interest of G.W.R.*, 943 P.2d 466, 467–69 (Colo. App. 1996) (holding that § 13-25-129 does not authorize the admission of child hearsay statements of similar transaction evidence) *with People v. Pineda*, 40 P.3d 60, 66–67 (Colo. App. 2001) (refusing to follow *People in the Interest of G.W.R.* and allowing the introduction of child hearsay statements of the brother of the victim of charged child abuse regarding similar acts of child abuse to the brother and the victim).

HEARSAY ADMITTED AS DISCLOSURE OF FACTS OF DATA UNDERLYING AN EXPERT OPINION

If a witness is qualified as an expert in child protection, social work, or some other area in a D&N proceeding and testifying as an expert, the witness may rely, in forming an opinion, on facts or data perceived by or made known to the witness if of a type reasonably relied on by experts in the qualified field of expertise. C.R.E. 703. Such facts or data may be made known to the expert at or before the hearing and need not be admissible for the expert's opinion or inference to be admitted. *Id.*

Under C.R.E. 705, an expert is permitted on direct examination to disclose the bases of his or her opinion. *See People v. Masters*, 33 P.3d 1191, 1206 (Colo. App. 2001), *aff'd,* 58 P.3d 979 (Colo. 2002). The bases for the opinion may include inadmissible evidence such as hearsay. C.R.E. 703. However, facts or data that are otherwise inadmissible shall not be disclosed to the jury unless the court first determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. *Id.* Additionally, the basis for the expert's opinion may be excluded under C.R.E. 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See Vialpando v. People*, 727 P.2d 1090, 1095–96 (Colo. 1986).

Immigration Fact Sheet

INTRODUCTION

Generally speaking, Colorado child protection laws and policies neither create nor recognize distinctions in availability of protections and services based on immigration status. From a practical perspective, however, lack of immigration status may interfere with a child's or family's access to public services and ability to comply with requirements of treatment plans and reunification efforts. Additionally, undocumented individuals, particularly those who may be involved with child protection, delinquency, or criminal proceedings, face a very real threat of "ICE holds," deportation proceedings, civil immigration detention, and—ultimately—removal from the United States, further complicating efforts to work toward reunification and achieve permanency for children.

- **TIP:** Because of the immediate and long-term impact of lack of immigration status, RPC and GALs should identify immigration issues as early as possible and work to resolve them in a manner consistent with the best interests of the child and/or client. Creativity in minimizing costs of services, maximizing access to federal and state funding steams, and using alternative resources will promote the Children's Code's stated purposes of securing care and guidance for each child subject to its provisions; preserving and strengthening family ties whenever possible; and—for those children who have been removed from their parents' custody—securing the necessary care, guidance,

and discipline to assist them in becoming responsible and productive members of society. *See* § 19-1-102.

TIP: Immigration law is complicated and subject to frequent substantive and procedural changes. The information provided in this fact sheet is intended as a very general overview. When immigration issues arise, D&N attorneys should contact an experienced immigration attorney familiar with the best practices and trends of local immigration offices and consulates.

BENEFITS ELIGIBILITY

Although a detailed discussion of public benefits eligibility for noncitizens in Colorado is beyond the scope of this fact sheet, the following is a brief overview of some eligibility issues that may impact a family's ability to participate in services and to be successful in reunification efforts.

1. Generally

An undocumented child in Colorado has the same right to protection from abuse or neglect as does a US citizen child. Once a child is removed from his or her home through a D&N proceeding, immigration status should not affect that child's ability to access services and placement. Neither the Children's Code nor Volume 7 bases the provision of child welfare services or procedures on a child's immigration status, although immigration status may affect the source of the funding for services and placement. *See* 8 U.S.C. § 1611(a) (limiting eligibility for federal public benefits to specified benefits or "qualified aliens"); **Funding and Rate Issues fact sheet**.

All persons residing in the United States, regardless of status, are eligible for the following federal public benefits: emergency Medicaid, required immunizations, disaster relief, and in-kind, non-means-tested community services (e.g., fire and police protection, victim's advocacy). *See* 8 U.S.C. §1611(b); Final Order of the Attorney General, 66 Fed Reg. 3613 *at* 3615 (Jan. 16, 2001). Absent specific statutory exceptions or unless an individual is a "qualified alien," that person will not be entitled to other federal public benefits. 8 U.S.C. § 1611(a).

Colorado statutes limit access to Medicaid and other means-tested benefits for undocumented adults. *See* § 24-76.5-103; *Soskin v. Reinerton*, 353 F.3d 1242 (10th Cir. 2004). However, services benefiting children under the age of 18 are specifically exempted from these statutory bars. § 24-76.5-103(1); 9 CCR 2503-1 § 3.140.12.

TIP: Immigrant (legal and undocumented) eligibility for various federal benefit programs depends on a variety of factors, including length of residency, type of status, and the benefit sought. The National Immigrant Law Center maintains excellent updated charts regarding program eligibility. *See* **http://nilc.org/guideupdate.html**.

2. Education

Public compulsory education is also a mandated service for undocumented children. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d 786 (1982). However, Colorado does not recognize undocumented students as in-state residents for determining tuition at higher education institutions. § 23-7-111(1)(a). Undocumented students may still be admitted to Colorado colleges and universities but must pay nonresident tuition rates. Undocumented children do not qualify for federal financial aid, and even US citizen children of undocumented parents may have difficulty in obtaining federal student aid because of their parents' lack of valid social security numbers and proof of qualifying income required to complete the Free Application for Federal Student Aid (*available at* **www.FAFSA.ed.gov**).

TIP: Undocumented students evaluating higher education options should consider researching private universities and colleges, along with private scholarships and loans. Frequently, these options have fewer restrictions and may be more broadly available to undocumented youth because they are not as dependent on federal and state funds subject to eligibility restrictions.

3. Unaccompanied Refugee Minor (URM) Program

When family reunification is not possible, children certified as trafficking victims, approved for Special Immigrant Juvenile Status, or granted refugee or asylee status may qualify for URM

placement, case management, and other services, funded by the federal Office of Refugee Resettlement. *See* **http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm**. URM placements in Colorado are approved by the Colorado state refugee services coordinator. *Id.* At the time of this writing, URM services in Colorado are provided by Lutheran Family Services and supervised by Denver, El Paso, and Weld county human services departments and juvenile courts.

- **TIP:** URM program eligibility can be a critical resource for qualifying children and should be explored with an immigration lawyer whenever possible.

JURISDICTION AND CUSTODY MATTERS

Creation, implementation, and enforcement of US immigration law fall under the clear purview of the federal government. *See generally* U.S. Const. Art. I, § 8, Art. VI; *Chamber of Commerce of the U.S. v. Edmonson,* 594 F.3d 742, 764–66 (10th Cir. 2010) (discussing Supremacy Clause). Immigration law is considered civil in nature, and interior enforcement and removal (the legal term now used for deportation) operations are administered at the sole discretion of Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security. ICE lodges charges of removability with the nation's immigration courts against individuals suspected of immigration law violations. Because immigration courts, presided over by administrative civil law judges, are entities of the Department of Justice Executive Office of Immigration Review and not of the federal courts, many procedural protections do not apply. The Federal Rules of Evidence and the right to counsel at government expense, for example, do not apply in the context of removal proceedings. *See Matter of Wadud,* 19 I&N Dec. 182, 188 (BIA 1984); 8 U.S.C. § 1229(b). Other constitutional protections in the criminal context, such as mandatory warnings regarding self-incrimination and prohibition against *ex post facto* application of new laws, do not apply in the immigration context. *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011); *Seale v. INS*, 323 F.3d 150, 159–160 (1st Cir. 2003). Hearsay statements are admissible. 8 C.F.R. § 1240.7(a).

While removal proceedings are pending against a person, ICE may exercise broad discretion in determining whether to detain the individual. 8 U.S.C. § 1226. Once a person is in federal immigration custody, ICE is authorized to transfer the person to any ICE-contracted facility in the country, most often without notice to a detainee's attorney or relatives. *See generally* 8 C.F.R. § 236.1 *et seq*.

- **TIP:** To locate a person suspected of being in ICE custody, use the locator system available at **https://locator.ice.gov**. Note that the person's "Alien Registration Number" ("A Number") or exact name and date of birth, as entered into the ICE database, is required to yield accurate results. Information about juveniles in immigration custody is not available on this site, but such information may be obtained by an immigration attorney of record, parent, or legal guardian directly from the arresting ICE officer or the Office of Refugee Resettlement, Division of Unaccompanied Children's Services.

In Colorado, adult arrestees formally taken into custody and juveniles committed to, entering into a community placement from, and/or paroling out of the Division of Youth Corrections who cannot establish US citizenship are automatically reported to ICE. *See* § 29-29-103; Policy 16.14, *Committed Undocumented Juveniles*, John Gomez, Director, Colorado Department of Human Services, Division of Youth Corrections (June 19, 2006). ICE then, using its discretion, determines whether to issue an ICE "hold" or "detainer" over the person, notifying the custodian that the custodian must continue to hold the person for up to 48 hours, excluding weekends and holidays, after the person would otherwise be subject to release (e.g., by posting bail/bond, serving a sentence, parole, or dismissal of charges). *See* 8 C.F.R. §§ 236.1, 287.7. If ICE fails to take custody of the individual in the 48-hour window, release is mandatory. 8 C.F.R. § 287.7.

- **TIP:** An adult immigration detainee unable to secure release during the pendency of removal proceedings will face challenges in complying with court-ordered treatment in any pending D&N proceeding. Additionally, individuals in ICE custody will be transferred for nonimmigration-related court appearances only if the court in question issues a writ to ICE. Practitioners should remain mindful that a parent's lack of status, immigration detention, and, ultimately, removal or

deportation do not, in themselves, affect parental rights. When ultimate reunification with a detained parent is appropriate, parent's counsel and the GAL should keep appraised of the status of the immigration case and should work creatively to promote compliance with treatment plans (e.g., sending materials from court-ordered parenting classes to parents in detention). GALs and parent's counsel may have information that would assist in the release of a parent and should work with immigration attorneys to share that information with the immigration judge when doing so would serve the best interests of the child/client. To avoid adverse consequences in the removal case, any participation or release of information in removal proceedings should be done only upon advice and approval of experienced immigration counsel.

Some special procedures apply to youth placed in removal. Unless a specific exception applies, ICE may not detain a child under the age of 18 in its custody for longer than 72 hours (including weekends and holidays). *See Reno v. Flores*, 507 U.S. 292, 298, 113 S.Ct. 1439, 123 L.E.2d 1 (1993) (describing consent decrees requiring placement of juveniles in acceptable facilities within 72 hours); Memo, McNary (Dec. 13, 1991) *reprinted in* 69 No. 6 Interpreter Releases, 189, 205 (Feb. 10, 1993); 8 C.F.R. §§ 236.3(c), (d), 1236.3(c), (d) (describing role of juvenile coordinator and procedures for interim detention of juveniles). Options for placement of children in removal proceedings include: (a) release of the child to a parent or guardian; (b) placement of the child with another adult relative; (c) placement of the child with a responsible adult designated by a parent; (d) placement of the child at a location with contracted bed space with the Division of Unaccompanied Children's Services (DUCS) under the Office of Refugee Resettlement (ORR) with the Administration for Children and Families at the federal Department for Health and Human Services; or (e) in the case of Mexican children, voluntary repatriation into Mexico's federal social services custody if "elected" by the child. *See* 8 C.F.R. §§ 236.3, 1236.3. *See also* **http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm** (describing DUCS facilities). At the time of this writing, there are no DUCS-contracted facilities in Colorado. The majority of facilities are concentrated along the southern border with Mexico and on the East and West coasts, and they are nearly always at or above capacity. *Id.*

- **TIP:** Whenever a child, parent, or special respondent in D&N and/or delinquency proceedings is determined to have immigration issues, and particularly when a person has an ICE hold or is in ICE custody, counsel should make appropriate referrals for immigration counsel immediately. It is also a good practice for undocumented youth, families, and service providers to have a plan in place, including agreement about nuanced use of the right to remain silent in ICE interviews. Disclosure of names and addresses of documented relatives; facts of domestic violence, child abuse, or other victimization; and presentation of "equities," as well as letters of support and recommendation from teachers, therapists, caseworkers, GALs, client managers, parole/probation officers, certificates of completion of anger management, offense specific, and other treatment programs, may all be helpful. Answering questions about country of origin, entry into the United States, overstaying visas, and related inquiries about self or family will likely result in substantiating charges of removability.

CONSULATES

Consulates are available to assist noncitizen parents and children. Consulates may also assist child welfare workers with noncitizen children in county custody with obtaining birth certificates and other identity documents and with locating and evaluating relatives in the home country for potential placement. Occasionally, consulates may be able to fund or provide some services, such as document translation and service referrals (both locally and in the home country). It should be noted that some consulates are much more responsive and capable of offering assistance than others.

- **TIP:** It is critical to recognize that consulates must abide by their own countries' laws and that their constituents are the citizens and nationals of the consulate's home country. This may mean that, in child protection cases, consular services, interests, and priorities will not always align with the best interests of a child, particularly in instances in which child protection laws differ significantly in the home country from Colorado law or in which a child and/or the child's family have a fear of returning to their home country, where they may experience persecution. Special care should be used in sharing

the background of a child's D&N case with the consulate, and confidentiality should be maintained to the extent practicable in obtaining appropriate consular assistance.

- **TIP:** To find the consulate serving any given group of foreign nationals in Colorado, conduct an Internet search for the embassy for the country in question. Almost without exception, contact information for consular affairs and various jurisdictions/locations will be available on the embassy website.

- **TIP:** Keep a good record of communications and attempted communications with a consulate. When US Citizenship and Immigration Services (USCIS) is presented with evidence that a consulate failed to respond or indicated it was unable or unwilling to intervene, the USCIS may move more quickly in granting Special Immigrant Juvenile Status (see below).

PATHS TO LAWFUL STATUS

1. Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile Status provides a mechanism for some undocumented children who have been abused, neglected, or abandoned by one or both parents to such an extent that parental reunification is no longer a viable option to obtain lawful permanent residency (i.e., a "green card"). *See generally* 8 U.S.C. § 1101(a)(27)(J). Congress created SIJS to facilitate greater access to social services and improved opportunities for court-involved youth. SIJS approval results in not only lawful permanent residency but also eligibility for assistance from the Unaccompanied Refugee Minor (URM) Program, discussed above. The cornerstone of a SIJS case is a court order from a presiding juvenile court (D&N, delinquency, probate, and, under some circumstances, domestic relations) containing all of the following findings:

- ✓ The child is under 21 years of age and unmarried.
- ✓ The child is a juvenile court "dependent" (meaning the subject of proceedings in which the presiding court is authorized to make findings regarding the best interests, care, and custody of the child in question).

- ✓ The child cannot be reunited with one or both parents because of parental abuse, abandonment, or neglect.
- ✓ It is not in the child's best interests to be returned to the country of his or her origin.

8 U.S.C. § 1101(a)(27)(J).

TIP: Motions and orders for SIJS predicate findings may be prepared by GALs, county attorneys, or juvenile defense attorneys, or jointly by any combination of these practitioners, and should be reviewed by an immigration attorney prior to submission to the court. Motions should contain enough factual information to make clear that the presiding court has a reasonable basis for making the findings. Overly detailed motions are not necessary, and ultimately, the practitioner may wish to consult with experienced immigration counsel about striking an ideal balance between respecting the child's right to privacy and providing enough information to US Citizenship and Immigration Services (USCIS) to persuade it that the order is not fraudulent or issued solely to facilitate immigration status. *See* Memo, Yates, Assoc. Dir. Operations, USCIS, HQ/AND 70/23 (May 27, 2004), available at **www.uscis.gov**.

Congress amended the SIJS statute in 2008 in several significant ways, intending to broaden and clarify eligibility. The amendments also now mandate that SIJS cases be adjudicated within 180 days. Pub. L. 110-457 § 235(d)(2). The relevant regulations at 8 C.F.R. § 204.11 have yet to be amended to reflect these statutory changes but continue to control eligibility to the extent not in conflict with 8 U.S.C. § 1101(a)(27)(J). Practitioners familiar with the old statute (and outdated regulations) will recall that, formerly, a child must have been determined to be "eligible for long-term foster care" and must have continued to be "dependent upon the juvenile court," which was construed to mean that to obtain SIJS the juvenile case must remain open until residency was granted. These findings, which proved problematic for a number of reasons, have been eliminated. It is now clear that if a case closes for reasons related to the SIJS applicant's age, SIJS eligibility continues. It is also possible to argue successfully that SIJS continues to be an option for children whose cases have been resolved by adoption, guardianship, and other permanency arrangements, provided that the core findings continue to be true (i.e., parental reunification is not an option because of

abuse, abandonment, or neglect, and it is not in the child's best interests to return to his or her country of origin). The "one or both parents" language is also new, as of 2008, and because of the rarity of such cases and the absence of guiding regulations, immigration law expertise and familiarity with local USCIS adjudication trends and practices are essential to proceed in a "one parent" case.

- **TIP:** It is extremely helpful, if possible, to have a human services caseworker present at the final SIJS interview stage with USCIS. If the caseworker is unavailable or the case is closed prior to final adjudication of the SIJS application, a letter from the caseworker describing generally the case history and why parental reunification continues to not be viable is also very useful, as is an explanation of why the case might close despite the core SIJS predicate order and findings continuing to be true. This will avoid the need for questioning the SIJS child applicant about the dependency case at the final USCIS interview, when a decision whether to grant SIJS and residency is made.

As with "one parent" cases, consultation with an experienced immigration practitioner is warranted in cases in which juvenile proceedings may close prior to adjudication of the SIJS petition.

- **TIP:** A child granted residency via SIJS will never be able to serve as an anchoring relative to petition for immigration status for either parent, even in cases in which parental rights have not been terminated. This is an important consideration in some cases in which one parent's whereabouts are unknown and/or there are no specific allegations of abuse or neglect against a parent. Several other forms of status (discussed below) allow for other family members to apply as derivatives, and these should be considered in strategizing about what status may be in a child's best interests (e.g., having a parent, even a non-custodial parent, with status and work authorization may have long-term benefits).

2. VAWA

Under the Violence Against Women Act (VAWA), 8 U.S.C. § 1154, the undocumented spouse and/or child of an abusive US citizen or lawful permanent resident may apply for lawful permanent residency. This process is often referred to as "self-

petitioning" (similar to SIJS) and is an option when the applicant lacks the healthy family support needed to pursue "normal" immigration channels, which involve an anchoring relative with status who petitions on behalf of family members. This option is intended to prevent a victim's lack of immigration status from adding to the power and control dynamic exerted by abusers who already have immigration or citizenship status. While residency applications are pending under VAWA, applicants are first provided with "deferred action" and work authorization. "Abuse" is defined under VAWA as battery or "extreme cruelty" and need not be physical in nature but can also include pervasive psychological or emotional abuse. "Any credible evidence" is sufficient to demonstrate the abuse; thus, sustained allegations of abuse or neglect or even police, hospital, medical, or other reports generated in connection with a dependency case may be useful to an applicant in substantiating a claim. The gender of the applicant is irrelevant (despite the "VAWA" title referring solely to women), and many derivative family members of the principal applicant may also qualify, despite not being a target of abuse themselves. VAWA recipients are eligible for a broad range of federal and state public benefits.[1]

3. U Visa

The "U Visa" or U Nonimmigrant Status (8 U.S.C. § 1101(a)(15(U)) allows victims of specified serious crimes who have suffered substantial physical or mental abuse to obtain up to four years of temporary, nonimmigrant status (with work authorization) and, ultimately in many cases, to apply for lawful permanent residency after three years if they have been, are being, or are likely to be helpful in the investigation or prosecution of the crime. To obtain U status, the crime victim *must* provide a "certification" from a government agency (local, state, or federal) with investigatory or prosecutorial authority in criminal matters indicating the victim's cooperation with the investigation or prosecution of the crime. The certification must be completed on a special form, the I-918 Supplement B (*available at* **USCIS.gov**),

1. As mentioned elsewhere in this fact sheet, for complete, updated charts regarding public benefits eligibility, see NILC's website: **www.nilc.org.**

along with all other immigration applications, by any official designated by the agency's head to complete such certifications. Regulations specifically mention that when Child Protection Services has authority to investigate criminal child abuse and neglect allegations, it may provide the necessary certification. 8 C.F.R. § 214.14(a)(2). When a crime victim is under the age of 16, a parent, guardian, or "next friend" may provide the required assistance with law enforcement. U status is available not only to crime victims but also to spouses, children, and siblings in many situations, provided that the applicant(s) was not involved in the criminal activity resulting in victimization. It is also available in cases in which the primary victim (typically a child) is a US citizen but a supportive, cooperative family member is not. In such a case, an undocumented parent, for example, may demonstrate that he or she has suffered substantial harm as an "indirect" victim. Finally, it is worth noting that unlike several other categories of status mentioned here, U status does not result in broad eligibility for public benefits, although work authorization and the fact of status alone may result in greater ability to meet parenting and treatment plans.

> **TIP:** Referring a family for assistance and providing support (e.g., corroborating letters of support) in obtaining U status can protect vulnerable family units from deportation or other unnecessary separation. The U status work authorization available to single parents after domestic violence or sexual abuse by a partner, for example, may provide the single parent with the capacity to move out of a safehouse or shelter, provide a more stable living environment for the children, and assist with breaking out of the cycle of power and dependency common in violent relationships.

4. T Visa

Although still relatively rare, a growing number of T Visas are being issued to foreign-born victims of "severe forms of trafficking." 8 U.S.C. § 1101(a)(15)(T). Federal law defines severe forms of trafficking as (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion *or* in which the person induced to perform the act is under the age of 18; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force,

fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. 22 U.S.C. § 7102. Notably, human trafficking does not require human smuggling across an international border, but rather it is the force, fraud, or coercion to compel labor or services that constitutes trafficking. Obtaining a T Visa also requires demonstrating compliance with reasonable requests for assistance in the investigation or prosecution of the trafficking in cases involving victims 18 years of age and older and several other requirements. Trafficking victims "certified" by ORR/ACF/HHS are entitled to a wide range of federal benefits identical to those available to asylees and refugees. In the case of unaccompanied minors, certification as a trafficking victim also entitles the child to Unaccompanied Refugee Minor (URM) status, which allows for federal foster care placement, currently available and administered in Colorado by Lutheran Family Services in several Front Range counties under the review of local child protective services and the state refugee services coordinator. Like U status, the T Visa results in the possibility of lawful permanent residency after three years.

- **TIP:** The Colorado Network to End Human Trafficking (CoNEHT) has a 24-hour hotline to assist with screening and identifying victims of human trafficking: 1-866-455-5075. CoNEHT is also available to provide "pre-certification" services, including shelter; medical, dental, and mental health services; and comprehensive case management services. The National Human Trafficking Resource Center (NHTRC) also operates a useful multilingual 24-hour hotline: 1-888-3737-888.

5. Asylum

Children and youth are often more vulnerable to persecution in their home countries, but they are also uniquely disadvantaged in seeking asylum in the United States because they may not be able to articulate the basis for the persecution they fear and/or they are presumed to be too young to be targeted on a protected ground by governments or groups that the government cannot or will not control. To qualify for asylum, an applicant must demonstrate that he or she meets the definition of "refugee" found in the 1951 UN Refugee Convention, Article I—namely, that he or she is a person who is outside any country of such person's nationality and unable or unwilling to avail himself or herself of

the protection of that country because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. UN Convention Relating to the Status of Refugees, 189 U.N.T.S. 137; *see also* 8 U.S.C. § 1158(a). Asylum and related protections are not available to individuals fleeing civil war, famine, natural disasters, pervasive crime, or poverty. Because submission of "frivolous" applications carries severe consequences under immigration law, referral to experienced immigration counsel on these matters is critical.

- **TIP:** Asylees and refugees are eligible for a broad range of state and federal benefits. Some, such as employment and housing assistance, are time-limited and only available immediately after obtaining asylum status. For assistance in determining eligibility and locations for services sought, call the federal Office of Refugee Resettlement's hotline (1-800-354-0356) or review ORR's website at **www.acf.hhs.gov/programs/orr**.

- **TIP:** Children's and women's asylum law continues to be an area of emerging practice and precedent. Asylum protection may be available to victims of severe domestic violence, human trafficking, forced gang recruitment, and other "novel" theories in which government may not be the feared persecutor but may simply be unable or unwilling to control persecutors who target individuals because of their youth, gender, family membership, and the like. The Center for Gender and Refugee Studies (**http://cgrs.uchastings.edu**) at the University of California's Hastings College of the Law serves as a valuable clearinghouse and repository of information for these cases and is recommended to any practitioner interested in learning more about these cases.

- **TIP:** There are several other forms of humanitarian protections available to victims of persecution or torture in the country of origin. The information provided here is skeletal in nature and referral to immigration counsel is necessary to assess eligibility for asylum-related protections any time an individual indicates a fear of returning to his or her home country.

6. Other Means of Obtaining Lawful Status

There are numerous other ways to obtain status. In working with immigrant families, it is always worth exploring status of relatives to identify potential automatic claims to US citizenship,

which are possible if a parent or grandparent is or was a US citizen at any time before a child turned 18 years old. 8 U.S.C. §§ 1401(c)–(e), 1431. Other documented relatives may also be in a position to petition for their family members to become residents, although this process may require returning to a home country with a high risk of denial of reentry to the United States and waiting lists that run 5–20 years long. *See generally* 8 U.S.C. §§ 1151–1159. Additionally, there are temporary protections or grants of "deferred action" to some categories of individuals designated as low priority for removal. "Temporary Protected Status" (or "TPS") is available, upon presidential designation, to populations from countries that suffer from natural disasters or severe civil strife. 8 U.S.C. § 1254a. Finally, "DREAMers" are also receiving deference and possible work authorization from ICE insofar as they appear eligible for the DREAM Act (pending legislation that would result in residency for youth who enter the United States before the age of 15, graduate from high school, can demonstrate good moral character, and complete at least two years of higher education or military service after graduation). *See* Memo, Policy No. 10075.1, FEA No. 306-112-0026, Morton, Dir. USICE (June 16, 2011) *and* **http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources.**

◆◆ **TIP:** As previously mentioned, a person's status or prospective eligibility for status often can only be determined by experienced immigration counsel.

RESOURCES

Assistance in this complex, ever-changing area of law is available from several resources, including the following:

Rocky Mountain Immigrant Advocacy Network (RMIAN) Children's Program. Provides free consultations, direct representation, and technical support for undocumented children and their service providers. Also provides detention program "Know Your Rights" presentations and individual orientations for detained adults in deportation proceedings in Aurora, Colorado, with pro bono representation for qualifying individuals. **www.rmian.org** or 303-433-2812.

Higher Education Access Alliance (HEAA). Alliance of school districts, organizations, agencies, and individuals committed to achieving tuition equity in Colorado for undocumented college students through Colorado ASSET (Advancing Students for a Stronger Economy Tomorrow) legislation. Colorado ASSET's website (**www.coloradoasset.com**) has fantastic resources for undocumented students in Colorado, including scholarship opportunities, legislation status updates, and advocacy opportunities.

National Immigration Law Center (NILC). Leading national experts in public (federal, state, and local) benefits eligibility for noncitizens. **www.nilc.org**.

Immigrant Legal Resource Center (ILRC). Extensive free online resources, including a "Judicial Benchbook" on immigration issues arising in juvenile courts. In addition, ILRC offers, for purchase, thorough and user-friendly manuals on various forms of immigration status, including SIJS. Note that although many ILRC materials refer to California-specific law and practice, the overwhelming majority of its resources may be of considerable use to practitioners in other states. **www.ilrc.org**.

US Citizenship and Immigration Services (USCIS). Official government website with immigration applications and instructions, case tracking, guidance memos, and so forth. Caveat: information available on the website and provided on the USCIS 1-800 number may be confusing or misleading; this resource should not replace consultation with an experienced immigration attorney. **www.uscis.gov.**

Indian Child Welfare Act (ICWA) Fact Sheet

To address a history of unwarranted removal of Indian children from their families and the placement of such children in non-Indian foster homes and institutions, Congress enacted the Indian Child Welfare Act (ICWA) in 1978. *See* Pub. L. 95-608, Title I-V, 92 Stat. 3069-3078 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963). The intent of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by establishing minimum federal standards for the removal of Indian children from their families and, when removal is warranted, their placement into foster and adoptive homes reflective of the "unique values of Indian culture." 25 U.S.C. § 1902. ICWA establishes notice requirements, jurisdictional criteria, placement preferences, tribal intervention rights, and requisite findings and burdens of proof in cases involving Indian children as defined by the act.

In 2002, Colorado enacted a statute promoting compliance with ICWA. § 19-1-126. This statute sets forth specific inquiry, notice, and disclosure requirements with which a petitioning or filing party must comply in applicable proceedings under the Children's Code. § 19-1-126(1). It also places an obligation on the court to inquire as to the Indian status of a child when the petition or pleading does not identify whether a child is an Indian child and sets forth specific guidelines for the court to consider in determinations regarding transfer to the tribal court. §§ 19-1-126(2), (4).

TIP: It is imperative that the provisions of ICWA are strictly followed in all cases involving an Indian child. Not only does compliance with ICWA serve its important purposes, but failure to follow its provisions can invalidate the action from the beginning, potentially disrupting children from established placements. *See* 25 U.S.C. § 1914.

APPLICABILITY

1. Child Custody Proceedings

"Child custody proceedings" are defined in ICWA as any action involving the placement of a child into foster care, into a pre-adoptive home, or for adoption, as well as a proceeding for termination of parental rights. 25 U.S.C. § 1903(1). By its own terms, ICWA does not apply to custody disputes between parents or placement resulting from an act that would constitute a criminal act if committed by an adult. *Id.*

TIP: A party, the court, or an Indian tribe may invoke ICWA at any time, including after termination of parental rights or on appeal. *See People ex rel. S.R.M.*, 153 P.3d 438, 441 (Colo. App. 2006) (allowing tribe to raise the issue of inadequate notice in appellate proceeding).

2. Indian Child

ICWA applies when the child is deemed an Indian child. An "Indian child" is defined as any unmarried person who is under the age of 18 and (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). Each Indian tribe has the sole authority to determine whether a child is a member of its tribe or eligible for membership in the tribe. *See People ex rel. J.A.S.*, 160 P.3d 257, 260 (Colo. App. 2007). Some jurisdictions have held that the statute applies only if the child or the family has sufficient ties to the tribe or Indian culture so as to constitute an "existing Indian family"; however, Colorado's Court of Appeals has rejected this doctrine. *In re N.B.*, 199 P.3d 16, 20–22 (Colo. App. 2007).

- **TIP:** Eligibility for tribal membership may change throughout the duration of a D&N proceeding.

PROCEDURE

1. Inquiry

The petitioning or filing party in a proceeding must make continuing inquiries to determine whether the child is an Indian child and must determine the identity of the child's tribe. § 19-1-126(1)(a). The party must disclose in the applicable pleading the efforts that have been made to determine whether the child is an Indian child and the identity of the child's tribe. § 19-1-126(1)(c). When the pleading does not make such disclosure, the court must make an inquiry regarding whether the child is an Indian child and whether there has been compliance with ICWA's procedural requirements. § 19-1-126(3).

- **TIP:** A court will determine whether the petitioning/filing party had reasonable grounds to believe that a child is an Indian child by a totality of the circumstances. *People ex rel. X.H.*, 138 P.3d 299, 303 (Colo. 2006). The threshold for what constitutes such grounds is not intended to be high. *Id.* Because the determination of whether a child is a tribal member or an eligible child of a tribal member, any legitimate evidence of Indian heritage that is brought to the petitioning/filing party's attention will trigger the ICWA notice provisions. *Id.* at 304.

- **TIP:** To preserve and promote timely permanency for children, the GAL should be proactive in all cases to ensure that proper inquiry and notice are made by the responsible party. When the GAL is the party seeking foster care placement or filing a motion to terminate parental rights, the GAL must comply with the inquiry and notice requirements.

2. Notice

ICWA mandates that the party seeking the foster care placement of an Indian child or the termination of an Indian child's parental rights notify the parents and the child's tribe. 25 U.S.C. § 1912(a). Such notice must be by registered mail with return receipt requested. *Id.* When the identity and location of the

parent or tribe cannot be determined, the party must provide notice to the Secretary of the Interior by sending the appropriate paperwork to the regional office of the Bureau of Indian Affairs. *Id.* In cases when a child's tribal affiliation is uncertain, notice must be sent to each tribe of which the child might be a member. *See Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67588 at B.2(b) (1979) ("BIA Guidelines"). A hearing regarding the foster care placement or termination of parental rights cannot take place until at least ten days after the parent and the tribe or secretary receive notice of that action. 25 U.S.C. § 1912(a). The parents or the tribe can request and receive up to 20 additional days to prepare. *Id.*

Like the federal ICWA statute, the Children's Code requires that the petitioning/filing party send notice by registered mail with return receipt requested. § 19-1-126(1)(b). In addition, the Children's Code requires that postal receipts showing that notice has been provided be filed with the court within ten days of filing the action. § 19-1-126(1)(c).

- **TIP:** Failure to send proper notice to the tribe in a case involving an Indian child often results in a remand on appeal. *See, e.g.*, *In re T.M.W.*, 208 P.3d 272, 275 (Colo. App. 2009).

- **TIP:** For the purposes of ICWA, an "Indian tribe" is a federally recognized tribe. *See* 25 U.S.C. § 1903(8); *People in the Interest of P.A.M.*, 961 P.2d 588, 589 (Colo. App. 1998). The list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs" can be found in the Federal Register. Also available in the Federal Register is the list of "Designated Tribal Agents for Service of Notice." Both lists are updated regularly.

3. Rights

a. Right to counsel. In addition to notice, ICWA requires that the court appoint counsel for an indigent parent whenever removal, placement, or termination of parental rights is sought. 25 U.S.C. § 1912(b). The court also has the discretion to appoint counsel for the child if the court finds that such appointment is in the best interests of the child. *Id.*

b. Intervention. The tribe or Indian custodian may intervene in the state court proceedings at any point during the proceeding. 25 U.S.C. § 1911(c).

> **TIP:** Counsel should, whenever appropriate, encourage frequent and continuing contact between the parties to the case and the tribe. A collaborative approach from the beginning can often avoid adversarial proceedings later.

c. Inspection of court documents. All parties, including the Indian parent and the tribe, have the right to inspect all court documents in ICWA cases. 25 U.S.C. § 1912(c).

4. Jurisdictional Issues

a. Full faith and credit. Full faith and credit must be afforded to all public acts, records, and judicial proceedings of any Indian tribe. 25 U.S.C. § 1911(d).

b. Exclusive tribal jurisdiction. ICWA provides that a tribe has exclusive jurisdiction over an Indian child who resides on or is domiciled within the reservation or who is a ward of the tribal court. 25 U.S.C. § 1911(a). The United States Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48–52 (1989), held that a child's domicile is the domicile of the parent. Therefore, even if a child is born off the reservation and has never physically been on the reservation, the child's domicile will be the same as his or her parent for purposes of jurisdiction under ICWA. *Id.*

If a child is domiciled on a reservation or a ward of the tribal court but is temporarily off the reservation, the state court may remove the child from the parents on a temporary basis to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922. The state court must immediately terminate the removal order when it is no longer necessary to prevent imminent physical damage or harm to a child. *Id.* Additionally, as soon as the danger is gone, the state court must immediately transfer the case to the jurisdiction of the tribal court, bring proceedings into its own court in accordance with ICWA, or return the child to the parent. *Id.*

c. Transfer of jurisdiction. Upon the petition of either parent or the tribe, a state court should transfer a proceeding involving an Indian child to the tribal court absent good cause to the contrary and absent an objection by either parent. *Id.* ICWA does not define what constitutes good cause for declining to transfer the case to tribal court. However, the BIA Guidelines, which are not binding but are persuasive in Colorado courts, *see X.H.*, 138 P.3d at 302 n.2, suggest that a state trial court could find good cause to decline a transfer in the following situations:

- The tribe does not have a tribal court.
- The proceedings are at an advanced stage when the transfer is sought, assuming adequate notice was provided and not responded to promptly.
- The child is over 12 years old and objects to the transfer.
- The presentation of the evidence in tribal court would present an undue burden or hardship on the parties or witnesses.
- The child is over five years old, the parents are not available, and the child has had little or no contact with the tribe.

BIA Guidelines, 44 Fed. Reg. 67591 at C.3.

Colorado's ICWA statute similarly encourages courts to consider the following guidelines when faced with a request for transfer of jurisdiction: (1) whether the tribe has a tribal court; (2) whether either parent objects to the transfer; and (3) whether the proceeding was at an advanced stage when the request for transfer was made, if the petitioner did not respond promptly after receiving sufficient notice. § 19-1-126(4)(a). The burden of proof is on the party opposing the transfer of the case to the tribal court. § 19-1-126(4)(b). The party opposing the transfer must demonstrate by clear and convincing evidence that transfer of jurisdiction would injure the best interests of the child. *In re J.L.P.*, 870 P.2d 1252, 1257 (Colo. App. 1994). However, because ICWA presumes the best interests of the child are with the tribe, consideration of state definitions regarding the best interests of the child will not constitute good cause for not transferring jurisdiction. *Id.* at 1258–59.

In Colorado, good cause to deny a request for transfer of jurisdiction is determined on a case-by-case basis. *See, e.g., People In the Interest of A.T.W.S.*, 899 P.2d 223, 226 (Colo. App. 1994). Regarding the exception for the proceedings being at an

advanced stage, Colorado courts have held that a one-year delay was not good cause when a permanency planning hearing had not been held, *see J.L.P.*, 870 P.2d at 1257–58, but that a three-and-one-half-year delay was good cause even though a permanency planning hearing had not been held. *See A.T.W.S.*, 899 P.2d at 226–27.

Transfer of jurisdiction to a tribal court is subject to the tribal court's declination of such jurisdiction. 25 U.S.C. § 1911(b).

5. Burdens of Proof / Requisite Findings

ICWA requires a higher standard for removal than the one applicable to cases involving non-Indian children. Before a state court removes an Indian child from the home, the court must make a finding based on clear and convincing evidence "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." 25 U.S.C. § 1912(e). Additionally, ICWA requires that this standard be supported by testimony from a "qualified expert witness." *Id.* The statute does not define who is considered a qualified expert witness. Colorado has held that as long as the expert is otherwise qualified in his or her area of expertise and the allegations of unfitness are not based on Indian culture or society, the expert does not need to have a more specific expertise in Indian culture or Indian families. *See, e.g., People ex rel. K.D.*, 155 P.3d 634, 638 (Colo. App. 2007).

Before the court can remove an Indian child from his or her home for placement in foster care or terminate parental rights, the petitioner must demonstrate to the court that "active efforts" have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful. 25 U.S.C. § 1912(d). ICWA does not define active efforts. However, the Colorado Court of Appeals has stated that active efforts "are equivalent to reasonable efforts to provide or offer a treatment plan in a non-ICWA case and must be tailored to the circumstances of the case" and held that active efforts are not required when such efforts would be futile. *See K.D.*, 155 P.3d at 637.

To terminate the parental rights to an Indian child, the state court must find, beyond a reasonable doubt, that the continued custody of the child by the parent is likely to result in serious

emotional or physical damage to the child. 25 U.S.C. § 1912(f). As with removals, the evidence must be supported by testimony from a qualified expert witness. 25 U.S.C. § 1912(f).

> **TIP:** Counsel should always be aware of and advocate for application of the correct ICWA standard at any hearing involving an Indian child. RPC should be aware of the correct standard so as to create a heightened burden for the state to prove, and the GAL should be aware so that any decision made is not subject to reversal on appeal.

PLACEMENT PREFERENCES

In addition to the requirement that placement of an Indian child be in the least restrictive, most family-like setting that meets the child's needs in close proximity to the child's home, ICWA imposes a descending order of placement preferences. 25 U.S.C. § 1915(b). First, the statute requires that the child be placed with a member of the child's extended family. 25 U.S.C. § 1915(b)(i). If no family member is available, the statute permits placement in a foster home that has been licensed, approved, or specified by the child's tribe. 25 U.S.C. §1915(b)(ii). Only if these options are not available may the state place the child in an Indian foster home licensed by a non-Indian licensing authority. 25 U.S.C. § 1915(b)(iii). If the child must be placed in an institution, the institution should be approved by the tribe or operated by an Indian organization and be suitable to meet the Indian child's needs. 25 U.S.C. § 1915(b)(iv).

The state court may deviate from these preferences when the tribe has established a different order of preference for good cause and the resultant placement is the least restrictive setting appropriate to meet the child's needs. 25 U.S.C. §§ 1915(b), (c). The preference of the Indian child and parent should be considered when appropriate. 25 U.S.C. § 1915(c). The BIA Guidelines provide the following factors for determining good cause to deviate from the placement provisions:

- A request by the parent or child for a different placement.
- The extraordinary physical or emotional needs of the child.

- The lack of available family member meeting the preference requirements, even after conducting a diligent search.

BIA Guidelines, 44 Fed. Reg. 67594 at F.3.

When a state court terminates the parental rights to an Indian child, it is required to follow similar placement preferences for adoption. In descending order of preference, placement should be with (1) a member of the child's extended family; (2) a member of the child's tribe; or (3) another Indian family. 25 U.S.C. § 1915(a). Colorado courts have held that the certainty of emotional or psychological damage to a child if the child is removed from a primary caretaker may be considered in determining whether there is good cause to deviate from ICWA's placement provisions. *See In re A.N.W.*, 976 P.2d 365, 369 (Colo. App. 1999).

TIP: ICWA does not explicitly allow for the placement of an Indian child in a non-Indian foster home. Indian children should be placed only in a non-Indian, non-relative foster care placement as a last resort because such a placement carries a high risk of being disrupted.

Interstate Compact on the Placement of Children (ICPC) Fact Sheet

The Interstate Compact on the Placement of Children (ICPC) is a reciprocal agreement among member territories and states to provide for uniform legal and administrative procedures governing the interstate placement of foster children. The ICPC has been adopted by all 50 states, the District of Columbia, and the US Virgin Islands. Colorado has enacted the ICPC in §§ 24-60-1801–1803. The Colorado Department of Human Services Staff Manual for the ICPC is found in 7.307. A complete version of the ICPC's text, along with the regulations developed by the Association of the Administrators on the Interstate Compact on the Placement of Children (AAICPC), can be found on the Internet at **http://icpc.aphsa.org./Home/home_news.asp**.[1]

- **TIP:** The regulations developed by AAICPC are advisory only, but they are a helpful tool because they identify the expectations for sending agencies/states and receiving states for successful compliance with the ICPC.

- **TIP:** A revised ICPC was drafted but will not come into force until 35 states have adopted it. Since its release in March 2006, 12 states have adopted the new version. The revised ICPC was developed without input from all stakeholders, and state and

1 References to the regulations developed by the Association of Administrators of the Interstate Compact on the Placement of Children will be cited in this fact sheet in the following format: "ICPC Reg. No. __."

national efforts have been underway to prevent its enactment. It is unlikely that the revised ICPC will go into effect.

PURPOSE OF ICPC

The purpose of the compact is to encourage cooperation between jurisdictions for ensuring timely and informed placements of children across state lines in the appropriate and least restrictive setting. § 24-60-1802, Art. I.

APPLICABILITY

Generally, the ICPC covers the following types of placements:

- Placement of a child "in a family free or boarding home," a "child care agency or institution," or foster care. § 24-60-1802, Arts. II (d), III. *See also* 7.307.31, 7.307.32(A) (requiring ICPC procedures to be initiated for children in the custody of the county department or under the jurisdiction of the court being considered for out-of-state placement into group homes, foster homes, residential child care, and homes of parents or relatives).
- Placement of a child adjudicated delinquent into an institution. § 24-60-1802, Art. VI. *See also* 7.307.32 (requiring the initiation of ICPC procedures for a juvenile adjudicated delinquent who is not on probation or parole and who is being considered for out-of-state placement with relatives, foster parents, or prospective adoptive parents).
- Placement of a child as a preliminary for adoption. § 24-60-1802, Art. III; 7.307.31.
- When a child in a D&N proceeding moves out of state with a parent, relative, foster parent, or prospective adoptive parents, as well as in certain situations involving runaway youth. *See* 7.307.32(B), (F)–(H).

See also ICPC Reg. No. 3 (effective Oct. 1, 2011).

The provisions of the compact do not apply to the following placements:

- Placements by a parent, guardian, or specified relative to a parent, specified relatives, or non-agency guardian. § 24-60-1802, Art. VIII(a).

- Any placement pursuant to any other interstate compact to which both the sending state and the receiving state are parties. § 24-60-1802, Art. VIII (b).
- Placements in medical facilities, mental health facilities, boarding schools, or any institution primarily educational in nature. § 24-60-1802, Art. II(d).

See also ICPC Reg. No. 3.

TIP: The ICPC regulations exempt from the ICPC requirements placements made to parents from whom the child was not removed when the court has no evidence that the parent is unfit and does not seek any such evidence regarding the parent's fitness from the receiving state if the court relinquishes jurisdiction immediately upon placement with the parent. *See* ICPC Reg. No. 3(3)(a). Additionally, the regulations exempt from the ICPC out-of-state placements with a parent made by a court in conjunction with a request for a "courtesy check" (non-ICPC related) of the placement. *See* ICPC Reg. No. 3(3)(b). Colorado rules do not reflect these exemptions. *See* 7.307.31(b), 7.307.32(A), (B) (requiring ICPC procedures to be applied when a court or agency places a child with a parent or a parent moves out of state with a child).

TIP: Although applying ICPC procedures to out-of-state placements with parents may help the court make informed placement decisions in the best interests of children, in some cases such procedures may cause undue delay or problematic obstacles to the placement of a child with his or her biological parent. For example, in *In the Dependency of D.F.-M.*, 236 P.3d 961 (Wash. App. 2010), the receiving state denied the home study of the father with whom the child was to be placed because the father did not have enough bedrooms in his house. The court held that although ICPC Reg. No. 3 would have required the ICPC to apply to the father's placement, the ICPC itself did not require such application and that ICPC Reg. No. 3 "impermissibly expand[ed] the scope of the compact beyond that set out in Article III" of the ICPC. *Id.* at 967. Although not binding law in Colorado, this case may serve as persuasive authority in circumstances in which counsel believes application of the ICPC would be contrary to the best interests of a child. In such cases, RPC and/or the GAL should gather and present evidence showing the parent's relationship to the child and his or her fitness as a custodian so the court can make an informed decision for placement in the noncustodial parent's custody and termination of jurisdiction.

ICPC regulations provide that a visit is exempt from the ICPC. *See* ICPC Reg. No. 9. Any out-of-state visit that extends beyond 30 days requires court approval. § 19-1-115(3)(b). In granting such approval, the court, if appropriate, must order compliance with the ICPC. *See id.*

> **TIP:** Practitioners should be careful not to attempt to disguise a placement by labeling it a "visit" even though the hope is to place the child. If the circumstances make the duration of the stay unclear and the stay does not have an express termination date from the onset, it could be construed as a placement and could be in violation of the ICPC. The key issues are purpose, duration, and intention. *See* ICPC Reg. No. 9.

PROCEDURES AND REQUIREMENTS

Specific procedures and requirements must be met and followed to comply with the ICPC prior to sending any child from one state to another.

Prior to placing any child in another state, the sending state must provide written notice to the receiving state of the intention to place the child in the receiving state. § 24-60-1802, Art. III(b). The written notice must include information identifying the child, the parents or legal guardian of the child, and the proposed placement, along with the reasons and authority for the placement. *Id.*; *see also* 7.307.51(detailing obligations of the department or child placement agency when Colorado is the sending state); Reg. No. 0.01(discussing ICPC forms). The home study must be completed within 60 days after receipt of the request. ICPC Reg. No. 1(6)(a); *see also* 42 § U.S.C. 671(a)(26). This home study must assess the safety and suitability of the home for the child and the extent to which placement in the home would meet the needs of the child. *Id.* Final approval or denial of the placement (also addressing the education and training requirements of the receiving state) must be provided by the receiving state as soon as practicable but no later than 180 days after receipt of the initial request for the home study. ICPC Reg. No. 1(6)(b).

A child cannot be sent to the new placement until the receiving state has responded in writing that it has determined the placement does not appear to be contrary to the interests of the child. § 24-60-1802, Art. III(d).

TIP: Receiving a favorable determination by the receiving state does not mean the sending state is required to make the placement. The county department must determine, within 14 calendar days upon receipt of the home study report conducted by the receiving state, whether the placement is appropriate for the child. 7.307.5.

EXPEDITED PROCEDURES FOR PLACEMENTS

Expedited procedures may be utilized to reduce delays in the placement of children in appropriate family homes across state lines. *See* 7.307.6.1; ICPC Reg. No. 7.

An expedited placement decision can be made only when the placement of the child is with a parent, step-parent, adult brother or sister, adult uncle or aunt, grandparent, or guardian. 7.307.6(B). The court must enter an expedited placement decision court order for an expedited placement procedure to apply. 7.307.6(A). The court order must specifically contain a finding that the placement is with a family member, as defined above, and make an express finding that one or more of the following circumstances apply:

- The child is four years old or younger or a sibling of such child and being placed in the same home as the child.
- The child is in an emergency placement.
- The child or any child in the sibling group has a substantial relationship with the proposed placement resource.

7.307.6(A).

ICPC regulations also provide for expedited placement procedures for placements necessitated by unexpected dependency because of the sudden or recent incarceration, incapacitation, or death of a parent or guardian. *See* ICPC Reg. No. 7(5)(a).

Volume 7 provides that for expedited placement decisions, the court will send a copy of its signed order to the sending agency within two business days of the hearing or consideration of the request. 7.307.62(B). The department caseworker must transmit the signed order, completed forms, and supporting documents to the ICPC county liaison. *Id.* Within two business days after receipt of the expedited placement decision request, the ICPC county liaison must send, by overnight mail, the request and

supporting documentation to the receiving state compact administrator, along with a notice form of the placement's entitlement to expedited procedures. *Id.*

The receiving state is allowed, but not required, to provide provisional approval or denial for the child to be placed with a parent or relative. ICPC Reg. No. 7(6). Such provisional approval or denial must be communicated in writing and completed within seven calendar days of receipt of the completed request packet. *Id.* The receiving state must make an expedited placement decision no later than 20 business days after receipt of the request and required forms and documentation. ICPC Reg. No. 7(9)(e).

> **TIP:** In all ICPC requests, whether or not it is an expedited placement, counsel should keep close watch on the time limits for ICPC compliance and request court assistance if the ICPC request is not proceeding in a timely manner.

RETENTION OF JURISDICTION

In all ICPC placements, the sending state retains jurisdiction over the child sufficient to determine all matters for custody, supervision, care, treatment, and disposition of the child that it would have had if the child remained in the sending state. *See* § 24-60-1802, Art. V; 7.307.51. The receiving state has no legal jurisdiction over the child under the ICPC.

The sending agency continues to have financial responsibility for support and maintenance of the child during the period of placement. § 24-60-1802, Art. V(a). The sending agency's responsibility for the child continues until it legally terminates the interstate placement. Under the ICPC, the placement terminates only with one of the following circumstances:

- The child is adopted.
- The child reaches majority.
- The child becomes self-supporting.
- The child is discharged by agreement of both the sending agency and the receiving state.

§ 24-60-1802, Art. V; *see also Department of Social Services of the City and County of Denver v. District Court*, 742 P.2d 339, 341

(Colo. 1987)(holding that the mere filing of an adoption petition is not sufficient to divest the sending agency of jurisdiction under the ICPC).

A receiving state must supervise a child placed pursuant to the ICPC if the sending state requests supervision and if both the sending agency and the agency completing the home study are public child placement agencies and the child's placement is not in a residential treatment center or group home. ICPC Reg. No. 11(3). Supervision must begin when the child is placed and the receiving state has received the proper ICPC forms. ICPC Reg. No. 11(4). Supervision must include face-to-face visits with the child at least once per month. ICPC Reg. No. 11(6). Written supervision reports must be completed at least once every 90 days. ICPC Reg. No. 11(7). The child placement agency in the sending state remains responsible for the case planning for the child and the ongoing well-being of the child, as well as for meeting any identified needs of the child that are not being met by other available means. ICPC Reg. No. 11(9)(a), (b). The receiving state is responsible for assisting the sending state in locating appropriate resources for the child and placement. ICPC Reg. No. 9(c).

VIOLATION OF THE ICPC

Interstate placements made in violation of the ICPC constitute a violation of the laws of both the sending and receiving states. § 24-60-1802, Art. IV. Violations are subject to penalties in both jurisdictions. *Id.*

Intervenors
Fact Sheet

The Children's Code grants persons in a specified relationship with the child the opportunity to intervene in D&N proceedings.

WHO MAY INTERVENE

1. Caregivers

Section 19-3-507(5)(a) grants "parents, grandparents, relatives, or foster parents who have the child in their care for more than three months" the right to intervene after adjudication upon a showing that they have information or knowledge concerning the care and protection of the child.

2. Relatives Requesting Custody

Colorado courts view a relative's request for legal custody pursuant to § 19-3-605(1) as a request to intervene. *People ex rel. S.R.M.*, 153 P.3d 438, 443 (Colo. App. 2006); *People in the Interest of C.E.*, 923 P.2d 383, 386 (Colo. App. 1996); *see also* C.R.C.P. 24. The relative seeking custody, however, must file the request for custody (i.e., to intervene) no more than 20 days after the motion to terminate parental rights has been filed or risk denial of the request as "untimely." § 19-3-605(1); *People ex rel. S.R.M.*, at 443; *People in the Interest of C.E.*, 923 P.2d at 386.

INTERVENOR PARTICIPATION IN D&N PROCEEDINGS

The extent of intervenor participation in D&N proceedings is pending before the Colorado Supreme Court. *See A.M. v. N.M.*, 2011 WL 3276665 (Colo. Aug. 1, 2011) (granting certiorari on question of whether the Court of Appeals erred in determining that the intervenor's cross-examination of witnesses at a termination hearing exceeded meaning of intervention set forth by § 19-3-507(5)(a) and violated parents' due process rights). The Colorado Court of Appeals has issued various opinions regarding the extent of intervenor participation. Those cases, summarized below, base participation on the issues presented at the particular hearing and statutory interpretation.

- An intervenor does not become the child's representative. *People in the Interest of G.S.*, 820 P.2d 1178, 1181 (Colo. App. 1991).
- An intervenor relative seeking custody may fully participate in the hearing regarding his/her request, including presenting evidence. *People in the interest of C.P.*, 524 P.2d 316, 319–20 (Colo. App. 1974).
- Caregivers who have intervened pursuant to § 19-3-507(5)(a) may participate fully in the dispositional hearing. *People ex rel. A.M.*, 2010 WL 5621076 (Colo. App. no. 10CA0522, Dec. 23, 2010), *cert. granted on other grounds, A.M. v. N.M.*, 2011 WL 3276665 (Colo. Aug. 1, 2011).
- An intervenor foster parent is not entitled to full participation in permanency planning hearing in which issue was whether court should return the child to the mother's home. *In the Interest of A.W.R.*, 17 P.3d 192, 197 (Colo. App. 2000). *But see A.M.*, 2011 WL 3276665.
- Intervenor relatives are entitled to service of notice of appeal. *People ex rel. S.R.M.*, 153 P.3d 438, 439–40 (Colo. App. 2006).

Jurisdictional Issues Fact Sheet

In cases involving custody orders from other states or countries and/or allegations of wrongful removal/retention across international and state borders, knowledge of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), the Parental Kidnapping Prevention Act (PKPA), and the Hague Convention on the International Aspects of Child Abduction (Hague Convention) is key.

UCCJEA

The UCCJEA is a uniform state law adopted by 49 states at the time of this writing. Colorado has adopted the UCCJEA. *See* § 14-13-101 *et seq*. The UCCJEA contains specific enforcement mechanisms for out-of-state custody orders, *see* § 14-13-105, and rules for determining whether a state has jurisdiction to make determinations involving the custody of a child. § 14-13-201 *et seq.* A foreign country is treated like a state for purposes of jurisdictional analysis. § 14-13-104 (providing that a custody determination made by a foreign country will be enforced if it appears the foreign country exercised jurisdiction substantially in compliance with the UCCJEA unless its custody laws violate fundamental principles of human rights). The UCCJEA also treats a Hague Convention return order as a custody order for purposes of enforcement. § 14-13-302.

TIP: The UCCJEA made several significant revisions to the Uniform Child Custody Jurisdiction Act (UCCJA) to clarify ambiguities and reconcile different interpretations of when a state can modify a custody order, including the following: (1) prioritizing a child's home state for deciding which state has initial jurisdiction; (2) authorizing temporary emergency jurisdiction in some situations; (3) establishing exclusive continuing jurisdiction for deciding which state has jurisdiction to modify an initial determination; (4) providing a process to determine which state will exercise jurisdiction when concurrent cases exist in different jurisdictions; (5) providing a structure for interjurisdictional communication and cooperation; (6) providing mechanisms to enforce custody and visitation orders; and (7) providing procedural provisions on miscellaneous issues such as notice, immunity, and pleading requirements. *See* § 14-13-101, prefatory note. One of the purposes underlying the revisions made by the UCCJEA to the UCCJA was to resolve inconsistencies between the UCCJA and the PKPA. *See id.*; **PKPA section**, *infra.*

1. Application of the UCCJEA

The requirements of the UCCJEA must be met for the court to have jurisdiction to make a child custody determination. Although the parties must be given notice and an opportunity to be heard, physical presence of or personal jurisdiction over a party or a child is neither necessary nor sufficient to make a child custody determination. § 14-13-201(3). The UCCJEA applies to the following child custody determinations: temporary, permanent, initial, modification, and enforcement of legal custody, physical custody, or visitation. § 14-13-102(3). The UCCJEA defines a child custody proceeding as a proceeding in which the legal or physical custody of a child, allocation of parental responsibilities of a child, visiting, or parenting time is at issue. § 14-13-102(4). Under the UCCJEA, child custody proceedings specifically include divorce, legal separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence. § 14-13-102 (4). *See also People ex rel. M.C.,* 94 P.3d 1220, 1224 (Colo. App. 2004)(holding that a temporary restraining order is a child custody proceeding under the UCCJEA). Juvenile delinquency, contractual emancipation, adoptions, and emergency medical care are not child custody

proceedings within the meaning of the UCCJEA. *See* §§ 14-13-103, 14-13-102(4).

TIP: The UCCJEA broadly defines "person" to include governmental agencies such as the department. § 14-13-102(12). "Person acting as a parent" means a person other than a parent who has physical custody or has had physical custody for six consecutive months (including any temporary absence) within one year before commencement of a child custody proceeding and has been awarded legal custody or APR or who claims parental rights. § 14-13-102(13).

2. Initial Jurisdiction

In non-emergency situations, a state has four ways to obtain initial jurisdiction: home state, significant connection, more appropriate forum, and default or vacuum jurisdiction. *See* § 14-13-201 *et seq*.

a. Home state. The UCCJEA prioritizes home state over any other basis for jurisdiction. *See* § 14-13-102, official comment. A state establishes home state jurisdiction once the child and a parent have lived there for six months, including any temporary absences. § 14-13-102(7)(a). When the child permanently leaves the state, as long as a parent remains, home state jurisdiction continues for six months. § 14-13-201(1)(a). This "look back" provision provides the remaining parent an opportunity to request court intervention for a period of time even after a child has been removed from the state. The home state of a child under six months old is where the child has lived from birth with a parent. § 14-13-102(7)(a).

The concept of exclusive continuing jurisdiction, discussed below, renders home state relevant only in initial custody determinations. When modifying a custody order, the child's home state is not considered unless an exception to exclusive, continuing jurisdiction applies. In that situation, jurisdiction is reset and treated as if an initial determination. § 14-13-202(2).

b. Significant connection. If no home state exists or the home state has declined to exercise jurisdiction, a state may establish significant connection jurisdiction when it is the location of "substantial" evidence and the child and at least one par-

ent has a "significant" connection with the state, other than mere physical presence. § 14-13-201(1)(b). Because two or more states simultaneously may have initial jurisdiction based on significant connections, the UCCJEA also provides a procedure to determine which state will exercise jurisdiction *See* 14-13-206.

c. More appropriate forum. On the basis of inconvenient forum, *see* § 14-13-207, or unjustifiable conduct, *see* § 14-13-208, both the home state and any significant connection state(s) may decline to exercise jurisdiction and defer to a more appropriate forum. § 14-13-201(1)(c).

d. Default jurisdiction. A state may establish default jurisdiction (sometimes referred to as "vacuum jurisdiction") when no other state has initial jurisdiction. § 14-13-201(1)(d). This situation may apply, for example, to transient families or to children under six months old who have lived in more than one state.

3. Temporary Emergency Jurisdiction

A state has temporary emergency jurisdiction (TEJ) when the child is present in the state and the child has been abandoned or when emergency protection is required because the child or the child's parent or sibling has been subjected to or threatened with mistreatment or abuse. § 14-13-204(1). An abandoned child is defined as one "left without provision for reasonable and necessary care or supervision." § 14-13-102(1). A court may assume TEJ in abuse but not neglect cases. § 14-13-204(1), official comment.

By its nature, TEJ is limited; the duration of a TEJ order depends on whether custody has been or is being litigated elsewhere. When no prior custody determinations exist and no custody action is pending in another state having jurisdiction, the temporary order remains in effect until a state having jurisdiction issues an order. § 14-13-204(2). If the TEJ state later becomes the child's home state, the temporary order may ripen into a permanent one (if the language of the temporary order provides for this). *Id.*

If there is a prior custody order or if an action is commenced in another state having jurisdiction, the order made under TEJ must specify an expiration date. § 14-13-204(3). The TEJ order remains in effect until it expires under its terms or until the other

state having jurisdiction issues an order before the expiration date. *Id.* Upon being informed of a proceeding in another state pursuant to another basis of jurisdiction under the UCCJEA, the court exercising TEJ must immediately communicate with the sending state to determine how to proceed. *Id.*

4. Exclusive Continuing Jurisdiction

When a court properly exercises either initial or modification jurisdiction to issue a custody order, exclusive continuing jurisdiction (ECJ) continues until one of the following:

- The issuing state determines that the child, the child's parents, and anyone acting as a parent no longer have a significant connection with the issuing state or substantial relevant evidence no longer exists in the issuing state.
- The issuing state or another state determines that the child, the child's parents, and anyone acting as a parent no longer reside in the issuing state.

§§ 14-13-202(1)(a), (b).

TIP: Only the issuing state can make a significant connection determination, whereas either the issuing or the receiving state can determine that the parents and child have moved from the issuing state. *Compare* § 14-13-202(1)(a) *with* § 14-13-202(1)(b).

5. Modification Jurisdiction

The provisions regarding modification and ECJ dovetail with one another. A receiving state may modify custody determinations only if it meets the factors for initial jurisdiction and the issuing state cedes jurisdiction or if the receiving state or the issuing state determines that both parents and the child do not reside in the issuing state. § 14-13-203(1).

6. Simultaneous Jurisdiction

In some initial jurisdiction situations, more than one state may have jurisdiction, such as when there is no home state, no ECJ state, or more than one state having significant connection jurisdiction. In these situations, the courts must communicate and the "first in time rule" generally applies, giving priority to

the proceeding filed first. §§ 14-13-206(1), (2). In modification and enforcement proceedings, intercourt communication is not required, and the state having ECJ may stay or proceed with the modification or may enjoin the parties from proceeding with the enforcement in the other state. § 14-13-206(3).

TIP: For the purposes of communication, "court" includes a judge and a magistrate, but not a law clerk. *People ex rel. D.P.*, 181 P.3d 403,407 (Colo. App. 2008).

7. Declining Jurisdiction

A court having initial, exclusive, continuing, or modification jurisdiction may decline to exercise its authority and find another forum to be more appropriate for two reasons: inconvenient forum and unclean hands.

a. Inconvenient forum. The court, upon motion of a party, the court's own motion, or the request of another court, may decline to exercise jurisdiction if it is an inconvenient forum and another state is more appropriate. § 14-13-207(1). The statute provides a number of factors that the court shall consider, including domestic violence, the length of time the child has been outside the state, and the distance between the courts. § 14-13-207(2).

b. Unclean hands. Most issues regarding unjustifiable conduct have been eliminated by prioritization of home state, exclusive continuing jurisdiction, and modification jurisdiction. However, subject to some exceptions, a state must decline jurisdiction when it is based on a party's reprehensible act (such as secreting a child) and must assess costs of the action to the wrongdoer. §§ 14-13-208(1), (3). A court declining jurisdiction on this ground must also fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the conduct. § 14-13-208(2).

PKPA

The PKPA is a federal law that extends the full faith and credit clause of the US Constitution to child custody proceedings. *See* 28 U.S.C. § 1738A. The PKPA "'furnish[es] a rule of decision

for [state and federal] courts to use in adjudicating custody disputes' and, hence, dictates the outcome of jurisdictional conflicts between state courts in child custody determinations." *In re L.S.*, 257 P.3d 201, 204–05 (Colo. 2011)(quoting *Thompson v. Thompson*, 484 U.S. 174, 183 (1988)).

A custody order consistent with the PKPA requirements must be recognized and enforced by other state courts. *In the Interest of A.J.C.*, 88 P.3d 599, 611(Colo. 2004). Because the UCCJEA is based on and incorporates the PKPA, *see* § 14-13-101, prefatory note; **UCCJEA section**, *supra*, an order entered by a state having jurisdiction pursuant to the UCCJEA likely satisfies the jurisdictional requirements of the PKPA.

Conversely, sister states need not accord full faith and credit to a custody order not meeting the PKPA requirements. *In re L.S.*, 257 P.3d 201, 204–05 (Colo. 2011)(holding that an order entered by the other state pursuant to mistaken application of UCCJEA was not entitled to full faith and credit under the PKPA); *In re Marriage of Dedie and Springston,* 255 P.3d 1142, 1146 (Colo. 2011) (holding that the district court erred in ordering enforcement of a New York custody order under PKPA when the order was based on faulty jurisdiction under UCCJEA).

> **TIP:** The jurisdictional provisions that must be satisfied for an order to be in compliance with the PKPA are codified at 28 U.S.C. §§ 1738A(c)–(h). Counsel should not only ensure that orders entered in Colorado D&N proceedings are consistent with these provisions, in addition to the parallel requirements of the UCCJEA, but should also ensure that any order sought to be enforced in Colorado courts was entered in compliance with these jurisdictional requirements.

HAGUE CONVENTION

The Hague Convention, implemented in the United States by the International Child Abduction Remedies Act (ICARA), provides methods for the return of a wrongfully removed or retained child and for enforcement of visitation across international borders. 42 U.S.C. § 11601 *et seq*. The Hague Convention applies "to any child who was habitually resident in a Contracting [nation] immediately before any breach of custody or access rights."

Hague Convention on the Civil Aspects of International Child Abduction Art 4 T.I.A.S. No. 11,670 (Oct. 24, 1980), *available at* **http://www.hcch.net/index_en.php?act=conventions.text&cid=24**. It ceases to apply when a child turns 16 years old. *Id.*

The petitioner must establish where the child habitually lived, that the removal violates the petitioner's rights under the laws of the receiving country, and that the petitioner's rights were being exercised at the time of removal. 42 U.S.C. § 11603(e)(1). To contest return of a child to the country of habitual residence, the respondent may assert four defenses: return may expose the child to grave risk of harm, return would violate human rights principles, the child has settled in, or the petitioner assented to the removal. 42 U.S.C. § 11601(e)(2)(referencing Arts. 12, 13, and 20 of the Hague Convention).

- **TIP:** More defenses are available under the Hague Convention than under the international portions of UCCJEA. However, the Hague Convention is available only when both countries are signatories. *See* **http://www.hcch.net/index_en.php?act=conventions.status&cid=24** *for a list of signatories.* Additionally, the UCCJEA defines "child" as an individual under the age of 18, § 14-13-102(2), which is broader than the Hague Convention's application to children under the age of 16.

Magistrates Fact Sheet

Magistrates play a significant role in D&N proceedings in many jurisdictions throughout Colorado. Although local practice regarding the use of magistrates varies throughout the state, uniform rules and statutes govern each jurisdiction's use of magistrates in D&N proceedings.

RULES GOVERNING MAGISTRATES

Both the Children's Code and the Colorado Rules for Magistrates govern the use of magistrates in D&N proceedings. The Colorado Rules for Magistrates apply to magistrates in district court and juvenile court proceedings. C.R.M. 2. The rules specifically provide that juvenile magistrates are afforded the powers and subject to the limitations set forth by Article I of the Children's Code. C.R.M. 6(d). Section 19-1-108 governs the qualifications and duties of magistrates in juvenile proceedings, including D&N proceedings. Section 13-8-109 governs the appointment of magistrates in Denver Juvenile Court; this provision references § 19-1-108 as the controlling authority for the Denver Juvenile Court's appointment of magistrates. C.R.J.P. 2.4 sets forth specific limitations on a juvenile court magistrate's authority. Section 13-5-201 also sets forth the duties and powers of district court magistrates.

➢ **TIP:** Section 19-1-108 outlines procedures regarding magistrates and review of their orders in juvenile proceedings; however, the procedures are not nearly as comprehensive as those detailed in the Colorado Rules for Magistrates. Unless statutory authority or another rule specifically precludes their application, the Colorado Rules for Magistrates apply to juvenile proceedings. *In the Interest of R.A.*, 937 P.2d 731, 736 n.5 (Colo. 1997). *See also People ex rel. S.X.G.*, 269 P.3d 735, 738 (Colo. 2012) (applying C.R.M. 7(a) standards to judicial review of magistrate's order); *In re A.P.H.*, 98 P.3d 955, 957 (Colo. App. 2004) (applying § 19-1-109(3)(a) instead of C.R.M. 5(a) to determine whether magistrate had properly advised parent of the right to a hearing before a judge).

LEGAL AUTHORITY FOR APPOINTMENT OF MAGISTRATES IN JUVENILE COURT

Magistrates are appointed by the juvenile court and serve at the pleasure of the court. § 19-1-108(1). Magistrates in juvenile court must be licensed attorneys, with one exception not applicable to D&N actions. § 19-1-108(2).

SCOPE OF AUTHORITY OF MAGISTRATES IN JUVENILE COURT

Magistrates in juvenile proceedings are permitted to hear any case or matter under the juvenile court's jurisdiction except for matters in which a jury trial has been requested pursuant to § 19-2-107 or transfer hearings held pursuant to § 19-2-518. § 19-1-108(1). They may also issue citations for contempt, conduct contempt proceedings, and enter orders for contempt. C.R.M. 5(b). They have the power to issue bench warrants for parties' failure to appear, as well as all writs and orders necessary for the exercise of their jurisdiction. C.R.M. 5(c), (e). Magistrates in D&N proceedings also have the authority to issue a search warrant for a child pursuant to § 19-1-112. § 19-1-108(6).

Section 13-5-201 specifically precludes any district court magistrate from presiding over a jury trial. Further, juvenile court magistrates are precluded from deciding whether a state

constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. C.R.J.P. 2.4.

Although the Children's Code permits broad use of magistrates, parties in a D&N proceeding are entitled to a hearing before a judge in all D&N matters other than temporary custody hearings held pursuant to § 19-3-403. *See* § 19-1-108(3)(a.5). A magistrate must inform any party during the initial advisement of the party's rights of the right to be heard before the judge in the first instance and the ability to waive that right. *Id.* Additionally, the magistrate also must also inform the party of the implications of waiving that right; specifically, that the party will be bound by the magistrate's findings and recommendations, subject to judicial review. § 19-1-108 (3)(a.5).

The initial advisement of the right to a hearing before a judge is a mandatory advisement, and the failure to advise may result in the proceedings being vacated on appeal. *See In re Petition R.G.B.*, 98 P.3d 958, 960 (Colo. App. 2004). However, a party waiving formal advisement pursuant to § 19-3-202(1) explicitly waives advisement of the right to be heard by a judge. *In the Interest of T.E.M.*, 124 P.3d 905, 908 (Colo. App. 2004). Waiver of the right to advisement is effective throughout the proceeding and cannot be raised at a later time. *Id.*

In a D&N proceeding, a party is deemed to have waived the right to require a hearing before a judge if (1) the party is represented by counsel at the time the matter is set for a hearing and counsel does not object to the setting of the hearing before the magistrate or (2) the matter is set outside of the presence of counsel or on notice to counsel and counsel does not submit a written request for the hearing to be set before a judge within five days after receiving notice of the setting. § 19-1-108(3)(a.5)(c).

- **TIP:** Counsel must think carefully about whether to waive objections to the magistrate's jurisdiction at the time that matters are set for hearing. These decisions must be governed by considerations regarding the strategy that best serves the client's interests (for RPC) and the child's best interests (for GALs) rather than by the convenience of the court or general practice in the district.

RESPONSIBILITIES OF MAGISTRATES IN D&N PROCEEDINGS

Juvenile court magistrates must conduct hearings in the manner provided for the hearing of cases by the court. § 19-1-108(3)(a.5). A magistrate must conduct him- or herself in accord with the provisions of the Colorado Code of Judicial Conduct. C.R.M. 5(g).

In addition to the advisement regarding the right to a hearing before a judge, *see* **Scope of Authority section** *supra*, a magistrate must issue findings and orders at the conclusion of any hearing and advise parties of their right to judicial review of the magistrate's findings and orders. § 19-1-108(4)(a)–(b). The magistrate must also prepare a written order, which will become the order of the court unless a petition for review is filed. § 19-1-108(4)(c).

SEEKING REVIEW OF THE MAGISTRATE'S FINDINGS AND ORDERS

Magistrates' findings and orders are subject to judicial review. § 19-1-108(5.5). A petition for judicial review of a magistrate's order is a prerequisite to an appeal before the Colorado Court of Appeals or the Colorado Supreme Court. *Id.*; *S.X.G.*, 269 P.3d at 739 (holding that because the district court did not review magistrate's suppression order, the Supreme Court lacked appellate jurisdiction over the order). *See also People ex rel. K.L.-P.*, 148 P.3d 402, 403 (Colo. App. 2006) (holding that the magistrate's order must be presented to district court for review before it can be raised on appeal).

A petition for review of a magistrate's order in a D&N proceeding must be filed within five days after the parties have received notice of the magistrate's ruling. § 19-1-108(6). In a D&N proceeding, the five-day deadline is a non-jurisdictional deadline that can be waived, and the court has the discretion to allow late filing of the petition for review if the party demonstrates excusable neglect. *C.S. v. People*, 83 P.3d 627, 635 (Colo. 2004). In determining whether to consider a late-filed petition for review in a D&N proceeding, the court must not only take into account the reasons for delay but also the child's need for finality in the

proceedings. *Id.* Although the court's determination of excusable neglect was not properly preserved for appellate review in *C.S.*, the Court of Appeals has upheld a district court's finding of inexcusable neglect based on a mistake of the law regarding the applicable time frame for filing a petition for review. *People ex rel. M.A.M.*, 167 P.3d 169, 171 (Colo. App. 2007).

- **TIP:** Although the Colorado Rules for Magistrates allow requests for an extension of time to be filed within the deadline, *see* C.R.M. 7(a)(6), counsel should not rely on such procedures in D&N proceedings. Section 19-1-108 does not set forth any possibility for extensions of time, and its provisions will be construed in light of the purpose of the Children's Code. *See C.S.*, 83 P.3d at 635.

In addition to § 19-1-108(5.5), C.R.M. 7(a)(3) governs petitions for review of a magistrate's order. *See S.X.G.*, 269 P.3d at 738 n.4 (holding that C.R.M. 7(a), not C.R.M. 7(b), applies to review of magistrate orders entered pursuant to § 19-1-108(1)). C.R.M. 7(a)(3) provides that only a final order or judgment of a magistrate is reviewable under the rule. Although this rule has been held applicable to juvenile proceedings, *see People in the Interest of M.A.M.*, 167 P.3d 169, 173 (Colo. App. 2007), the rule requiring finality will not be construed to render review opportunities set forth in the Children's Code meaningless. *See S.X.G.*, 269 P.3d at 739 (concerning interlocutory appeals). Section 19-1-109 specifically lists orders terminating or refusing to terminate the parent-child legal relationship and adjudication orders (after the entry of a disposition) as final and appealable orders. *See also* **Appeals fact sheet**.

- **TIP:** There is not settled case law regarding the applicability of C.R.M. 7(a)(3)'s finality requirement to D&N proceedings. Counsel should consider seeking review of a magistrate's order when doing so is necessary for effective representation of their client's or the child's interests.

In *T.E.M.*, 124 P.3d at 908, the Court of Appeals held that a magistrate's failure to reduce an order to writing as required by § 19-1-108(4)(c) rendered the order not final for the purposes of review. Similarly, the Colorado Rules for Magistrates provide that an order of a magistrate is final and appealable when it is written, dated, and signed by the magistrate. C.R.M. 7(a)(4).

The party requesting review must clearly state the grounds relied upon. § 19-1-108(5.5). Permissible grounds for review are those grounds set forth in C.R.C.P. 59. *Id.* The Rules for Magistrates further provide that the party seeking review must state the alleged errors of the magistrate with specificity and permit the party to submit a brief detailing authority to support the position. C.R.M. 7(a)(7). The party filing for review must serve all parties with copies of the petition and any supporting briefs or documentation. *Id.* A party has ten days to respond to a petition for review of a magistrate's order. *Id.*

The court's review of the magistrate's order must be solely on the record of the hearing before the magistrate. § 19-1-108(5.5). However, a party may raise questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance for the first time during judicial review of the magistrate's order or judgment. C.R.J.P. 2.4. A magistrate's findings of fact will not be modified unless they are clearly erroneous. C.R.M. 7(a)(9). The reviewing judge must consider the petition and briefs filed, along with any necessary review of the record. C.R.M. 7(a)(8). The reviewing judge may conduct further proceedings, take additional evidence, or order a new trial/hearing on the matter. *Id.* If the magistrate has made findings insufficient for appellate review, the district court must correct that error, or the decision may be subject to reversal on appeal. *See R.A.*, 937 P.2d at 736. The reviewing court must issue a written order adopting, modifying, or rejecting the magistrate's order/judgment; this order is the order/judgment of the district court. C.R.M. 7(a)(8). The reviewing judge, on his or her own motion, may remand the case to a different magistrate. § 19-1-108(5.5).

- **TIP:** When possible, counsel should attach all relevant and available minute orders and/or transcripts to any request for review.

Medical and Dental Needs of Children in Care Fact Sheet

Children and youth involved in the foster care system have a higher prevalence of chronic health issues and require more frequent and detailed health monitoring than other children and youth. These problems can be exacerbated by the foster care system, which often results in health care that is fragmented and crisis-driven. *See Healthy Foster Care America: Addressing Barriers to Good Care* (American Academy of Pediatrics), *available at* **http://www2.aap.org/fostercare/addressing_barriers.html**.

Every foster child has the right to receive adequate and appropriate medical, dental, vision, and mental health services. § 19-7-101(d); 7.708.33(A)(6). Federal laws and corresponding state regulations enforce the right of foster children to receive quality health care services. This fact sheet provides a brief overview of federal and state mandates relating to the health care needs of children in D&N proceedings, issues regarding consent and the court's authority to order health services in D&N proceedings, available services in Colorado, and relevant considerations in assessing and advocating for specific health needs.

- **TIP:** Confusion about authority to consent and responsibility for providing health care, placement changes, caseworker turnover, and other factors may lead to gaps in dental, vision, and health care services for children involved in D&N proceedings. Failure to provide routine health services and address other needs may lead to negative long-term consequences. It is the

responsibility of the GAL, as the attorney for the child's best interests, to ensure that the responsible parties are addressing the health needs of the child in an appropriate and timely manner.

THE DEPARTMENT'S OBLIGATION TO MEET THE HEALTH CARE NEEDS OF CHILDREN IN D&N PROCEEDINGS

1. Federal Requirements

Federal regulations require states to ensure that children receive adequate services to meet their physical and mental health needs. 45 C.F.R. § 1355.34(b)(1)(iii). Title IV-E requires each case plan to document the plan for addressing the needs of the child while in foster care and to document comprehensive and relevant health information about the child, including but not limited to the names and addresses of health providers, the child's immunization record, the child's known medical problems, and the child's medications. 42 U.S.C. §§ 675(1)(B), (C).

The Fostering Connections to Success and Increasing Adoptions Act requires state planning to coordinate and oversee health services for children in foster care, in collaboration with health care and child welfare experts. Pub. L. 110-351, 122 Stat. 3949 (amending 42 U.S.C. § 622(b)(15)(A)). Plans for oversight and coordination should promote collaborative efforts among child welfare agencies, Medicaid, pediatricians, and other experts to monitor and track medical and mental health; include medical and mental health evaluations, both upon entry into foster care and periodically while in foster care; and provide continuity of care and oversight of medication use. 42 U.S.C. § 622(b)(15)(A).

2. State Procedures

The licensing regulations for foster homes in Colorado mandate the availability of a comprehensive program of preventative, routine, and emergency medical and dental care for each foster child and that every reasonable effort be made to obtain routine and corrective dental care. 7.708.63. Any authority responsible for certifying foster homes must have a written plan for providing such care that must include, at a minimum, ongoing appraisal of the general health of each foster child; procedures for ongoing

diagnostic services and emergency care; immunizations; provision of health education; effective communication regarding medical treatment; dental care by a Colorado-licensed dentist; and procedures for dispensing, storing, and disposing of medication and documentation of administration of medication. *Id.*

Volume 7 placement provisions set forth detailed procedures that must be followed to provide for the medical, dental, vision, and mental health needs of a child entering or in out-of-home placement:

- The department must provide each child with a medical examination prior to placement or a medical screening as soon as is reasonably possible after placement. 7.304.61(A). Additionally, the department must ensure that the medical screening is consistent with the Early Periodic Screening Diagnosis and Treatment initial screening requirements. *See id.*; **EPSDT section**, *infra.*
- The child's medical history is among the information shared with the placement provider before placing the child. 7.304.61(D).
- Upon placing a child in foster care, the county department is required to give the placement provider a written procedure or authorization for obtaining medical care for the child and ensure that the provider receives the child's state identification number and Medicaid card for Medicaid-eligible children in a timely manner. 7.304.62(B).
- Within four weeks of the initial placement, the county department is required to give the provider a complete medical history for the child. 7.304.62(F). The medical history shall contain, to the maximum degree possible, the information listed in the Department of Human Services Health Passport. *Id.*
- The department must provide the child with a full medical examination scheduled within 14 calendar days after placement and a full dental examination scheduled within eight weeks after placement. 7.304.62(G).
- In addition, the county department must maintain the medical and dental information in a record, referred to as the child's Health Passport, which is kept with the child during placement and provided to the child upon return home, emancipation, or adoption. 7.304.62(G). Likewise, the county department must document whether ongoing medical and dental care is provided in a timely manner as defined by the department and the health care provider. *Id.*

- The regular schedule of medical/dental appointments must be maintained for the duration of the child's out-of-home placement. *See* 7.304.62(G).
- If a medical, dental, or psychological evaluation is necessary and cannot be covered under Medicaid, third-party insurance, or other sources, the county department may purchase the service under program services. 7.304.61(A).

  ❖ **TIP:** The GAL's independent investigation must include confirmation that the required medical, dental, and vision screenings have been conducted and that the department is providing required care and documenting its provision of such care. The GAL should consult with the department regarding the child's Health Passport and maintenance throughout the case and ensure that each placement provider has all necessary information and documents to adequately and timely address the child's health needs and follow-up care. The GAL may request appropriate orders to ensure medical services are provided to foster children in a timely manner.

ACCESSING HEALTH CARE SERVICES FOR CHILDREN IN D&N PROCEEDINGS

1. Early and Periodic Screening Diagnosis and Treatment (EPSDT) Services

EPSDT is the child health component of Medicaid designed to improve the health of low-income children. It is designed to address physical, developmental, and mental health needs by requiring health screenings at periodic intervals and, upon diagnosis, providing treatment to address the child's needs, including dental, vision, and hearing services. Under federal law, all children under the age of 21 enrolled in Medicaid are entitled to receive EPSDT services. *See generally* 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), 1396d(r).

❖ **TIP:** Under Title IV-E of the Social Security Act, all children in federally funded foster care or adoption assistance programs are entitled to Medicaid. 42 C.F.R. § 435.145. In Colorado, all foster children are entitled to Medicaid. 7.402.1(A). Children placed at home with their parents and those in the temporary legal custody of relatives may also be eligible for Medicaid,

depending on their families' circumstances. *See* 7.402.1(A)(5) (providing that children receiving Core Services who would otherwise be in foster care are eligible for Medicaid). Children in subsidized adoptions and subsidized relative guardianships are also entitled to Medicaid. 7.402.1(A); 7.203.31.

Colorado's Medicaid/EPSDT program provides medical, vision, hearing, and dental screens to be performed at periodic intervals that meet current national standards of pediatric and adolescent medical and dental care. *See generally* 10 CCR § 2505-10, 8.280.4 *et seq.* (hereafter cited by reference to rule number only). All children's health screenings must be age-appropriate and performed in a culturally and linguistically sensitive manner by a provider qualified to furnish primary medical and/or mental health care services. 8.280.4(A)(4). Results of screenings/examinations, including required further diagnostic studies and treatment, must be recorded in the child's medical record. 8.280.4(A)(5).

Services may also be provided if such need is identified during the child's screening process. 8.204(D). To be covered under EPSDT, services must meet the following criteria: the service is in accordance with generally accepted standards of medical practice; the service is clinically appropriate; the service provides a safe environment for the child; the service is not for the convenience of the caregiver; the service is medically necessary; the service is not experimental; the service is generally accepted by the medical community for the purpose stated; and the service is the least costly effective means. 8.280.4(D)(1)–(7). *See also* 8.280.5 (listing excluded services).

❖ **TIP:** If coverage is denied for a service, the GAL may contact the managed care ombudsperson for EPSDT (EPSDT ombudsperson 303-744-7667 or 1-877-HELP-123) or the Medicaid customer service department (303-866-3513 or 1-800-221-3943) to advocate that the service is in fact necessary to the child's health and well-being. GALs should also attempt to access services not covered under Medicaid. Core Services, *see* **Funding and Rate Issues fact sheet**, and Early Intervention Colorado, *see* **Education: Rights and Issues fact sheet**, are examples of other programs that may offer services to address developmental and mental health needs.

2. Colorado's Child Health Plan Plus (CHP+) Program

CHP+ provides medical and dental coverage to uninsured Colorado children through age 18 whose families earn too much to qualify for Medicaid but cannot afford private insurance. CHP+ is an important resource for children in the child welfare system who are no longer eligible for Medicaid, youth who are transitioning out of care, and adolescent women who are pregnant. *See* **www.CHPplus.org**.

3. The Women, Infants, and Children Program (WIC)

WIC provides food assistance to low-income pregnant women who do not have other children, low-income women with infants and children under the age of five who are nutritionally at risk, and children placed out of the home whose birth family is eligible. To assist a foster care client in applying for WIC, the GAL, caseworker, or CASA can direct the child to request an appointment at the nearest participating WIC medical center or clinic. *See* **http://www.colorado.gov/cs/Satellite/CDPHE-PSD/CBON/1251618192537** (Colorado Department of Public Health website).

4. Mental Health Services

Children enrolled in Medicaid are eligible to receive local Community Mental Health Center services. *See* 2 CCR 502–3, 20.300, 20.800. The state is divided into regional managed care groups called Mental Health Assessment and Service Agencies (MHASAs). The child may also qualify for mental health services under the Colorado Child Health Plan or the child/family may receive Core Services for mental health through the county DHS.

- **TIP:** Two Colorado-based organizations that may provide helpful information in navigating Colorado's mental health system are Mental Health America of Colorado (**www.mhacolorado.org**) and the Federation of Families for Children's Mental Health—Colorado Chapter (**www.coloradofederation.org**).

- **TIP:** GALs should ensure that each child receives appropriate mental health services to meet the child's specific mental health needs. GALs should also ensure that medication prescribed is appropriate for the child and appropriately managed. *See* **Psychotropic Medication and Youth in Care section**, *infra.*

PERSONS WITH AUTHORITY TO CONSENT TO HEALTH CARE

The Children's Code defines legal custody to include the right to the care, custody, and control of a child and the duty to provide clothing, food, shelter, ordinary medical care, education, and discipline for a child. § 19-1-103(73)(a). Legal custody also includes the duty, in an emergency, to authorize surgery or other extraordinary care. *Id.* Legal custody may be taken from a parent only by court action. *Id.*

THE JUVENILE COURT'S AUTHORITY TO ORDER HEALTH CARE SERVICES

The juvenile court has authority to make all decisions regarding the care and custody of children under its jurisdiction. *City and County of Denver v. Juvenile Court*, 511 P.2d 898, 901 (Colo. 1973). The juvenile court is vested with power to order the department to provide services in the best interests of children. *See e.g., id*; *People in the Interest of L.M.*, 910 P.2d 100 (Colo. App. 1995).

The court may authorize or consent to medical, surgical, or dental treatment or care for a child placed in shelter care if consent of the parent, guardian, or legal custodian cannot be obtained through reasonable efforts. § 19-3-403(6). The court may authorize emergency medical treatment if the child's parents are not immediately available. *Id.*

The juvenile court's authority extends to situations in which a parent, guardian, or legal custodian attempts (for religious reasons) to limit a child's access to medical care in a life-threatening situation or when the child's condition will result in a serious disability. *See* § 19-3-103(1). If the court determines that the child is in a life-threatening situation or that the child's condition will result in serious disability, the court may, as provided under § 19-1-104(3), order that medical treatment be provided for the child.

In special circumstances involving a developmentally disabled or mentally ill child, the court must ensure that the child is evaluated. *See* § 19-3-506. Likewise, the court should order mental health prescreening to be done for a child who appears to be

mentally ill. § 19-3-506(1)(c). Upon prescreen review, the court should then determine if commitment procedures are necessary and, if so, hold a hearing. § 19-3-506(3).

The court may issue protective orders prescribing reasonable conditions of behavior for respondent parents or any person who is a party to the proceeding. *See* § 19-1-114. Notice and an opportunity for a hearing are required. § 19-1-114(4).

TIP: The GAL should ensure that parents are informed of the child's medical, dental, and mental health status and encourage parents to be involved in the child's treatment while in foster care. Parents can be an important source of information about the child's health history. Additionally, involving parents in medical decision making can help parents better understand the child's needs and how to address those needs. Parents should be made aware of the child's appointments (date, time, location) and encouraged to attend.

PARENTAL NOTIFICATION/MINOR CONSENT ISSUES

1. Abortion Parental Notification Requirement in Limited Circumstances

Generally, at least one parent or relative with whom a minor resides must be notified no less than 48 hours before an abortion is performed on the minor. § 12-37.5-101, *et seq*. Notice is not required if a court finds that giving notice is not in the minor's best interests, the court finds by clear and convincing evidence that the minor is mature enough to decide to have an abortion, a medical emergency exists, or the minor is a victim of child abuse or neglect. *See* §§ 12-37.5-105, 107; **Pregnant and Parenting Teens fact sheet**.

2. Minor Consent for Medical Care and Treatment for Addiction or Use of Drugs

Minors can consent to treatment for addiction to or use of drugs without notice or consent to parent, legal guardian, or person with decision-making authority. § 13-22-102.

3. Minor Consent and Confidentiality—HIV testing

Minors can be examined and treated for HIV infection without the consent of the parent or guardian. § 25-4-1405(6). If the minor is 16 years of age or older, the results of the examination or treatment need not be divulged to the minor's parent or guardian, or to any person, unless necessary under reporting requirements of Title 25 or Title 19. *Id.* The county department must recommend to the medical care provider that a child or youth be tested for HIV based on a determination of risk. 7.200.22(A). In the event that the county becomes aware of positive HIV test results, the county must develop a plan for confidential management of test results and HIV status. 7.200.22(B). The county policy may limit test results based on the "need to know" and must be in compliance with § 25-4-1401 *et seq. Id.*

4. Minor Consent to Receive Mental Health Services

A minor who is 15 years of age or older may consent to mental health services. § 27-65-103(2). The service provider may, with or without the consent of the minor, advise the minor's parent or legal guardian of the services given or needed. *Id.*

A minor who is 15 years of age or older or a parent or legal guardian of a minor on the minor's behalf may make voluntary application for hospitalization. § 27-65-103(3). Whenever such application for hospitalization is made, an independent professional person shall interview the minor and conduct a careful investigation into the minor's background, using all available sources, including, but not limited to, the parents or legal guardian and the school and any other social agencies. *Id.*

5. Colorado's Immunization Consent Law

A parent, legal guardian, or person vested with "legal custody or decision-making responsibility for the medical care of the minor" has authority to consent to routine immunizations and may delegate that authority verbally or in writing to a stepparent or "an adult relative of the first or second degree of kinship." § 25-4-1704(2.5). The consenting adult must inform the physician administering the immunization of any relevant health history. *Id.*

CHECKLISTS AND RESOURCES

1. Healthy Development of Foster Children

Checklist: Permanent Judicial Commission on Justice for Children Healthy Development

- ❑ Has the child received a comprehensive health assessment since entering foster care?
- ❑ Are the child's immunizations complete and up-to-date for his or her age?
- ❑ Has the child received a hearing and vision screening?
- ❑ Has the child been screened for lead exposure?
- ❑ Has the child received regular dental services?
- ❑ Has the child been screened for communicable diseases?
- ❑ Does the child have a "medical home" where he or she can receive coordinated, comprehensive, and continuous health care?
- ❑ Has the child received a developmental evaluation by a provider with experience in child development?
- ❑ Has the child received a mental health screening?
- ❑ Are the child and his or her family receiving the necessary early intervention services, for example, speech therapy, occupational therapy, educational intervention, family support?
- ❑ Has the adolescent youth received information about healthy development?

Permanent Judicial Commission on Justice for Children, *Ensuring the Healthy Development of Foster Children: A Guide for Judges, Advocates, and Child Welfare Professionals* (White Plains, NY, 2001), *available at* **http://www.courts.state.ny.us/ip/justiceforchildren/PDF/Infant%20Booklet.pdf**.

2. Dental Health

The American Academy of Pediatrics (AAP) reports that dental and oral health care remains among the most difficult health services to access for children and teens in foster care. Approximately 35 percent of youth enter foster care with significant dental and oral health problems, including bottle tooth

decay in very young children and multiple dental cavities in older children. The AAP recommends that every child and teen entering foster care have a dental evaluation within 30 days of placement. *See Healthy Foster Care America, Dental and Oral Health* (American Academy of Pediatrics), *available at* **http://www2.aap.org/fostercare/dental_health.html**.

Checklist: Meeting Child's Oral Health Care Needs

- ❑ Does the child have a dental home and/or access to preventive and treatment services?
- ❑ Has the child had a dental exam? When?
- ❑ What dental health needs does the child have?
- ❑ How are the child's dental health needs being met?
- ❑ How often does the child brush? Floss?
- ❑ How does the child receive fluoride?
- ❑ When is the child's next dental exam scheduled?
- ❑ Has the child received sealants?

Beverly Largent, DMD, Hon. Cindy Lederman, and E. Whitney Barnes, JD, *Children's Dental Health: The Next Frontier in Well-Being* (Technical Assistance Brief, National Council of Juvenile and Family Court Judges, 2008), © National Council Juvenile and Family Court Judges, all rights reserved, *available at* **http://centerforchildwelfare.fmhi.usf.edu/mhsa/MHSA_Phys_Dent_Resources/ChDentalHealth.pdf**.

3. Representing Very Young Children

GALs representing very young children can profoundly influence the health, development, and well-being of the children through advocacy. When necessary, the GAL should request court orders to obtain an infant's health care records/information from treatment providers, parents, and caregivers and to facilitate consent to additional health care services. Candice Maze, JD, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation* (ABA Center on Children and the Law, Washington, DC, 2010), *available at* **http://new.abanet.org/child/Pages/baby-health.aspx**.

The American Academy of Pediatrics recommends gathering the following information when an infant or young child is removed:

- ❑ Where the child has been receiving health care.
- ❑ Immunization record or history.
- ❑ Any chronic medical conditions (e.g., asthma, sickle cell disease, epilepsy).
- ❑ Past surgeries or hospitalizations.
- ❑ Medications the child takes.
- ❑ Medical equipment the child uses (e.g., glasses, hearing aids, nebulizers, wheelchairs, epipens).
- ❑ Any allergies.
- ❑ The child's birthplace (so birth records can be obtained).
- ❑ A family health history (particularly regarding hereditable or communicable diseases).

Healthy Beginnings, Healthy Futures: A Judge's Guide (ABA Center on Children and the Law, National Council of Juvenile and Family Court Judges, and Zero to Three National Policy Center, 2009), at 18, *citing* American Academy of Pediatrics, Task Force on Health Care for Children in Foster Care, *Fostering Health: Health Care for Children and Adolescents in Foster Care*, 2d ed. (Elk Grove Village, IL: American Academy of Pediatrics, 2005), *available at* **http://www2.aap.org/fostercare/PDFs/FosteringHealth/FosteringHealthBook.pdf.**

When infants are placed into care directly from the hospital, the following information should be obtained from hospital staff:

- ❑ Instructions for immediate care (e.g., treatment for existing health conditions, signs and symptoms requiring urgent health care).
- ❑ Information about where the infant will receive follow-up primary care and referrals to specialists, if any.
- ❑ Results of any state-mandated screenings to identify conditions for which the infant will need follow-up care (e.g., genetic defects, metabolic problems).
- ❑ A list of immunizations given at the hospital.
- ❑ Results of the newborn hearing screen.
- ❑ Any information about risks to later healthy development, such as prematurity, low birth weight, prenatal substance exposures, and lack of prenatal care.
- ❑ Birth records and the hospital discharge summary.

Healthy Beginnings, Healthy Futures: A Judge's Guide (ABA Center on Children and the Law, National Council of Juvenile and Family Court Judges, and Zero to Three National Policy Center, 2009), at 19, *citing* S. Dicker and E. Gordon, *Ensuring the Healthy Development of Infants in Foster Care: A Guide for Judges, Advocates and Child Welfare Professionals* (Washington, DC: Zero to Three Policy Center, 2004).

4. Addressing the Unique Needs of Teens in Care

Foster youth have a higher incidence of chronic physical health conditions such as asthma, diabetes, and seizures. Additionally, foster care alumni experience a high level of post-traumatic stress disorder and continue to need medical and mental health supervision long after leaving the custody of the state. *Addressing the Health Care Needs of Transitioning Youth* (National Association of Public Child Welfare Administrators, 2010), *available at* **http://www.napcwa.org/Youth/docs/HealthCareBrief2010.pdf**. *See also Healthy Foster Care America: Health Care Standards* (American Academy of Pediatrics, Child Welfare League of America), *available at* **http://www2.aap.org/fostercare/health_care_standard.html.**

Addressing Health Care Needs of Teens/Older Youth in Care

- ❑ Ensure all youth in care have general physical health checkups as well as dentist and optometrist appointments regularly while in care and shortly before leaving.
- ❑ Ensure female youth have at least one appointment for a pelvic exam with an obstetrician/gynecologist before aging out of care.
- ❑ Ensure youth have access to information on health, diet, and exercise and advocate for youth to be able to participate in extracurricular activities positively affecting their physical and/or mental health.
- ❑ Ensure that a current mental health evaluation has been conducted, if appropriate.
- ❑ If a youth has already been diagnosed, ask about the youth's support in addressing these health issues (e.g., doctor or therapist) to try to ensure that those supportive clinical relationships survive emancipation.
- ❑ Assess whether a youth with a diagnosis or condition requiring ongoing treatment and attention understands the diagnosis and his or her role in continuing treatment.
- ❑ Assess whether a youth currently taking medication understands why the medication is necessary and is able to manage it without supervision.
- ❑ Ensure mental health services, transitional living, or other opportunities are set up to provide a youth with mental health or behavioral issues who is aging out of care with a safety net after exiting care.
- ❑ Know whether the youth is covered under Medicaid both while in care and after aging out.
- ❑ Contact your state's Medicaid office to inquire about Medicaid extension benefits or any other program that a youth aging out of care can access (e.g., Colorado's CHP+).
- ❑ Make sure that the youth knows how to continue health care after emancipation through an extension of Medicaid or some other state-sponsored medical coverage.
- ❑ Assist the child welfare agency with gathering a child's medical records well before his or her eighteenth birthday, because that process can take some time.
- ❑ Obtain authorization to release medical information from the parent if state law considers a child welfare agency a "covered entity" under HIPAA, or if the parent is unwilling, use a court order or subpoena.
- ❑ Work with the youth on establishing a "medical home," where all health care can be provided and all related information saved.
- ❑ Ensure that youth in foster care who will soon be parents have access to maternal and child health care services.

IMPROVING OUTCOMES FOR OLDER YOUTH: WHAT JUDGES AND ATTORNEYS NEED TO KNOW 107 (Kathleen McNaught, JD, and Lauren Onkeles, JD, National Resource Center for Youth Development, Tulsa, OK, 2004) *available at* **www.nrcyd.ou.edu/resources/publications/pdfs/improveoutcomes.pdf**.

❖ **TIP:** It is imperative that the GAL addresses the medical needs of older youth while they are still in care and ensures continuity of coverage for youth exiting the system. GALs should request court orders that require caseworkers, reunifying or adoptive families, or other individuals in the child's life to address and assist the child in applying for Medicaid or CHP+ health insurance while the child is still under the court's jurisdiction to ensure uninterrupted Medicaid or health insurance for children exiting care. In addition, GALs should ensure that the department has provided the child's Health Passport to the child prior to emancipation.

5. Psychotropic Medication and Youth in Care

Studies have revealed a notable increase in the use of psychotropic medications for youth in foster care, including more medications prescribed for young children, increased frequency of use of more than one medication at a time, and increased "blanket authorizations" of prescriptions in residential facilities. *See Multi-State Study on Psychotropic Medication Oversight in Foster Care* (Tufts Clinical and Translational Science Institute, Boston, MA, 2010), *available at* **http://tuftsctsi.org/About-Us/Announcements/~/media/23549A0AA4DE4763ADE445802B3F8D6F.ashx**. Children and youth in foster care are up to 4.5 times more likely to be medicated than youth not in foster care. In some states, nearly 40 percent of foster children are receiving psychotropic medications. *HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions* (US Government Accountability Office, Statement of Gregory D. Kutz, 2011), *available at* **http://www.gao.gov/assets/590/586570.pdf**.

If a child is placed on a psychotropic medication, the GAL should ensure that such medication is appropriate and that it is properly managed throughout the dependency process.

Questions to ask when there is a request to place a child in care on psychotropic medication:

- ❑ Who is requesting that the child be placed on medication?
- ❑ What is the reason for the request?
- ❑ How long has the requesting party known the child?
- ❑ Does the requesting party have any specialized knowledge in child development?

Questions to ask when child is currently taking prescribed psychotropic medications:

- ❑ When did the child start taking the medication?
- ❑ What led the child to be placed on the medication?
- ❑ Who performed the evaluation?
- ❑ What was the evaluator's experience?
- ❑ When was the last time the child was evaluated?
- ❑ How has the child's behavior changed?
- ❑ What other therapies are being used in conjunction with medication?
- ❑ How long does the current treating physician believe the child will need to stay on the medication?
- ❑ Has the child experienced any side effects? If yes, how are they being handled?
- ❑ Is the parent/caregiver receiving Supplemental Security Income (SSI) because of the child's mental health disorder? If yes, how is the money being spent?
- ❑ Is the child getting ready to age out of the system? If yes, what safeguards have been put in place to ensure the child will still have adequate access to medication and/or treatment?

Kate O'Leary, *Advocate's Guide to the Use of Psychotropic Medications in Children and Adolescents*, 25 ABA Child Law Practice 85, 89 (August 2006), © American Bar Association, all rights reserved, *available at* **www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/aug06.authcheckdam.pdf**.

Orders Entered Pursuant to § 19-3-207: Protections and Limitations Fact Sheet

For parents and children who are or could be facing criminal or delinquency charges related to the D&N proceeding, § 19-3-207 offers some protection against the use of certain statements and admissions as evidence in the criminal/delinquency proceeding.

- **TIP:** Although the protections of § 19-3-207 are significant, they are not absolute. Counsel should be aware of the protections and limitations provided by this statute and should make sure that the client/child is aware of the protections and limitations. When defense counsel is appointed or retained by the parent or child, counsel should attempt to coordinate strategy in a manner that maximizes the ability of the parent/child to participate in treatment while minimizing the risk of a criminal conviction or a delinquency adjudication.

- **TIP:** If the applicability of § 19-3-207 to certain statements or against uses is unclear, counsel should seek a court order clarifying its protections as applied to the case in advance of the disclosure of the statements. Additionally, when § 19-3-207 protections do not apply, counsel should consider seeking a protective order pursuant to § 19-1-114, which allows the court to enter protective orders against parties and specified persons "in assistance of, or as a condition of, any decree" authorized by the Children's Code. § 19-1-114(1); *People v. District Court*, 731 P.2d 652, 657–59 (Colo. 1987).

PROTECTIONS FOR PARENTS

1. Statements Made during Court-Ordered Treatment

Section 19-3-207(2) prevents a professional treating a parent from being examined in a criminal case without the consent of the parent as to statements made pursuant to compliance with court treatment orders, including protective orders, entered pursuant to Article 3 of the Children's Code. The protection specifically does not apply to "discussion of any future misconduct or of any other past misconduct unrelated to the allegations involved in the treatment plan." Section 19-3-207(2) does not prevent a professional from fulfilling mandatory reporting responsibilities pursuant to § 19-3-304 or explicitly preclude the use of evidence derived from protected statements.

❖ **TIP:** In cases in which protection against the use or introduction of evidence obtained as a result of statements protected under § 19-3-207(2) is necessary for a parent's participation in treatment, counsel should consider seeking protective orders against the use of such evidence. The legislative declaration that provisions of the Children's Code "shall be liberally construed to serve the welfare of children and the best interest of society" may support motions for a more expansive reading than the plain text of § 19-3-207. § 19-1-102(2); *District Court*, 731 P.2d at 654.

2. Admissions

Pursuant to § 19-3-207(3), an admission to a D&N petition made by a respondent in open court or by written pleading may not be used against the respondent. Such admissions may be used against the respondent for purposes of impeachment or rebuttal. *Id.*

3. Evidence/Information Derived from Statements Made Pursuant to Compulsory Process

Section 19-3-207(1) sets forth a procedure in which the court determines the admissibility of information derived directly from testimony obtained pursuant to compulsory process in the D&N proceeding. This procedure applies only to subsequent

criminal proceedings arising from the same "episode" leading to the D&N proceeding. *Id.*

A hearing to determine the admissibility in the subsequent criminal proceeding of such information is required upon the request of the attorney for the department. *Id.* The district attorney must be given five days' written notice of the hearing. *Id.* The hearing is held *in camera*, and the district attorney has the opportunity to object to the entry of any orders holding such information inadmissible. *Id*. The court may not enter an order holding such information inadmissible if the district attorney presents prima facie evidence that the order would substantially impair the ability to prosecute the criminal case. *Id.*

This section does not prevent independent production or obtaining of similar information or evidence by law enforcement. *Id.*

PROTECTIONS FOR CHILDREN

1. Statements Made during Court-Ordered Treatment

Statements made by a juvenile to a professional for the purposes of treatment ordered by the court in a D&N proceeding are not admissible against the juvenile in a criminal or delinquency proceeding, unless the juvenile consents to their introduction. § 19-3-207(2.5). This protection does not apply to statements regarding future misconduct. *Id.* Section 19-3-207(2.5) does not prevent a professional from fulfilling mandatory reporting responsibilities pursuant to § 19-3-304 or explicitly preclude the use of evidence derived from protected statements.

> **TIP:** To invoke the protections of § 19-3-207(2.5), the GAL should ensure that any treatment in which the juvenile is participating is court-ordered. Additionally, the GAL should consider moving for protective orders against the derivative use of such statements when such orders are necessary for full participation in treatment. *See* **Protections for Parents section**, *supra*.

2. Evidence/Information Derived from Statements Made Pursuant to Compulsory Process

Although the protections of § 19-3-207(1) regarding the use of evidence/information derived from statements made pursu-

ant to compulsory process specifically apply to criminal proceedings, a liberal construction of the Children's Code "to serve the welfare of children and the best interests of society," as required by § 19-1-102(2), may support the applicability of this section to related juvenile proceedings.

Parents' Rights Fact Sheet

Parents have a fundamental liberty interest in the care, custody, and management of their child(ren). *See Troxel v. Granville*, 530 U.S. 57, 64, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *People in the Interest of A.M.D.*, 648 P.2d 625, 632 (Colo. 1982). State intrusion in this protected relationship "cue[s] constitutional due process concerns," *see Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S.Ct. 1378, 71 L.Ed. 599 (1982), and gives rise to rights and protections throughout the D&N proceeding. The purpose of D&N proceedings is not to punish the parents but to protect children and youth who are susceptible to harm from the effects of abuse and neglect. *L.G. v. People*, 890 P.2d 647, 655 (Colo. 1995).

1. Placement of Child

Parents are entitled to reasonable efforts to prevent or eliminate the need to remove the child from the home, unless an emergency exists or under certain specified circumstances. §§ 19-1-115(6), (7). If the child is placed out of the home, parents completing the required relative affidavit form may identify relatives and kin in addition to the contact information for specifically required relatives and may provide comments concerning the appropriateness of the child's potential placement with identified relatives and kin. §§ 19-3-403(3.6)(a)(I)(B), (C). Each parent is also entitled to suggest relatives believed by the parent to be appropriate caretakers for the child. § 19-3-403(3.6)(III).

2. Representation by Counsel

Parents have the statutory right to be represented by counsel at every state of the D&N proceeding, including appeal. § 19-3-202(1); *A.L.L. v. People in the Interest of C.Z.*, 226 P.3d 1054, 1062 (Colo. 2010). A parent may seek court-appointed counsel based on financial inability to secure counsel on his or her own. §§ 19-1-105(2), 19-3-202(1), 19-3-602(2); *People ex rel. Z.P.*, 167 P.3d 211, 213 (Colo. App. 2007); *see also* CJD 04-05 (setting forth appointment and indigency screening procedures for court-appointed counsel). The parent bears the burden of establishing indigence. *Waters v. Dist. Court*, 935 P.2d 981, 986 (Colo. 1997). Parents risk waiving the right to counsel by failing to make a timely request that an attorney be appointed. *People in the Interest of L.A.C.*, 97 P.3d 363, 367 (Colo. App. 2004); *Z.P.*, 167 P.3d at 213.

The court must advise the parent of his/her statutory right to appointed counsel at the parent's first appearance. § 19-3-202(1). The court again must advise the parent of this right, in open court or in writing, if a motion for termination is filed and the parent is not already represented by counsel. § 19-3-602(2).

A parent may request that the court discharge his or her attorney. *People in the Interest of M.M.*, 726 P.2d 1108, 1121 (Colo. 1986). Whether to grant or deny such request is a matter left to the sound discretion of the trial court. *Id.*

> **TIP:** In some jurisdictions, the court has declined to appoint substitute counsel following the parent's request to discharge counsel. *See, e.g., C.S. v. People*, 83 P.3d 627, 630–31, 636–38 (Colo. 2004) (holding that the district court did not abuse its discretion in allowing a parent's counsel to withdraw at the parent's request and denying the parent's motion to continue the termination hearing to seek what would have been the parent's third attorney in the proceedings). In determining whether to seek discharge of current counsel, the parent should consider whether the court will appoint new counsel if it grants the request to discharge counsel.

An attorney may withdraw from a case only upon approval of the court. C.R.C.P. 121 § 1-1(2)(b). Counsel must file a motion to withdraw that "advises the client of his or her right to object and other obligations." *Z.P.*, 167 P.3d at 214. Counsel may not withdraw at the appellate stage solely because counsel believes the appeal may not be successful. *A.L.L.*, 226 P.3d at 1063 (hold-

ing that counsel must present those issues the client wishes to be appealed even if counsel cannot discern a meritorious legal argument in support of the client's appeal).

A parent may challenge the effectiveness of counsel on appeal and must allege that he or she has suffered prejudice as a result of counsel's errors. Although the Colorado Supreme Court has specifically declined to decide whether the standard for ineffective assistance of counsel in criminal proceedings applies to D&N proceedings, it has determined that if such a claim is cognizable, it would require an allegation of prejudice. *People ex rel. A.G.*, 262 P.3d 646, 651 (Colo. Oct. 17, 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)). The Court of Appeals has held that the *Strickland* analysis applies to ineffective assistance of counsel claims in proceedings concerning termination of the parent-child legal relationship. *People ex rel. C.H.*, 166 P.3d 288, 290–91 (Colo. App. 2007).

3. Appointment of a GAL

A GAL may be appointed for a respondent who has been determined to be mentally ill or developmentally disabled, unless a conservator has been appointed. § 19-1-111(c); *see also* **Preliminary Protective Proceeding chapter**.

4. Notice and Advisement

Parents are entitled to a detailed informational "notice of rights and remedies" for families involved in D&N proceedings when a child is removed from the home. *See* § 19-3-212. Parents must also receive notice of the basis for the department's allegation that the child is dependent or neglected. § 19-3-502(2). Parents are entitled to notice of their constitutional and legal rights regarding the permanency hearing. § 19-3-702(2).

Parents must receive notice of all hearings. §§ 19-3-502(7), 19-3-503(1), 19-3-602(1), 19-3-603, 19-3-702(2). Prior to the dispositional hearing, the department must provide a detailed statement of the services offered to the family. § 19-3-507(1)(b). The department is required to file and serve reports at least five days in advance of hearings, and sanctions may be imposed if such filing and service are not provided. CJD 96-08(3). A parent must be provided with adequate notice of a termination hearing and

an opportunity to protect his or her interests at the hearing itself. *People in the Interest of E.A.*, 638 P.2d 278 (Colo. 1982); *see also M.M.*, 726 P.2d at 1115.

5. Administrative Reviews

If an administrative review is ordered, all counsel of record must be notified of the review and may appear at the review. § 19-3-702(8)(a). Parents are entitled to participate in an administrative review. 42 U.S.C. § 675(6).

6. Decisions Concerning Medical Care for the Child

The Children's Code provides that legal custody includes the duty to provide ordinary medical care and, in an emergency, to authorize surgery or other extraordinary care. § 19-3-103(73)(a). Legal custody may be taken from a parent only by court action. *Id.* A right to make decisions regarding a child's medical care or to be consulted in such decisions is not included in the Children's Code definition of "residual parental rights and responsibilities," which are those rights remaining with the parent after legal custody, guardianship, or both have been vested in another person, agency, or institution; however, the definition of residual parental rights specifically provides that its enumeration of rights may not be exhaustive. § 19-3-103(93).

- **TIP:** Neither case law nor statute defines what constitutes ordinary medical care and what constitutes extraordinary care. Additionally, the Children's Code does not specify the responsible party for authorizing surgery or non-emergency medical care when the court removes the child from the legal custody of the parent. When the court orders legal custody of the child to someone other than the parent, RPC should seek protective orders pursuant to § 19-1-114 clarifying medical decision-making responsibilities and requiring consultation with the parent. *See People v. District Court,* 731 P.2d 652, 654, 657–59 (Colo. 1987) (citing the legislative declaration in § 19-1-102 that the Children's Code should be liberally construed to serve the welfare of children and the best interests of society and holding that the juvenile court's authority to enter protective orders was not limited to the protective orders specifically enumerated in subsection 2 of the protective orders statute (formerly § 19-3-110)). Similarly, the GAL should ensure that court

orders placing the child in the legal custody of an individual or entity other than the parent clarify what individuals/entities are responsible for the varying types of medical decisions that may need to be made for the child.

The court has the authority to issue temporary orders providing for medical evaluation or treatment, surgical treatment, psychological evaluation or treatment, and dental treatment in the best interests of the child during the time period between the filing of a petition and the adjudication or disposition of the case. § 19-1-104(3)(a). Parents are entitled to a hearing on the matter and prior notice of the hearing. *Id.* Although the court may issue *ex parte* emergency orders in an emergency or on the basis of a report that a child's welfare may be endangered, even in such situations reasonable effort to notify the parent is required and the parent may challenge the order. § 19-1-104(3)(b).

7. Hearing Procedures

Although D&N proceedings may be held before a magistrate or judge, a parent has the right to object to the magistrate's jurisdiction for all hearings other than the temporary custody hearing. *See* **Magistrates fact sheet**. The parent may demand an adjudicatory trial by a six-member jury. § 19-3-202(2); *People in the Interest of T.A.W. v. N.W.*, 556 P.2d 1225, 1225–26 (Colo. App. 1976). The right to a jury trial or a trial before a judge may be deemed waived unless a timely request is made. § 19-1-108(3)(c); C.R.J.P. 4.3(a).

The parent may be heard separately when deemed necessary by the court. § 19-1-106(5). The parent is entitled to an individual determination of the D&N allegations, and an admission by one parent is "not necessarily dispositive of allegations disputed by other named respondents." *People in the Interest of A.M.*, 786 P.2d 476, 479 (Colo. App. 1989). A parent who prevails at an adjudicatory trial is entitled to dismissal of the petition, to be discharged from any restriction or previous temporary orders, and to the child being discharged from any detention or restrictions previously ordered. § 19-3-505(6); *People ex rel. A.H.* 271 P.3d 1116, 1121–22 (Colo. App. 2011).

The parent is entitled to have the author of the dispositional report "appear as a witness and be subject to both direct and

cross-examination." § 19-1-107(2). The court shall inform the parent of the right of cross-examination concerning any written report or other material relating to the child's mental, physical, and social history. § 19-1-702(4).

8. Treatment Plan

Unless specific findings are made that an appropriate treatment plan cannot be devised, a parent is entitled to a treatment plan designed to preserve the parent-child legal relationship by assisting the parent in addressing the problems that required intervention into the family. § 19-3-508(1)(e)(I); *People in the Interest of M.M.*, 726 P.2d 1108, 1121 (Colo. 1986); *People in the Interest of C.A.K.*, 652 P.2d 603, 610 (Colo. 1982). The parent must be involved in case planning so that relevant services can be provided to permit timely rehabilitation and reunification. § 19-3-209; 7.200.1(F). Parents who disagree with the proposed treatment plan or the department's assessment that an appropriate treatment plan cannot be devised are entitled to a hearing on the matter. *See generally* § 19-3-508; **Dispositional Hearing chapter**.

- **TIP:** The mere fact of incarceration does not mean that a parent is not entitled to a treatment plan. *See* §§ 19-3-508(1)(e)(I) (identifying unfitness of the parent as set forth in § 19-3-604(1)(b) as specific ground upon which a court may find that an appropriate treatment plan cannot be devised), 19-3-604(1)(b)(III) (requiring a finding of ineligibility of parole for six years after the date of adjudication for children age six or over or 36 months for children under six and a finding by clear and convincing evidence that an appropriate treatment plan cannot be devised for long-term confinement of the parent to constitute an independent ground for termination of the parent-child legal relationship).

9. Confidentiality

The name and address or any other identifying information of any family in reports of child abuse or neglect shall be confidential and shall not be public information. § 19-1-307(1)(a). Disclosure of such information is permitted only when authorized by a court for good cause. § 19-1-307(1)(b).

10. Visits with Children

Parents are entitled to visiting services if children are in out-of-home placement as determined necessary and appropriate by individual case plans. §§ 19-3-208(1), (2)(b)(IV); *People in the Interest of B.C.*, 122 P.3d 1067, 1070 (Colo. App. 2005); *see also* **Visits fact sheet**. Incarcerated parents are entitled to face-to-face visits absent safety concerns. *People ex rel. D.G.*, 140 P.3d 299, 302 (Colo. App. 2006).

11. Expert Witness

An indigent parent has the right to have an expert witness of his or her own choosing appointed and reasonable fees and expenses paid by the state. § 19-3-607(1). However, a parent's statutory right to have an expert appointed to assist him or her in a termination proceeding may be limited in scope if necessary because of the physical, mental, or emotional condition of the child. *People in the Interest of M.H.*, 855 P.2d 15, 17 (Colo. App. 1992) (holding that the court properly refused to permit a parent-child interaction when it was not in the child's best interests to come into contact with the father and the child could experience serious emotional detriment).

- **TIP:** Use of state-paid experts requires advance approval of the court. CJD 04-05(IV)(a)(2). The Court of Appeals has held that "neither concern for fundamental fairness nor the Children's Code" requires the appointment of an expert for an adjudicatory hearing and that a parent was not entitled to more than one expert at a hearing on a motion to terminate the parent-child legal relationship. *See In the Interest of S.B.*, 742 P.2d 935, 939 (Colo. App. 1987); *People in the Interest of T.R.S.*, 717 P.2d 1025, 1026 (Colo. App. 1986). However, RPC who believe that additional experts are needed to preserve a parent's due process rights or to provide effective assistance of counsel should request such experts, making a record regarding the due process concerns implicated by the request. Notably, the facts in the two Court of Appeals cases upholding denial of additional experts were not particularly sympathetic. *S.B.* involved a request for an expert for the adjudicatory hearing by a respondent father who had pled guilty to second-degree murder of S.B.'s mother and was sentenced to 12 years of incarceration; the Court of Appeals also upheld the trial court's adjudication

pursuant to summary judgment procedures. 742 P.2d at 937–39. *L.G.* involved a request for a second expert after the first court-appointed expert refused to assist in preparation of the defense. 737 P.2d at 434. It is possible that different factual circumstances may demonstrate that due process requires the appointment of experts in addition to the statutorily required one.

12. Religious Preferences

The Children's Code recognizes decisions regarding religious upbringing as a residual parental right. § 19-1-103(93). Whenever practical, the court must consider parents' religious preferences in placement decisions. § 19-3-508(5)(a).

Pregnant and Parenting Teens Fact Sheet

When a teenager in a D&N proceeding is also pregnant or a parent, protection of that teenager's constitutional and statutory rights to have access to reproductive health care and to parent must become part of counsel's advocacy, whether the teen parent is the respondent parent (father or mother) or the child in the proceeding. Advocating for such rights may include advocacy for appropriate housing, child care, schooling, prenatal care, and employment/financial support.

> **TIP:** Although many of the issues facing teen parents may be "collateral" to the D&N proceeding, effective advocacy on such issues may be central to the minor's successful transition from foster care to independence (for teen parents postured as children in the proceeding) or for a teen parent's ultimate ability to maintain the child in his or her care and/or to get the child returned home. Both GALs and RPC should have a basic familiarity with the rights of and services available to teen parents, as well as other legal and advocacy organizations that may be able to assist teen parents in accessing services and benefits to which they may be entitled.

SEXUAL AND REPRODUCTIVE HEALTH CARE FOR MINORS

1. Family Planning

In Colorado, minors may, on their own, request and consent to birth control procedures, supplies, and information. § 13-22-

105; *see also* § 25-6-102(8). However, a minor may not consent to permanent sterilization procedures without the consent of his or her parent or guardian. § 25-6-102(6). The department's obligation to provide medical care for a child in foster care includes the obligation to provide age-appropriate sex education and birth control information and education. 7.708.63(C).

2. Prenatal, Delivery, and Post-Delivery Care

A pregnant minor may authorize prenatal, delivery, and post-delivery medical care for herself related to the intended live birth of a child. § 13-22-103.5.

3. Termination of Pregnancy

Colorado law requires written notice to be served on the parent(s) of an unemancipated minor at least 48 hours before an abortion may be performed on the minor. § 12-37.5-104(1). For the purposes of the notice requirement, "parent" is defined to include natural or adoptive parent, a court-appointed guardian, or any foster parent to whom the care and custody has been assigned. § 12-37.5-103(2). If a minor is residing with a relative (defined to include grandparent, adult aunt, or adult uncle in § 12-37.5-101(6)) and the parent is not also residing with the relative, notice must be provided to either the parent(s) of the minor or the relative. § 12-37.5-104(2)(a).

Colorado law provides for exceptions to the parental notification requirement when a medical emergency exists or when a minor states that she is the victim of abuse or neglect by acts or omissions of a person who would be entitled to notice. §§ 12-37.5-105(1)(b), (c). Additionally, notice is not required if there is a valid court order based on a finding that the giving of such notice is not in the best interests of a minor or a finding by clear and convincing evidence that the minor is sufficiently mature to make the decision to have an abortion. §§ 12-37.5-105(1)(d), 12-37.5-107(2)(a). A hearing on a petition for such a finding must be held and a decision issued as soon as practicable but no later than four days after the filing of the petition. § 12-37.5-107(2)(c). The court has the discretion to appoint a GAL and counsel for the minor. § 12-37.5-107(2)(b). A minor whose petition for such a finding is denied is entitled to a confidential

appeal, which must be decided no later than five days after its filing. § 12-37.5-107(2)(d).

HOUSING ASSISTANCE

1. Title IV-E

When the parent is a minor and the minor parent has been determined eligible for Title IV-E foster care, the child's placement costs are reimbursable through Title IV-E foster funding as an extension of the minor parent's cost of care. 7.001.41(G); *see also* 42 U.S.C. § 675(B) (requiring foster care maintenance payments with respect to a minor child to also include "such amounts as may be necessary" to cover cost of clothing, food, shelter, daily supervision, and other items delineated as foster care maintenance for the minor child's son or daughter residing in the same home or institution as the minor parent); 45 CFR § 1356.21(j). This funding stream does not require a D&N proceeding to be filed against the minor parent.

- **TIP:** GALs should contest any representation by department personnel that a D&N filing is necessary to fund placement for the child of a minor parent. The need for placement funding is not a basis on which to file a D&N proceeding.

- **TIP:** An appropriate foster placement for a teen parent is one that will allow joint placement with the child and that will provide support and direction to the young parent. The GAL should be vigilant in ensuring full exploration of such potential placements for a teen parent.

- **TIP**: A reality for teen parents in foster care is that they may be under more stringent scrutiny and supervision than teen parents who are not already in contact with the child welfare system. It is important for the GAL to ensure that the minor parent understands his or her rights as a parent, as well as the importance of keeping records related to the care of the child (e.g., doctor's visits) and participation in services designed to support appropriate parenting behavior.

2. Section 8 Housing Choice Vouchers

Section 8 vouchers provide a rent subsidy to recipient low-income families living in private housing units in the commu-

nity. *See* 42 U.S.C. § 1437f. Typically, the household pays the landlord 30 percent of the adjusted household income and the government pays the remaining rent directly to the landlord. *See generally* 42 U.S.C. §§ 1437a, 1437f; 24 C.F.R. § 982.1(a). A family must apply for such vouchers through the local housing authority; applications are typically made on a lottery basis during specified times.

> **TIP:** Whether the Section 8 Housing Choice Voucher Program is a potential housing support for a teen parent is contingent on that parent's ability to enter into a lease. *See generally* § 13-22-101(1)(a) (declaring age 18 as the age at which a person can enter into a legal contractual obligation and be bound by such obligation to the full extent as any adult).

The Family Unification Program (FUP) is a set-aside program through the Section 8 voucher program. FUP vouchers are specifically available to (1) families for whom the lack of adequate housing is a primary factor in the separation, or threat of imminent separation, of their children or an obstacle to the return home of the children, and (2) young adults ages 18 to 21 who left foster care at age 16 or older and who lack adequate housing. The FUP recipient must be 18 years of age, and the local child welfare agency is responsible for making the referral to the local housing authority. FUP funding is allocated through a competitive process, and not all local housing authorities have FUP vouchers. Information about FUP, including a list of local authorities that have received FUP vouchers, is available at the Department of Housing and Urban Development website at **http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/family#3**.

3. Independent Living Services

Youth eligible for independent living services, including those youth ages 18 to 21 who were in out-of-home care on their eighteenth birthday, may be eligible for room and board assistance, depending on the local department's independent living program. *See* **Transition to Adulthood and Independent Living fact sheet**.

CHILD CARE

Colorado's Child Care Assistance Program (CCAP) has expanded eligibility provisions for teen parents. A teen parent household's gross monthly income for the purpose of determining eligibility for this assistance includes only the income of the teen parent(s) in the household and does not include the income of other individuals residing in the household, even if those individuals are family members. 9 CCR § 2503-1, Rule Manual Volume 3, Income Maintenance 3.904(A) (Income Maintenance Regulations will hereafter be referred to by regulation number). Additionally, education/training is deemed an eligible activity for teen parents in all counties, whereas counties must specifically designate eligible activities for adults. *See* 3.903 (defining eligible activities), 3.904(C). The regulations allow for a complete waiver of a teen parent's parental fee when that parent is participating in middle school, high school, GED, vocational, or training activities offered as secondary education and the fee would produce a hardship on the parent. 3.904(B). For the purposes of CCAP, a teen parent is defined as a parent under age 21 who has physical custody of his or her child during the time that care is requested. 3.903. General information about CCAP is available at **http://www.colorado.gov/cs/Satellite/CDHS-ChildYouthFam/CBON/1251583639415**.

> **TIP:** Many counties have waiting lists for their CCAP programs. Because child care availability can impact a teen parent's options for employment and education, counsel should work with the teen to get the teen on the waiting list for CCAP as soon as possible.

Child Welfare Child Care may also be an option for teen parents whose child(ren) meet Program Area 4, 5, or 6 eligibility criteria and who require assistance to maintain their children in the home. *See* 7.302.1, 7.302.2. The need for such child care must be documented in the family services plan. 7.302.3.

EDUCATION

Title IX of the federal Education Amendments of 1972 prohibits discrimination in education on the basis of sex. *See* 20 U.S.C.

§ 1681. Implementing regulations protects the rights of pregnant and parenting teens to participate fully in educational programs. 34 C.F.R. 106.40 specifically precludes schools from discriminating against a student's participation in educational and extracurricular activities on the basis of parental status and requires students to treat pregnancy and childbirth the same as any other temporary disability for the purposes of excusing absences and making up work. Schools also must provide a leave of absence to a pregnant student or a student who has given birth as long as is deemed medically necessary by the student's treating physician and must allow the student to return after that leave of absence. 34 C.F.R. § 106.40(b)(5). Although students may voluntarily attend separate programs for pregnant or parenting students, they cannot be forced to attend those programs and such programs must be comparable to the programs offered to nonpregnant students. 34 C.F.R. § 106.40(b)(3).

- **TIP:** The National Women's Law Center website contains extensive information about Title IX protections for pregnant and parenting teens. *See* **http://www.nwlc.org**.

- **TIP:** Teen parents may need flexibility and support to be successful in their educational endeavors. Advocating for appropriate educational programs and supports to enable school success is integral to a minor parent's overall success in the D&N proceeding, whether the minor parent is the respondent parent or the child in the proceeding. Counsel should be familiar with local educational settings that are supportive of teen parents and should advocate for enrollment in such programs as appropriate in any given case.

FINANCIAL AND BASIC NEEDS ASSISTANCE

1. Temporary Assistance for Needy Families (TANF)

Colorado administers TANF cash assistance dollars through the Colorado Works Program. *See generally* 42 U.S.C. § 601 *et seq.*; § 26-2-701 *et seq.* Under TANF/Colorado Works, an individual has a lifetime support limit of 60 months. § 26-2-706.5. Teen parents may receive their own TANF assistance grants if they meet certain eligibility criteria. In addition to the rules for all TANF applications, teen parents must be living with a parent, legal

guardian, or another adult relative or in a living arrangement approved by the county department. § 26-2-706(2)(b). A teen parent under the age of 20 is deemed to be in compliance with TANF's work participation requirements if that teen maintains satisfactory attendance at a secondary school or an equivalent program or participates in education directly related to employment. 42 U.S.C. § 607(c)(2)(C). A parent receiving TANF must cooperate with child support enforcement services in the establishment of paternity and support, unless in a rare case a "good cause" exception is granted to the parent by the department. Failure to cooperate may result in a sanction imposed against the TANF distribution. 3.604.2.

2. Women, Infants, and Children (WIC)

WIC is a supplemental nutrition and education program for pregnant women, new mothers, breastfeeding mothers, and infants and children under the age of five. *See generally* 42 U.S.C. § 1786. Information about Colorado's WIC program is available at **http://www.cdphe.state.co.us/ps/wic/**.

3. Supplemental Nutrition Assistance Program (SNAP)

SNAP, formerly known as food stamps, is another potential support for a pregnant and/or parenting teen. *See generally* 7 U.S.C. § 2011 *et seq.* Eligibility requirements are detailed at 10 C.C.R. 2506-1, Rule Manual Volume 4B, Food Stamps B-4000 *et seq.*

4. Child Support

By legislative declaration, both parents are responsible for the financial support of their children. Paternity is extremely important and must be established prior to the establishment of a support order. Statutory provisions regarding the establishment of paternity can be found at § 19-4-101 to § 19-4-130. Once paternity is established, child support guidelines are used to calculate what child support should be. *See* §14-10-115. Electronic guidelines are on the judicial website at **http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID = 94**.

The easiest way to proceed in a paternity and support establishment case is to apply for child support services with the

parent's local child support enforcement (CSE) agency, which is run through the Department of Human Services. A listing of local offices can be found online at **https://childsupport.state.co.us/siteuser/do/vfs/Frag?file=/cm:home.jsp**. There is a $20 application fee and the CSE agency will handle all aspects of the case, from paternity to establishment and enforcement of child support and medical support. The child support offices also may have other resources, such as employment services, fatherhood resources, free mediation for access and visitation issues, or other referrals that they can provide to young parents in need of services.

Reasonable Efforts Fact Sheet

Reasonable efforts defines the department's obligation to the child and family in a D&N proceeding. Although findings of reasonable efforts are relevant to the state's ability to seek reimbursement for out-of-home placement costs under Title IV-E of the Social Security Act, the Colorado Children's Code requires reasonable efforts to be made for all children and families subject to a D&N proceeding.

TIP: Counsel must play an active role in assessing and ensuring that reasonable efforts are made from the outset and throughout the proceeding.

REQUIREMENT OF REASONABLE EFFORTS

Title IV-E of the Social Security Act requires reasonable efforts to be made to:

- Prevent or eliminate the need for removing the child from his or her home.
- Make it possible for the child to return safely to his or her home.
- Place the child in a timely manner in accordance with the permanency plan and to complete all necessary steps to finalize the permanency plan (when continuation of reasonable efforts to return home are deemed inconsistent with the child's permanency plan).

42 U.S.C. § 671(a)(15). Title IV-E sets forth specific content and timing requirements for court orders regarding reasonable efforts. *See* **Funding and Rate Issues fact sheet**.

In Colorado, reasonable efforts are required for all children, and not just those for whom the state is seeking IV-E reimbursement. The Children's Code sets forth several procedural requirements regarding reasonable efforts:

- The petition seeking removal of child must state that reasonable efforts were made to prevent out-of-home placement and summarize those efforts, or it must explain why such services were not provided or a description of the emergency precluding the use of those services. § 19-3-502(2.5).
- Any time a court enters an order awarding legal custody of a child to the department, the court must make findings regarding the department's compliance with the reasonable efforts requirements. § 19-1-115(6)(b).
- Any time the court enters an order continuing the out-of-home placement of a child, it must determine whether reasonable efforts have been made to reunify the family or whether such efforts are not appropriate. § 19-1-115(6.5)(b).
- The department must submit a report regarding the services provided to prevent unnecessary out-of-home placement and/or to facilitate reunification at the dispositional hearing. § 19-3-507(1)(b).
- The court is required, for children whose disposition involves an out-of-home placement, to set a placement review hearing within 90 days of the dispositional hearing to determine whether reasonable efforts have been made to return the child home. § 19-3-507(4).
- At each permanency hearing, the court must determine whether reasonable efforts have been made to finalize the permanency plan in effect at the time of the hearing and whether reasonable efforts have been made to find a safe and permanent placement for the child. §§ 19-3-702(3), (3.5)(b).
- At the placement review hearing, the court must determine whether reasonable efforts have been made to reunite the child and the family or whether reasonable efforts are not required pursuant to § 19-1-115(7). §§ 19-1-115(6.5)(b), 19-3-507(4). The court must also determine whether reasonable efforts have been made to find a safe and permanent placement. § 19-3-702(6)(a)(II).

- If a child was under six years of age at the time of the filing of the petition and is not placed in a permanent home within 12 months of the original out-of-home placement, the court must find that placement in a permanent home is not in the child's best interests, and it may make that finding only if it is shown by clear and convincing evidence that reasonable efforts were made (1) to find the child an appropriate permanent home and such a home is not currently available or (2) that the child's mental or physical needs or conditions deem it improbable that the child would have a successful permanent placement. § 19-3-703.
- At the hearing on the motion to terminate the parent-child legal relationship, the court is required to consider whether reasonable efforts have been made to rehabilitate the parent(s) in determining whether the conduct and condition of a parent is unlikely to change within a reasonable time. § 19-3-604(2).

TIP: Counsel should ensure that the court gives thorough consideration to whether reasonable efforts are being or have been made and should challenge reasonable efforts findings whenever counsel's independent investigation reveals a lack of reasonable efforts. Failure to raise a reasonable efforts argument may result in waiver of the issue, impairing counsel's ability to litigate the reasonableness of efforts at later stages in the proceeding. *See People ex rel. T.M.W.*, 208 P.3d 272 (Colo. App. 2009); *In the Interest of M.S.*, 129 P.3d 1086; *but see People ex rel. S.N.-V.*, 2011 WL 6425577 (Colo. App. 2011). Whenever counsel objects to a court's reasonable efforts findings, counsel should ensure the record accurately reflects counsel's objection and that such record is designated in any applicable appeal.

TIP: As time is of the essence in D&N proceedings, counsel should not simply wait for scheduled hearings in cases in which reasonable efforts are not being made and should instead file a motion seeking a no reasonable efforts determination from the court.

Exceptions to the reasonable efforts can be found at 42 U.S.C. § 671(a)(15)(C)–(E). These exceptions are set forth in §§ 19-3-115(7), 19-3-604(1)(b). *See* **Preliminary Protective Proceeding chapter**; **Dispositional Hearing chapter**; **Termination Hearing chapter**. An emergency situation requiring the immediate temporary removal of the child from the home may initially excuse

the department from making reasonable efforts to prevent the out-of-home placement when it is reasonable for such preventative efforts not to be made. § 19-1-115(6)(b)(II). The initial emergency will not excuse the department from making reasonable efforts to return the child home unless another exception applies.

DEFINITION OF REASONABLE EFFORTS

Federal law does not define the term "reasonable efforts" but requires that in making and determining reasonable efforts, the child's health and safety shall be the paramount concern. 42 U.S.C. § 671(15)(a).

The Children's Code defines reasonable efforts as the exercise of diligence and care for children who are in out-of-home placement or are at imminent risk of out-of-home placement. *See* § 19-1-103(89). The child's health and safety must be the paramount concern in making reasonable efforts. *Id.* The Children's Code specifically states that reasonable efforts are deemed to be met when the department provides services designed to:

- Promote the immediate health, safety, and well-being of children.
- Reduce the risk of future maltreatment of children who have previously been abused or neglected and protect siblings and children who are members of the same household.
- Avoid unnecessary placement of children into foster care.
- Facilitate, if appropriate, speedy reunification.
- Ensure that the child's placement is neither delayed nor denied because of the race, color, or national origin of the child or any other person (unless permitted by federal law).
- Promote the best interests of child.

§§ 19-3-100.5(4), 19-3-208(2).

The Children's Code lists services that must be available and provided, as determined necessary and appropriate by individual case plans:

- Screenings.
- Home-based family and crisis counseling.

- Assessments.
- Information and referral services.
- Visiting services.
- Placement services.

§ 19-3-208(2)(b).

The following services must be available, as determined necessary and appropriate by individual case plans "and based upon the state's capacity to increase federal funding or any other moneys appropriated" for the services:

- Transportation.
- Child care.
- In-home supportive homemaker services.
- Diagnostic, mental health, and health care services.
- Drug and alcohol treatment.
- After-care services to prevent a return to out-of-home placement.
- Family support services when a child is in out-of-home placement, including home-based services, family counseling, and placement alternative services.
- Financial services to prevent placement.
- Family preservation services.

§ 19-3-208(2)(d).

❖ **TIP:** In advocating for services, counsel should not be deterred by department representations that specific services are not available or that funding does not exist for a service. Multiple funding sources can be accessed to provide services and financial support. *See* **Funding and Rate Issues fact sheet**. Counsel should require the department to confirm, through discovery or other means, that all funding sources have been explored, and counsel should also work collaboratively with the department to identify creative approaches to providing needed services and supports. Although the statute does not specify a burden of proof for the court's determination of reasonable efforts, a reasonable effort finding is an affirmative finding that must be made by a preponderance of the evidence. *See* § 13-25-127 (providing that unless otherwise specified by statute, the burden of proof in any civil action shall be by a preponderance of the evidence).

- **TIP:** In litigating reasonable efforts, counsel may cite to Volume 7 as persuasive authority. The fact that state regulations allow or require a county department to provide specific services is relevant to the reasonableness of a department's failure to provide.

Relative and Kinship Placement Fact Sheet

For children who must be placed out of the home, placement with relatives and kin serves to promote meaningful emotional and cultural ties, minimize the trauma of out-of-home placement, and support and strengthen the family's ability to protect the children and to provide permanency. 7.304.21(B).

Current research shows that children and youth who live with relatives or kin rather than in foster care often benefit because they are more likely to remain with their siblings, report being happy, stay in their own school, and maintain family cultural practices. *Welcome to Navigating Kinship Care: A Resource Guide for Kinship Caregivers*, Navigation, Introduction (2011), *available at* **http://www.cokinship.org**. Children in kinship care have been found to undergo fewer placement changes while in out-of-home placement and experience lower rates of reentry into the foster care system after reunifying with their parents than children placed in non-related foster homes. Tiffany Conway and Rutledge Q. Hutson, *Is Kinship Care Good for Kids?* (Center for Law and Social Policy, 2007), *available at* **www.clasp.org**.

The use of kinship and relative care for children who must be placed away from their parents furthers the Children's Code legislative intent to secure for each child such care and guidance as will best serve the child's welfare and the interests of society and to preserve and strengthen family ties whenever possible. §§ 19-1-102(1)(a), (b).

DEFINITIONS

1. Kinship Caregivers

In Colorado, "kinship care" is defined as "the full-time nurturing and protection of children and youth by kin." 7.304.21(A). "Kin" is defined as relatives, persons ascribed by the family as having a family-like relationship, or individuals that have a prior significant relationship with the child or youth. *Id.* These relationships take into account cultural values and continuity of significant relationships. *Id.*

2. Grandparent

The Children's Code defines a grandparent as "a person who is the parent of a child's father or mother, who is related to the child by blood, in whole or by half, adoption, or marriage." § 19-1-103(56)(a). The Children's Code specifically excludes the father or mother of the parent whose parental rights have been terminated from the definition of grandparent for the purpose of grandparent visitation rights. *See* § 19-1-103(56)(b).

TYPES OF KINSHIP CARE

Kinship care arrangements may be made outside the purview of D&N proceedings, whether informally, through allocation of parental responsibilities, or through a formal guardianship arrangement. *See generally* §§ 14-10-123, 15-14-105, 15-14-201. When a D&N petition is filed regarding such a caregiver, that caregiver may be made a respondent or special respondent to the proceeding. §§ 19-1-103(94), (100); 19-3-502(6); 19-3-503(3), (4).

Kinship placements effectuated through a D&N proceeding fall into two categories: noncertified kinship care and certified kinship care.

1. Noncertified Kinship Care

For the purpose of this fact sheet, "noncertified kinship care" refers to a relative or person with a significant relationship to the family who assumes custody of the child without pursuing

certification as a foster parent. *See generally* 7.304.21(C) (allowing the department to place the child with noncertified kin). The kinship care provider is awarded temporary custody by the juvenile court. §§ 19-3-403(7), 19-1-115(1)(a), 19-3-508(1)(b). If the placement becomes unsafe, the county department must return to court for authorization to remove the child. The department must complete a family assessment using the modified Structured Analysis Family Evaluation (SAFE) for kinship families to determine the safety and suitability of the home for the child, as well as a background check that includes review of child abuse and neglect records and completion of criminal history background checks. 7.304.21(C)(3), (6).

Noncertified kinship caregivers are eligible for the same supports as certified foster parents, with the exception of foster care reimbursement. 7.304.21(C)(5). Financial support for the child may be available through Temporary Assistance for Needy Families (TANF), child support, social security benefits, and programs. *Id.*; 7.304.21(D)(3). *See* **Funding and Support section**, *infra*.

> **TIP:** When the court awards temporary custody to kinship care providers, counsel should consider requesting the court to order protective supervision by the department to allow the department to supervise the placement and verify that the kinship provider will cooperate with reunification efforts and other orders. *See* §§ 19-1-114, 19-3-403(3.6)(a)(V) (allowing court to "enter such other orders as appropriate" at temporary custody hearing), 19-3-508(1)(b).

2. Certified Kinship Care

Certified kinship care refers to placement with a relative or kin who has become a certified foster parent. 7.304.21(D)(1)(d). The county department has temporary legal custody of the child, and the certified kinship provider is entitled to the same level of reimbursement as a non-related provider. *Id.* Certified kinship caregivers may elect not to receive payment. *Id.* Other funding and support services, including in-kind or concrete services, can be put into place as mutually agreed upon with the provider. *See* **Funding and Support section**, *infra*.

Kinship caregivers who are not certified foster parents at the time of the child's placement may apply for provisional licensing for an emergency "child-specific" placement. 7.304.21(D)(2)(e),

7.500.311(C), (D). The relative has 60 calendar days to complete the training and must submit to CBI and FBI background checks and child abuse and neglect records checks. 7.500.311(C), (D). Alternatively, the department may allow the child to visit the kinship caregiver on an emergency basis, subject to the same 60-day limit and background checks. 7.304.21(D)(2)(e).

HB 12-1047, which was signed by the governor on March 22, 2012, and is scheduled to take effect in August 2012, will allow county departments of social services to approve waivers of non-safety licensing standards for kinship foster care. *See* HB 12-1047, *to be codified at* § 26-6-106. This legislation represents a change from previous procedures in which county departments and child placement agencies were required to request waivers from the State Child Care Appeal Panel. *See* 7.304.21(D)(3)(d). Pursuant to HB 12-1047, the State Board of Human Services will promulgate rules identifying which standards may be waived and when waivers do not apply. § 26-6-106(d).

- **TIP:** A kin provider, either certified or non-certified, may become a special respondent and be subject to protective orders and receive services through treatment plans. *See* **Special Respondents fact sheet**.

LEGAL AUTHORITY FOR RELATIVE/ KINSHIP PLACEMENT PREFERENCE

1. Volume 7 Preference for Relative/Kin

When a child must be removed from his or her home, the department must explore the possibility of kinship placement as part of its reasonable efforts to maintain the family unit. 7.304.21(D)(2)(a); 7.202.52(N). The family services plan must document initial and ongoing kinship placement efforts. 7.301.24(F).

- **TIP:** Counsel should encourage relatives and kin to be involved at the earliest possible stage to build and strengthen the connections and relationships important to the child.

2. Relative Preference

Federal law provides that a state must consider giving placement preference to an adult relative who meets all the relevant

child protection standards. 42 U.S.C. § 671(a)(19). At the temporary custody hearing, the court must advise parents that the child may be placed with a relative if, in the court's opinion, the relative placement is appropriate and in the child's best interests. § 19-3-403(3.6)(a)(III). The Children's Code sets forth a procedure for identifying and notifying such relatives. *See* **Family Finding / Diligent Search fact sheet**.

Whether the statutory preference for relative placement is mandatory or permissive depends on the status of the case; similarly, once the case reaches a certain posture, specific procedures must be followed for the relative placement preference to apply. Specifically:

- At the temporary custody hearing, the court may consider and give preference to awarding temporary custody to a child's relative who is appropriate, capable, willing, and available if doing so is in the best interests of the child. § 19-3-403(3.6)(a)(V). The court may authorize the county department to place a child with a relative without a hearing if the county finds a suitable relative and the GAL concurs that the placement is in the best interests of the child. Details regarding such placement must be provided to the court at the next hearing. § 19-3-403(3.6)(a)(V).
- At the dispositional hearing, the court shall place a child with a relative if the placement is in the child's best interests. § 19-3-508(5)(b)(1). *See also* § 19-3-508(1)(b) (providing that the court may place the child in the legal custody of a relative with or without protective supervision, under conditions the court deems necessary and appropriate).
- Following an order of termination of parental rights, the court shall consider, but is not bound by, a request that guardianship and legal custody of the child be placed with a relative of the child. § 19-3-605(1). The court may give preference to a grandparent, aunt, uncle, brother, sister, half-sibling, or first cousin of the child when such relative has made a timely request and such placement is in the best interests of the child. *Id.* The statute defines a timely request as no later than 20 days after the motion for termination is filed. § 19-3-605(1). Relatives are not entitled to notice of the pending termination of parental rights and do not have a constitutionally protected liberty interest in the custody of the child. *People in the Interest of C.E.*, 923 P.2d 383, 385–86 (Colo. App. 1996).

- In a relinquishment proceeding, a court shall consider, but is not bound by, a request that custody of the child be awarded to a grandparent or an aunt, uncle, brother, or sister of the child; this requirement does not apply if the birth parents have specifically identified an adoptive parent or represented that they do not want the child to be placed with the grandparent or other relative. § 19-5-104(2)(a).

3. Grandparent Preference

In addition to preference for relatives, the Children's Code specifically provides that the court may, if it is in the best interests of the child, give placement preference to a grandparent who is appropriate, capable, willing, and available to care for the child. § 19-1-115(1)(a). As with the more general relative preference, the procedure requirements and whether the preference is mandatory or permissive vary depending on the posture and status of the case. Specifically:

- An agency with legal custody may give placement preference to an appropriate, capable, willing, and available grandparent. § 19-3-115(3)(a).
- Preference may be given to a grandparent in emergency placement decisions when the grandparent is appropriate, capable, willing, and available to care for the child. § 19-3-402(2)(a).
- The court shall place a child with a grandparent at the dispositional hearing when such placement is in the child's best interests. § 19-3-508(5)(b)(1). *See also* § 19-3-508(1)(b) (providing that the court may place the child in the legal custody of a grandparent with or without protective supervision, under such conditions as the court deems necessary and appropriate).
- If a grandparent has filed a timely request for consideration of placement post-termination, the court shall consider the placement and may order placement if it is in the child's best interests. § 19-3-605(1); *People ex rel. E.C. and A.C.*, 47 P.3d 707, 709 (Colo. App. 2002) (affirming trial court order denying the grandparent's request for placement).
- In a relinquishment proceeding, a court shall consider, but is not bound by, a request that custody of the child be awarded to a grandparent. § 19-5-104(2)(a). The court need not consider such request if the birth parents have specifically identified an adoptive parent or represented that they do not want

the child to be placed with the grandparent. *Id.; In re Petition of B.D.G.*, 881 P.2d 375, 377 (Colo. App. 1993).

The Children's Code specifically provides that when a grandparent seeks the placement of his or her grandchild in the grandparent's home, the court must consider any credible evidence of the grandparent's past conduct of child abuse or neglect. § 19-1-117.7.

A grandparent may also request reasonable visitation with a child who is involved in a D&N proceeding. *See* **Visits fact sheet**.

FUNDING AND SUPPORT FOR RELATIVE AND KINSHIP CAREGIVERS

1. Advisement and Determination of Necessary Support

As part of the assessment process, the department must determine, with the relative/kinship care provider, which funding options and support services will be necessary to support the placement. 7.304.21(D)(3)(a). This decision-making process must address the needs of the child, family, and kin and focus on the goals of safety, permanency, and well-being that can be most effectively achieved for the child. 7.304.21(D)(3)(b). The kinship care provider shall be advised of all support options available. 7.304.21(D)(3)(c). *See also* 7.304.21(D)(1)(c) (requiring kinship care providers to be advised of all support options, including family preservation, certification, and the relative guardianship assistance program). The family services plan must include a description of services and resources needed by the kinship providers to meet the needs of the child and the plan for providing the service. 7.301.24(I).

❖ **TIP:** Consistent with the best interests of the child, the GAL should confirm that the department has discussed all available supports with the kinship provider.

2. Types of Funding and Support

If eligible, at a minimum, the following funding sources shall be considered to support the child(ren) in a relative/kinship care placement:

- ❑ Child support.
- ❑ Social Security and other death benefits.
- ❑ Supplemental Security Income.
- ❑ Supplemental Security for Disability Income.
- ❑ Temporary Assistance for Needy Families; for kinship care to be supported by TANF, the caretaker relative must meet the TANF definition in § 3.600 of the Income Maintenance Manual (9 CCR 2503-1).
- ❑ Tricare or other medical benefits.
- ❑ Medicaid.
- ❑ Core Services, if eligible (*see* 7.303.13 et seq.; *see generally* CDHS Core Services Program Evaluation Annual Report, *available at* **www.colorado.gov**).
- ❑ Child Welfare Child Care, if eligible (*see* 7.302 *et seq.*).
- ❑ Colorado Child Care Assistance Program, if eligible (*see* 7.302.2(G); 9 CCR 2503-1), Rule Manual Volume 3, Income Maintenance, 3.900 *et seq.*
- ❑ In-kind services or donations.
- ❑ Certified foster care payment, if eligible.
- ❑ IV-E or state adoption subsidy.

7.304.21(D)(3).

Kinship caregivers are also entitled to training, support, and services specific to the needs of the kinship care providers and to the children in kinship placements, as well as family preservation services. 7.304.21(D)(3), 7.304.21(D)(1)(c)(1).

❖❖ **TIP:** Core services and family preservation funds vary by county, and counsel should be familiar with the programs and services offered through their department and in their community. *See* **Funding and Rate Issues fact sheet**. The Colorado Kinship Connection website is also a valuable resource for kinship caregivers. *See* **www.cokinship.org**.

Kinship caregivers who have been certified as foster parents and who become legal guardians for the child may receive relative guardianship assistance. *See* § 26-5-110; 7.311 *et seq.* The rules require reimbursement for nonrecurring expenses incurred in obtaining guardianship, including legal fees. 7.311.72.

SPECIAL CONSIDERATIONS

1. Notice and an Opportunity to Be Heard

In a D&N case, relative care providers must receive timely notice of and an opportunity to be heard at all hearings. § 19-3-502(7). Notice and an opportunity to be heard do not include the right to standing as a party to the case. *Id.* The county department is required to provide the relative provider with notice of any administrative reviews and, upon written request by the relative, written notice that includes the child's court case number, the date and time of the next court hearing, and the name of the magistrate or judge and the court division. §§ 19-3-507(5)(b), (c).

2. Permanency and Kin

When a child has been placed by the department into temporary kinship care and reasonable efforts to reunite the child with the parents are not successful, the court must consider permanent placement with the kinship care provider or other appropriate kin. 7.304.21(D)(6). The preferred permanent placement is adoption, legal guardianship, or permanent custody. *Id. See* **Adoption fact sheet**; **Allocation of Parental Responsibilities / Guardianship fact sheet**. If these options are ruled out based on compelling reasons, the court may also determine that the child's best interests will be served by continuing in long-term placement with a fit and willing relative. § 19-3-702(4); 7.304.54(G). *See also* **Permanency Hearing chapter**.

> **TIP:** Consistent with the best interests of the child, the GAL should confirm that the kinship provider is aware of forms of long-term support for the placement, including but not limited to the Relative Guardianship Assistance Program. *See* **Funding and Support section**, *supra*.

3. ICWA Preferences

The Indian Child Welfare Act sets forth the requirement that whenever removal from the home is necessary for Indian children as defined by the act, preference shall be given, in the absence of good cause to the contrary, to a placement with a member of

the Indian child's extended family. 25 U.S.C. § 1915(b); 7.309.6; 7.309.83. *See* **ICWA fact sheet**. ICWA provides that who qualifies as an "extended family member" be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, is the grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent of the child. 25 U.S.C. § 1903(2).

4. Applicability of Interstate Compact on the Placement of Children

Out-of-state relatives seeking placement of a child must comply with the Interstate Compact on the Placement of Children. §§ 19-1-115(3)(b), 24-60-1801 *et seq. See* **ICPC fact sheet**. A child may visit an out-of-state relative provided the out-of-state visit is less than 30 days; any visit that exceeds 30 days must be approved by the court. § 19-1-115(3)(b).

❖ **TIP:** Meeting the requirements of the ICPC process is time-consuming, so a referral should be made as soon as possible.

Siblings
Fact Sheet

The Colorado General Assembly has declared that "[i]t is beneficial for a child who is removed from his or her home and placed in foster care to be able to continue relationships with his or her brothers and sisters, regardless of age, in order that the siblings may share their strengths and association in their everyday and often common experiences." § 19-3-500.2(1).

DEFINITIONS

1. Sibling, Biological Sibling, and Half-Sibling

A biological sibling is a brother, sister, or half-sibling of a child. § 19-1-103(14). Half-siblings have the same definition as biological siblings. § 19-1-103(61.5). For the purposes of arranging visits for siblings in foster care, "sibling" means a sibling from birth who is descended from one or two mutual parents or a stepbrother or former stepbrother or a stepsister or former stepsister. § 19-1-128(5). *See also* 7.000.5(AA).

2. Sibling Group

A "sibling group" means biological siblings who have been raised together or have lived together. § 19-1-103(98.5).

PREFERENCES FOR SIBLING PLACEMENT

1. Pre-Placement Duties of the Department

If the child is a part of a sibling group, the county shall make thorough efforts to locate a joint placement for all children in the sibling group unless it is not in the best interests of the children to be placed as a group and as long as these efforts do not unreasonably delay permanency for any child. 7.304.61(c). These efforts shall be documented in the child's case record. *Id.*

2. Placement with a Sibling Caregiver

It is the stated intent of the General Assembly to "preserve and strengthen family ties whenever possible." § 19-1-102(1)(b). If a child must be removed from the home, the court may consider and give preference to granting temporary custody to a child's relative who is appropriate, capable, willing, and available for care if doing so is in the best interests of the child. § 19-3-403(3.6)(a)(V). *See also* § 19-1-103(87)(defining "protective supervision" as a legal status created by the court in which a child may be placed with a relative); **Relative and Kinship Placement fact sheet.**

> **TIP:** Counsel should keep in mind that adult siblings may be an appropriate relative placement for a child in need of out-of-home care and ensure that this placement option is not overlooked.

3. Placement of Siblings Together in Foster Care

When a child must be removed from the home and is part of a sibling group and the sibling group is being placed in foster care, the county department shall make thorough efforts to locate a joint placement for all children in the sibling group. § 19-3-213(1)(c)(I); 7.304.61(c). If the county department locates an appropriate, capable, willing, and available joint placement for all children in the sibling group, it shall be presumed that placement of the entire sibling group in the joint placement is in the best interests of the children. §§ 19-3-213(1)(c)(I), 19-3-500.2(1)(c), 19-3-507(4), 19-3-508(1)(c). This presumption may be rebutted by a preponderance of the evidence that placement

of the entire sibling group in the joint placement is not in the best interests of a child or the children. §§ 19-3-213(1)(c)(I), 19-3-500.2(c), 19-3-507(4), 19-3-508(1)(c).

The presumption for appropriate joint sibling placement takes precedence over applicable grandparent/relative placement preferences. *See* §§ 19-3-402(2)(b)(regarding temporary placement with grandparents), 19-3-403(3.6)(b)(regarding grandparent/relative placement preferences), 19-3-508(5)(b)(II)(regarding grandparent/relative placement preferences at dispositional hearing), 19-3-605(2)(regarding post-termination request for placement with grandparents and relatives).

A foster home may exceed its normal capacity if necessary to allow for the joint placement of sibling groups. § 19-3-215; 7.708.1.

❖ **TIP:** The early identification of sibling relationships is a critical element of a successful litigation plan. Counsel should ensure the department has thoroughly explored and identified all sibling relationships early in the case, particularly for a child in need of an out-of-home placement. Initial decisions about temporary placement of a child can have a significant impact on the ultimate permanent placement of the child in the sibling group. § 19-3-500.2(1)(a).

VISITS BETWEEN SIBLINGS IN FOSTER CARE

When the department has primary responsibility for a child in out-of-home placement, an appropriate visiting plan must be established and documented in the child's case record. 7.305.64(B). The visiting plan shall specify the frequency and type of contact between the parents and others as appropriate. *Id.* At a minimum, the visiting plan should provide methods to allow the child's contact with siblings. 7.304.64(B)(5).

If a child in foster care and his or her sibling mutually request an opportunity to visit each other, the county department that has legal custody of the child shall arrange the visit within a reasonable amount of time and document the visit. § 19-1-128(1). If the siblings request to visit on a regular basis, the county department that has legal custody of the child shall arrange the visits and ensure that the visits occur with sufficient frequency and duration to promote continuity in the siblings' relationship. § 19-1-128(2). If a criminal action is pending in which any of the sib-

lings is a witness or victim, the county department shall consult with the district attorney to determine whether the requested visit may have a detrimental effect on the prosecution of the pending criminal action before arranging any visit between the siblings. § 19-1-128(3).

Upon a mutual request for sibling visits, the county department shall perform and document the following in the visiting plan and contact notes:

- ❑ Visits are scheduled within a reasonable amount of time and with sufficient frequency to promote continuity of the relationships.
- ❑ Whether the county department has determined that it is not in the best interests of one or more of the children.
- ❑ There has been consultation with the district attorney, prior to arranging a visit, to determine whether a criminal action is pending in any jurisdiction in which a sibling is a victim or witness.
- ❑ A visit is not required or permitted because it would violate a known existing protection order pending in any state.
- ❑ The child in foster care was informed of the right to sibling visits.

7.304.64(C).

The local department may deny sibling visits if it determines that they would not be in the best interests of one or more siblings. § 19-1-128(3).

❖ **TIP:** The GAL should ensure that each child with siblings in a separate placement understands his or her rights with regard to visits with those siblings. The GAL should engage in the necessary advocacy and litigation to ensure that frequent and meaningful visits with siblings, consistent with the best interests of the child, take place.

COURT ORDERS AFFECTING SIBLING CONTACT AND PLACEMENT

1. Dispositional Hearing

At the dispositional hearing, if the child is part of a sibling group and the child was not placed with his or her siblings, the

caseworker shall submit to the court a statement about whether separate placement continues to be in the best interests of the child or the children in the sibling group. § 19-3-507(1)(b); 7.301.24(B). The family services plan must include a description of the services provided to reunite the family, including the plan for visitation, or to accomplish another permanency goal. 7.301.24(J). The visiting plan shall specify the frequency, type of contact, and the person(s) who will make the visit. *Id.* At a minimum, the visiting plan shall provide the methods to meet the child's need for contact with parents, siblings, and other family members. 7.301.24(J)(5). The court must review the family services plan document regarding placement of siblings. §§ 19-3-213(1)(c)(III), 19-3-507(4).

In any case in which the disposition is placement out of the home, the court shall, at the time of placement, set a review within 90 days to determine, among other things, whether it is in the best interests of the children in a sibling group to be placed together. § 19-3-507(4).

2. Permanency and Review Hearings

In making placement determinations, the court may consider all pertinent information, giving strong consideration to, among other things, whether a person who could provide a permanent placement for the child is willing, after adopting the child, to maintain appropriate contact with the child's relatives, particularly sibling relatives, when such contact is safe, reasonable, and appropriate. § 19-3-702(9)(e). Consideration of the placement of children together as a sibling group shall not delay the efforts for expedited permanency planning or permanency planning in order to achieve permanency for each child in the sibling group. § 19-3-702(2.7).

TIP: Sibling placement may affect permanency outcomes. A recent study found that placing siblings in the same foster home was associated with a significantly higher rate of family reunification. *See* Daniel Webster, Aaron Shlonsky, Terry Shaw, and M. Alan Brookhart, *The Ties that Bind II: Reunification for Siblings in Out-of-Home Care Using a Statistical Technique for Examining Non-Independent Observations*, 27 Children and Youth Services Review 765, 773-77 (2005).

3. Relative Guardianship Assistance Program (RGAP)

By rule, local departments shall document, in conjunction with any relative guardianship assistance agreement: (1) the efforts to place siblings together in the relative kinship family foster care home and the ongoing efforts to facilitate placement together, and (2) the efforts to maintain frequent visits and ongoing connections for siblings who live apart. 7.301.21. Although Title IV-E eligibility is not a requirement for RGAP, *see* 7.311.5, IV-E funds may cover RGAP costs for non-IV-E eligible siblings of IV-E eligible siblings when there is agreement by the siblings, prospective relative guardian, and the county department that the arrangement is in the best interests of the siblings. 7.311.22(A). Inclusion of the siblings may occur on or at a later date than for the youth or child who is Title IV-E eligible. 7.311.22(A).

4. Termination of Parental Rights

The termination of a parent-child legal relationship by a court pursuant to the Children's Code shall not be deemed to terminate a sibling relationship between sibling children who are parties to the termination of the parent-child legal relationship. § 19-5-101(3).

5. Relinquishment

The court shall consider, but shall not be bound by, a request that custody of the child, with the option of applying for adoption, be placed with a brother or sister of the child. § 19-5-104(2)(a). When ordering legal custody of the child, the court shall give preference to a brother or sister when such relative has made a timely request and the court determines that such placement is in the best interests of the child. *Id.*

> **TIP:** Counsel should remember that placement requests must be submitted to the court prior to commencement of the hearing on the petition for relinquishment. *Id.* Also, the birth parents and the child placement agency are not required to notify the siblings of a pending relinquishment.

If a parent is seeking to relinquish his or her parent-child legal relationship with more than one child of a sibling group at one time and if the county department or child placement

agency locates an appropriate, capable, willing, and available joint placement for all children in the sibling group, the court shall presume that placement of the entire sibling group in the joint placement is in the best interests of the children. § 19-5-104(2)(b). Such presumption may be rebutted by a preponderance of the evidence that placement of the entire sibling group in the joint placement is not in the best interests of a child or the children. *Id.*

6. Adoption

As in the other stages discussed above, the county department must make thorough efforts to locate a joint placement for all children in the sibling group who are available for adoption and whose placement in such a home is presumptively in the children's best interests. §§ 19-5-200.2(2)(c), 19-5-207.3(2), (3). The Children's Code requires efforts to place siblings together, unless there is a danger of specific harm to a child or joint placement is not in the child's or children's best interests. § 19-5-200.2(2)(c). If the county department locates an appropriate, capable, willing, and available joint placement for all children in the sibling group, there is a presumption that placement of the entire sibling group in the joint placement is in the best interests of the children, which can be rebutted by a preponderance of the evidence that placement of the entire sibling group in the joint placement is not in the best interests of a child or of the children. *Id.*; 19-5-207.3(2), (3). Consideration of the placement of children together as a sibling group shall not delay the efforts for expedited permanency planning or planning to achieve permanency for each child in the sibling group. § 19-5-207.5(4).

> **TIP:** The legislative declaration concerning joint sibling placement for adoption contains strong language regarding the ongoing importance of sibling connections after termination of the parent-child legal relationship, which may be helpful in counsel's advocacy for such placement. Specifically, Article 5 specifically states that "[i]t is beneficial for a child placed for adoption to be able to continue relationships with his or her brothers and sisters, regardless of age, so that the siblings may share their strengths and association in their everyday and often common experiences" and that "[w]hen parents and other adult relatives are no longer available to a child, the

child's siblings constitute his or her biological family." §§ 19-5-200.2(2)(a), (b).

When evaluating the needs of children, including their readiness for adoption, the county department must make thorough efforts to place siblings together in adoption and document such efforts in the family services plan. 7.306.11(B). When a child is placed for adoption by the county department and is part of a sibling group, the county department shall include in the adoption report prepared for the court the names and current physical custody and location of any siblings who are also available for adoption. § 19-5-207.3(1).

If an entire sibling group is not placed together in an adoptive placement, the child placement agency shall place as many siblings of the group together as possible, considering their relationships and the best interests of each child. § 19-5-207.3(3).

When the adoption does not involve a joint placement of siblings in a sibling group, the court may encourage reasonable visitation of siblings and must review the record and inquire whether the adoptive parents have received counseling regarding children in sibling groups maintaining or developing ties with each other. § 19-5-210(7).

Additional Resources

- Casey Family Programs National Center for Resource Family Support, *Siblings in Out-of-Home Care: An Overview* (April 2003), *available at* **http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/sibling_overview.pdf**.
- National Resource Center for Family-Centered Practice and Permanency Planning, *Policies on Placing Siblings in Out-of-Home Care* (December 2005), *available at* **http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/Sibling_Placement_Policies.pdf.**
- National Resource Center for Family-Centered Practice and Permanency Planning, *Siblings Resources web page*: **http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/siblings.html.**
- US Department of Health and Human Services Administration for Children and Families, *Bulletin on Sibling Issues in Foster Care and Adoption* (December 2006).

Special Respondents Fact Sheet

Children in D&N cases often have significant relationships with individuals who are not their parents, guardians, or custodians. The Children's Code allows the court to obtain jurisdiction over some of these individuals for the purpose of entering protective orders or including them in a treatment plan. Individuals over whom the court has obtained such jurisdiction are known as "special respondents."

IDENTIFYING SPECIAL RESPONDENTS

The Children's Code defines a special respondent as "any person who is not a parent, guardian, or legal custodian and who is involuntarily joined as a party . . . for the limited purposes of protective orders or inclusion in a treatment plan." § 19-1-103(100).

A person who resides with, has assumed a parenting role toward, has participated in the neglect or abuse of a child, or maintains a significant relationship with the child may be named as a special respondent. § 19-3-502(6).

- **TIP:** The definition of special respondent is broad, and the GAL should be proactive in identifying individuals whose inclusion in treatment and/or subjection to protective orders would benefit the child. Similarly, RPC may proactively seek identification of special respondent status for those individuals whose actions may have an impact on a parent's ability to successfully

participate in treatment and services. The decision whether to name a stepparent or spousal equivalent as a respondent or to join that person as a special respondent is discretionary. § 19-3-502(5); *People ex rel. E.S.*, 49 P.3d 1221, 1223 (Colo. App. 2002).

OBTAINING JURISDICTION OVER SPECIAL RESPONDENTS

The court obtains personal jurisdiction over a special respondent by giving notice through service of a summons and a copy of the petition or the motion that describes the reason for joinder. § 19-3-502(6). On the court's own motion or the motion of any party, the court may compel joinder of a special respondent. § 19-3-503(4).

RIGHTS AND RESPONSIBILITIES OF SPECIAL RESPONDENTS

Involuntary joinder as a special respondent creates a significant obligation to comply with court orders. If the court has obtained proper jurisdiction over the special respondent, lack of compliance with the court's order may result in the special respondent being held in contempt of court. *See* C.R.C.P. 107.

The rights of special respondents are limited. The special respondent is entitled to a hearing to contest joinder and the appropriateness of any other orders that impact the special respondent. § 19-3-502(6). The special respondent may be represented by counsel at this hearing and, if indigent, may obtain court-appointed counsel. *Id.* A special respondent may obtain private counsel at other stages of the proceeding but must do so at his or her own expense. *Id.*

A special respondent may not present evidence or cross-examine witnesses at an adjudicatory trial. *People ex rel. E.S.*, 49 P.3d 1221, 1223 (Colo. App. 2002). Furthermore, the court may enter orders as to a special respondent in the absence of an adjudication regarding him or her. *Cf. People ex rel. U.S.*, 121 P.3d 326, 328 (Colo. App. 2005).

Termination of Jurisdiction: Common Issues Fact Sheet

The court may terminate jurisdiction at several stages of the proceedings and under a number of scenarios.

REUNIFICATION

Government intrusion into the parent-child relationship is intended to occur only when the child's welfare and safety or the protection of the public require continued intervention. *See* § 19-1-102(1). The GAL must facilitate reunification of the child with the child's family, if reunification is in the child's best interests. § 19-3-203(3).

- **TIP:** The parents' correction or improvement of the conduct or condition requiring state intervention and their ability to provide reasonable parental care are the critical issues in determining whether the reunification and termination of the court's jurisdiction are appropriate. § 19-1-102(1)(c); *People ex rel. E.D.*, 221 P.3d 65, 68 (Colo. App. 2009). *See also People in the Interest of D.L.C.*, 70 P.3d 584, 588 (Colo. App. 2003); *People in the Interest of D.M.W.*, 752 P.2d 587, 588 (Colo. App. 1987); *Interest of A.W.R.*, 17 P.3d 192, 198 (Colo. App. 2000). "Reasonable parental care" means the parent is capable of providing nurturing and protection adequate to meet the child's physical, emotional, and mental health needs. § 19-3-604(2); *A.W.R.*, 17 P.3d at 198. Absolute compliance with the treatment plan, however, is not required; the issue is whether the

parent is able to give the child reasonable parental care. *Id.*; *People in the Interest of C.L.I.*, 710 P.2d 1183, 1185 (Colo. App. 1985).

- **TIP:** The Colorado Assessment Continuum, comprising safety, risk, and needs assessments, is utilized throughout the D&N case. *See* 7.301 *et seq.* Counsel should obtain discovery of the assessment materials from the county department to fully assess the need for continued court involvement.

DISMISSAL

The case must be dismissed if, after the adjudicatory hearing, the child is not adjudicated dependent or neglected. § 19-3-505(6); *People ex rel A.H.*, 10CA0325 (Colo. App. May 26, 2011). The case must also be dismissed if there are no child protective issues. *See E.D.*, 221 P.3d at 68.

- **TIP:** A motion by the department to dismiss cannot be summarily granted over the GAL's objection. The court must hold a hearing to determine whether the D&N petition is supported by a preponderance of the evidence. *People in the Interest of R.E.*, 729 P.2d 1032, 1034 (Colo. App. 1986); *see also People ex rel. E.D.*, 221 P.3d at 67–68. Whenever the safety concerns justifying initial intervention have not been successfully resolved, the GAL should object to the dismissal of the petition and demand a hearing. Examples of such circumstances include a family's absconding from the jurisdiction and the commitment of a child to the Division of Youth Corrections through a delinquency case, particularly when it is possible that the child will be paroled before the age of emancipation. In such circumstances, placement reviews conducted by the Administrative Review Division of the State Department of Human Services (instead of the court) may be appropriate. §§ 19-3-702(6), (8).

A deferred/continued adjudication requires the petition to be dismissed if not sustained after one year. *See* § 19-3-505(5)(b); *see also People in the Interest of K.M.J.*, 698 P.2d 1380, 1381–82 (Colo. App. 1984).

EMANCIPATION

The Children's Code provides for continuing jurisdiction of the juvenile court over a child who has been adjudicated dependent or neglected until that child reaches the age of 21, unless jurisdiction is terminated earlier by court order. § 19-3-205(1). The court is required to specifically consider whether the child is engaged in educational, vocational, or employment activities in determining whether there is a need for continuing jurisdiction past the age of 18. § 19-3-205(2)(a).

- **TIP:** GALs should object to the termination of the court's jurisdiction for any youth under age 21 who is not sufficiently prepared for a successful transition to adulthood. Prior to agreeing to termination of any case involving an emancipating youth, the GAL should ensure that all vital documents have been provided to the youth, the requisite credit check has been performed, and that all emancipation-planning requirements are fulfilled, including the development of a meaningful emancipation transition plan. *See* **Transition to Adulthood and Independent Living fact sheet**. GALs should also beware of the implications of dismissing a case before the age of 18 on the child's eligibility to receive Medicaid, educational training vouchers, and other independent living services. *See id.*

ACHIEVMENT OF PERMANENCY PLAN OF ADOPTION, GUARDIANSHIP, OR ALLOCATION OF PARENTAL RESPONSIBILITIES (APR)

The child's adoption, appointment of a guardian, or granting of APR achieves the court's permanency plan and supports termination of the court's jurisdiction under § 19-3-205(1). After certification of the court's adoption, guardianship, or APR order, a motion to dismiss informing the D&N court of proper certification should be filed.

- **TIP:** The GAL must confirm in APR and guardianship proceedings that the orders have been appropriately certified in the required court before agreeing to termination of the D&N court's jurisdiction. Otherwise, the enforceability of those orders will terminate upon the dismissal of the D&N proceeding.

- **TIP:** The GAL, consistent with the best interests of the child, should ensure that all supports for the child's permanency, including but not limited to adoption subsidies and guardianship subsidies, are fully explored. *See* **Adoption fact sheet**; **Allocation of Parental Responsibilities / Guardianship fact sheet**.

Transition to Adulthood and Independent Living Fact Sheet

Former foster youth are particularly vulnerable to homelessness, joblessness, low educational attainment, poverty, and involvement in the criminal justice system. *See, e.g.,* Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth* (Chapin Hall 2011), *available at* **http://www.chapinhall.org/research/report/midwest-evaluation-adult-functioning-former-foster-youth**. These risks may not only be related to the issues leading to involvement with the child welfare system but may also stem from experiences in the system itself and the lack of a natural support system resulting from involuntary estrangement from extended family or other potential supports during the youth's time in care.

To mitigate against these risks, the focus of D&N proceedings, particularly those involving older children and youth, should be not only on the immediate needs of the child/youth but also on planning for the young person's adult life and ensuring the provision of services and supports to promote future success.

- **TIP:** Effective representation requires GALs to be familiar with the independent living programs and services available to help foster youth become self-sufficient adults. Before the court's jurisdiction is terminated, the GAL should ensure that the department has provided all assistance required and that the youth is as well-prepared as possible for life outside the dependency system.

OVERVIEW OF RELEVANT FEDERAL LAW

1. John H. Chafee Foster Care Independence Act

In recognition of the obstacles faced by youth aging out of the foster care system without a permanent family, Congress in 1986 amended Title IV-E of the Social Security Act to provide limited funding assistance to youth transitioning out of foster care. *See* Pub. L. 99-272, § 12306, 100 Stat. 82 (adding Independent Living Initiatives provisions, then codified as 42 U.S.C. § 677, to Title IV-E). In 1999, the John H. Chafee Foster Care Independence Act (Chafee Act) was adopted to identify youth who are likely to emancipate from foster care and established services to help them transition to self-sufficiency. *See* Pub. L. 106-169, 113 Stat. 1882, *codified at* 42 U.S.C. § 677. The Chafee Act authorizes services to former foster youth ages 18 to 21 and imposes a mandate that each state use a portion of its federal funding to support current and former foster youth up to the age of 21. 42 U.S.C. § 677(b)(3)(A). States are also provided with the option to extend Medicaid coverage to former foster youth up to the age of 21. 42 U.S.C. § 1396a (a)(10)(A)(ii)(XVII). In 2002, the Chafee Act was amended to include educational and training vouchers up to $5,000 per year for former foster youth to help pay for college or vocational training. Pub. L. 107-133 (amending 42 U.S.C. § 677 (i)).

2. Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act), Pub. L. 110-351, 122 Stat. 3949, contains several provisions promoting the permanency and improved well-being of older youth. First, federal law now allows states to expand the definition of "child" to include youth in foster care up to age 21. 42 U.S.C. § 675(8)(B). A state can then receive federal matching funds if it extends foster care to older youth. *See* 42 U.S.C. § 672 (providing foster care maintenance payments for "children" who meet specified eligibility criteria). Additionally, states may now provide adoption or guardianship assistance payments until the age of 21 to children who meet specified criteria and for whom the agreement

became effective after the child had reached age 16. 42 U.S.C. §§ 673(a)(4)(A). The Fostering Connections Act also requires that personalized transition plans for youth aging out of foster care are developed within 90 days prior to the youth's exit from foster care. 42 U.S.C. § 675(H). Independent Living Program services are now available to children adopted or placed in kinship guardianship at age 16 or older, and eligibility for education and training vouchers has been extended to children who exit foster care to kinship guardianship or adoption at age 16 or older. 42 U.S.C. §§ 677(a)(7), (i)(2).

EXTENSION OF COURT'S JURISDICTION UNTIL AGE 21

The Children's Code provides for continuing jurisdiction of the juvenile court over a child who has been adjudicated dependent or neglected until that child reaches the age of 21, unless jurisdiction is terminated earlier by court order. § 19-3-205(1). The court is required to specifically consider whether the child is engaged in educational, vocational, or employment activities in determining whether there is a need for continuing jurisdiction past the age of 18. § 19-3-205(2)(a).

- **TIP:** GALs should, in consultation with the youth, object to the termination of the court's jurisdiction for any youth under age 21 who is not sufficiently prepared for a successful transition to adulthood.

COLORADO PROCEDURES FOR INDEPENDENT LIVING SERVICES AND YOUTH EMANCIPATING FROM CARE

1. Documentation of Assessment and Provision of Independent Living Services in the Family Services Plan

Volume 7 states that all children in out-of-home care should receive services to build life skills competency and specifically requires such efforts to be provided to youth ages 16 and older. 7.305.1. The department is mandated to assess all youth in foster care who have reached the age of 16 for independent living services and to complete the independent living section of the family services plan, regardless of the specified permanency

goal. 7.305.2. The department's assessment must include documentation of the youth's capacity for self-sufficiency and self-support by reviewing daily living skills, along with an evaluation of individual, family, community, and financial support resources available to promote emancipation or semi-independent living. *Id.*

For youth ages 16 and older, the family services plan must include a description of services and a plan for accomplishing tasks to assist youth in preparation for self-sufficiency and independent living as early in placement as possible but no later than 60 calendar days after the youth's sixteenth birthday. 7.301.21(C), 7.301.24(L). For youth under age 16, the family services plan must include a description of services and a plan for accomplishing tasks to prepare youth to be age-appropriately self-sufficient when independent living services are provided. 7.301.24(K).

The independent living plan must be based on the assessment and developed jointly by the youth, caseworker, care providers, and other significant persons or agencies. 7.305.2(C).

- **TIP:** The family services plan must document services to address a child's needs in terms of specific, measurable, agreed upon, realistic, and time-limited objectives and action steps to be accomplished by the parents, child, service providers, and county staff. 7.301.23(A). The GAL should ensure that each independent living service satisfies these criteria. The GAL should also ensure that the child is involved in the development of his or her independent living plan and that the plan is tailored appropriately to the child's strengths and needs. As with any service, a "cookie cutter" approach to developing an independent living plan is much less likely to promote success than one that reflects the child's unique needs, strengths, interests, support structures, and long-term goals.

- **TIP:** Counsel should be mindful that independent living services do not replace the child's need for a permanent family.

2. Required Court Findings

At permanency planning hearings, the court must make a determination that the permanency plan of a child 16 years of age or older includes independent living services. § 19-3-702(3.5)(d). Independent living, however, is not a permanency goal. *See* **Permanency Hearing chapter**.

3. Credit Check

Youth in foster care ages 16 to 18 are entitled to a free credit report. § 19-7-102(1). The GAL must be informed if there is evidence of identify theft and advise the youth of possible consequences and options to address the identity theft. *Id.* CDHS is required to develop by July 2012 a referral list of governmental and nonprofit entities that are authorized to assist youth in foster care who have been victims of identity theft in clearing their credit reports. § 19-7-102(2).

4. Emancipation Transition Plans

An emancipation transition plan is a personalized, youth-driven written document that supports emancipation and is intended to prevent the youth from becoming homeless. 7.000.5. This plan must be developed a minimum of 90 business days prior to the projected emancipation date of the youth. 7.305.2(E). The plan must contain an assurance that it meets the self-sufficiency and cost-of-living standard in the county and the state in which the youth plans to live, and at a minimum it should include specific options for housing, health insurance, education, mentors, after-care support, and employment services. *Id.* The plan must also include required vital health documents. *See* **Vital Health Documents section**, *infra*. The youth must be provided with a copy of the plan, free of charge. 7.305.2(E).

> **TIP:** The GAL should inform the department of his or her intention to be involved in the development of the emancipation transition plan and should advocate to ensure that this plan is personalized and tailored to the unique goals of the youth. Because 90 days may not provide sufficient time for the development of a meaningful plan, the GAL should advocate, as appropriate, for more advance meetings to begin working on the plan.

5. Vital Health Documents and Other Required Records

Youth must be provided their birth certificates or green cards, tribal affiliation information if Native American, social security cards, and state identification cards or driver's licenses. § 26-5-101(3)(o); 7.305.5. The youth must also be provided with

a Health Passport and other pertinent health records and educational records. 7.305.5(C).

6. Medicaid

Young adults who were in foster care until the age of 18 are eligible to receive ongoing Medicaid until they reach age 21. *See* § 25.5-5-201(1)(n).

7. Independent Living Services for Emancipated Youth

Emancipated young adults ages 18 to 21 who were in out-of-home care on their eighteenth birthday are eligible to receive independent living services. 7.203.51. Services may include independent living assessment, case planning, transitional services, room and board, and other services as identified in the county independent living plan. *Id.* Participation in independent living programs is voluntary for emancipated young adults. 7.203.5.

The county department must document in the case file independent living services provided and complete the independent living plan. Contact between the participant and caseworker must be at a minimum quarterly to determine the appropriateness of services and continued need. 7.203.52.

❖ **TIP:** Accessing independent living services after the eighteenth birthday requires that the youth was in out-of-home placement on his or her eighteenth birthday. The GAL should be cognizant that termination of the court's jurisdiction prior to the youth's eighteenth birthday (if the youth is not already enrolled) jeopardizes the availability of this valuable resource later.

INDEPENDENT LIVING/EMANCIPATION SERVICES AND SUPPORTS

1. Independent Living Arrangement/Stipend

An independent living arrangement (ILA) is a form of placement out of the home arranged and supervised by the county department of social services wherein the child is established in a living situation designed to promote and lead to the child's

emancipation. *See* § 19-1-103(65). The county may make an ILA for youth ages 16 to 21 when the county has legal authority for placement and the child was previously in out-of-home care or in a Core Services Program (administrative permission is necessary if the Core Service Program lasted less than 30 days). 7.203.51.

The independent living stipend is determined according to the planned goals addressed in the case plan and contracted between the youth and the department. 7.305.2(D)(3)(b).

- **TIP:** The department must develop a written policy addressing the ILA stipend for the youth that is determined based on goals in the case plan. 7.305.2(D)(3). The decision to withhold any funds must be based on the case plan goals and defined guidelines, with timely and adequate written appeal and notification procedures. 7.305.2(D)(3)(b).

- **TIP:** Youth in an independent living placement are still eligible for Core Services through the county if the goal in the family services plan is for the child to remain in the placement on a permanent basis. 7.303.11.

2. Independent Living Grants

The Chafee Foster Care Independence Program is a federally funded, statewide, and county-administered independent living program with the purpose of providing age-appropriate independent living resources to youth in care who are at risk of aging out of foster care. 7.305.4. These services supplement existing resources offered by county agencies or residential facilities and cannot duplicate services or be used to fund room and board for a youth under age 18. *Id.*

- **TIP:** Recent rule changes (effective April 1, 2012) eliminated the permanency goal of OPPLA as a requirement for youth to be eligible for the Chafee Foster Care Independence Program. The eligible population has been expanded to include youth ages 15 to 18 who have been in out-of-home care for a minimum of six months (consecutive months not required), young adults ages 18 to 21 who were in out-of-home care on their eighteenth birthday, youth ages 16 to 21 who meet requirements for relative guardianship assistance, youth who meet requirements for adoption assistance, and youth who met such requirements prior to their eighteenth birthday. 7.305.4.

TIP: County departments are required to submit a Chafee Foster Care Independence Program plan to the state and to submit amendments to the plan prior to its implementation. *See* 7.305.41. GALs should be familiar with their local county plan(s).

3. Education and Training Vouchers (ETV)

Education and training vouchers are available to a foster youth who meets the following eligibility requirements:

- Is a current or former foster youth; specifically, youth must currently be in foster care, have been adopted from foster care after attaining age 16, or have been emancipated from foster care upon or after turning 18.
- Is a citizen or qualified noncitizen.
- Is age 17 to 20 (eligibility for reapplication extends until age 23).
- Has obtained a GED or high school diploma and is entering or enrolled in vocational or college-level training. (Youth must be able to demonstrate continuing progress toward degree to maintain eligibility.)

Education and training vouchers are processed online at **www.statevoucher.org**. ETV funds are disbursed on a first-come, first-serve basis and can only be used for school-related expenses by students actually registered, enrolled, and attending school/classes/courses and who are in good standing.

Visits
Fact Sheet

Among the stated purposes of the Children's Code is the preservation and strengthening of family ties whenever possible. § 19-1-102(1)(b). A meaningful and individualized visiting plan is key to achievement of this goal. *See* Jillian Cohen and Michele Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 28 ABA Child Law Practice 37, 38 (May 2009).

VISITING SERVICES

The department is required to provide visiting services for parents and children if children are in out-of-home placement as determined necessary and appropriate by individual case plans. §§ 19-3-208(1), (2)(b)(IV); *People in the Interest of B.C.*, 122 P.3d 1067, 1070 (Colo. App. 2005). Whenever a child is placed out of the child's home, an appropriate visiting plan must be developed and documented in the children's case record. 7.304.64.

Visiting services must be designed to promote immediate health, safety, and well-being; reduce risk of maltreatment; avoid unnecessary placement; facilitate, if appropriate, speedy reunification of parents with the child; and promote the best interests of the child. *Id.* The visiting plan must specify the frequency, type of contact, and person(s) who will participate in visits. 7.304.64(B). At a minimum, the visiting plan should specify the

methods utilized to meet the following objectives: the growth and development of the child; the child's adjustment to placement; the ability of the provider to meet the child's needs; the appropriateness of the parent and child visits, including assessment of risk; and the child's contact with parents, siblings, and other family members. *Id.*

When children have been removed from their parents' care, the frequency of visits is a "stronger predictor of reunification than parental characteristics, child characteristics, and the reason for child placement." Erin Cass, *Visitation as a Reunification Service* (Juvenile Rights Project, Inc., Portland, OR, 2010), *available at* **http://www.jrplaw.org/documents/VisitReunif.pdf** (citing Sonya J. Leathers, *Parental Visiting, Conflicting Allegiances, and Emotional and Behavior Problems among Foster Children*, 52 Family Relations 53, 53 (2002)). Visits should occur as frequently and for as long as possible and in a setting that most closely resembles family life. Cohen and Cortese, *supra*, at 38. A visiting plan should set forth who will supervise visits, if necessary, as well as where, when, and how long visits will be between children and parents. The needs of the child and family—not the capacity and convenience of the department—should inform decisions about the frequency and duration of visits. *See* Leonard P. Edwards, *Judicial Oversight of Parent Visitation in Family Reunification Cases*, 54 Juvenile and Family Court Journal 3, 11 (2003), *available at* **http://www.f2f.ca.gov/res/pdf/LenEdwards.pdf**.

- **TIP:** RPC should seek court orders permitting the parent to attend medical appointments and school events with the child and requiring that parents be notified of such events, and the GAL should also advocate, consistent with the best interests of the child, for such orders.

- **TIP:** Visiting in a supervised setting away from the home is not a normal activity for families. RPC should prepare parents for what to expect at visits and how to succeed. The preparation discussion should include a conversation about the purpose of visits, how visits will occur, and how they may progress, as well as an explanation of what the visiting environment will look like, who will be supervising, what the supervisor will be watching for, and what parents should bring (e.g., supplies for

an activity, a snack). It is important to explain to parents that they will need to continue to set limits for their children and impose appropriate discipline, if necessary, during the visit. The GAL should also engage in a conversation with the child about what to expect at visits.

Visiting services are part of the department's obligation to make reasonable efforts to preserve and reunify families and to make it possible for the child to return safely to his or her home. *See generally* 42 U.S.C. § 671(a)(15). In Colorado, reasonable efforts are defined as the exercise of diligence and care for children who are in out-of-home placement or at risk of such placement and are defined to include necessary and appropriate visiting services for parents and children in out-of-home placement. §§ 19-1-103(89), 19-3-208(2)(b)(IV).

◆◆ **TIP:** As appropriate, counsel should incorporate arguments regarding visits into a reasonable efforts argument and seek specific, detailed findings regarding how a current or proposed visiting plan constitutes reasonable efforts to reunify the family.

INITIATION OF VISITS

The court has authority to order visits pursuant to § 19-1-114. It is not necessary for a treatment plan to be adopted for visiting to begin.Visits between parents and children should be arranged as soon as possible following removal from the home. Separating families can be a traumatic, emotional, and stressful event for all involved. Edwards, *supra*, at 2. Parents may worry about where their children will be placed, wonder how they will adjust, and fear that their children are scared and lonely. Children may worry that they did something wrong to promulgate the removal and wonder when they will see their parents again. Edwards, *supra*, at 2 (citing Janet R. Johnston and Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (New York: Free Press, 1997)). To alleviate some of those concerns, parents and children must have contact with one another within the first few days of removal from the home.

- **TIP:** The limited information available at the preliminary protective proceeding leads to difficulties in making an informed decision about the frequency and settings of visits. Counsel should obtain as much information as possible from the department's reports, conversations with the parties, and review and discussion with collateral sources to take an informed position on the appropriate frequency, duration, and setting of visits, keeping in mind that lack of frequent and meaningful visits may be just as—if not more—harmful to the child than the typical visiting plan proposed at this stage in the proceeding. Counsel should advocate for specific orders setting forth the frequency, duration, and location of the visits, as well as the commencement of visits within a specified period of time (e.g., 48 hours).

  Counsel can facilitate timely visits by identifying who the ongoing caseworker will be at the preliminary protective proceeding and ensuring parents are provided with the contact information for that caseworker. If an ongoing caseworker has not yet been assigned, counsel should ask the court to order that parents and counsel be notified within 48 hours of who the assigned caseworker will be. This will enable parents and counsel to be proactive in commencing visits.

- **TIP:** Counsel should advocate for visits to be supervised by a relative, friend, or community member whenever such visits do not pose a safety risk to the child. *See* **Types of Visits section**, *infra.* The department will likely need to investigate this supervision possibility by running a criminal history background check and a TRAILS review and speaking to the potential visit supervisor regarding willingness to supervise and the guidelines for visits. Counsel can expedite the process by advance communication with the potential supervisor and, as appropriate, review of the court's electronic data files on the person. If the department agrees to investigate kinship, community member, or relative supervision, counsel should seek a court order setting a deadline for the investigation's completion.

  There may also be visiting agencies in the community that provide low-cost supervision. Counsel should investigate such options and come to court prepared with program information and agency costs.

TYPES OF VISITS

Visiting is an essential component of any treatment plan. The department is required to develop a visiting plan specific to the needs of each family. § 19-3-208(2)(b)(IV). There are a several types of visits with varying levels of supervision.

- **TIP:** Counsel should not consider the case limited to one form of visits. Depending on the supervision needs of the family, a combination of the following types of visits may be used to maximize the duration, frequency, and benefits of visits.

- **TIP:** Written communication between parents and children, rather than visits, may be necessary in certain cases, including those involving incarcerated parents. However, written communication is not a visit. *In re D.G.* 140 P.3d 299, 305 (Colo. App. 2006). The term "visitation" contemplates face-to-face encounters between parents and children. *Id.*

  Although written and telephone communication cannot substitute for actual visits, these forms of contact can enhance the parent-child relationship when out-of-home placement is necessary. As appropriate, counsel should also advocate for parents to be permitted to have telephone and written contact with the child in addition to live visits.

1. Supervised Visits at DSS

Most families begin visits in a supervised setting, typically in a visiting room at the department. The department frequently asserts the desire to observe interaction between parents and children before moving visits to a less restrictive environment.

- **TIP:** Visiting at the department may be extremely stressful for parents and children. Counsel should demand articulation of the specific safety concerns requiring visits to occur in this setting. When visits must be supervised by the department, counsel should ask that the supervisor accompany the family outside the visiting room or in the community, such as in the building cafeteria, around the neighborhood, or at a park, recreation center, the family home, or a relative's home. The goal is to have the visit occur in the most natural, normal setting as is safely possible.

To advocate for appropriate and timely progression of visits, counsel should request a copy of all visiting assessments and notes prepared by the supervisor of the visits and should request that these be provided to counsel on a regular basis. It is important that counsel always have current information about the progress of visits. If the department is not willing to share this information, counsel should file a motion for a court order requiring the department to provide visiting updates and should seek specificity in the order regarding the frequency and content of what must be provided to counsel.

2. Supervised Visits by Relatives or Kin

Relative and kinship placement providers may be willing to supervise visits between parents and children. Visits supervised by relatives often provide a more flexible visiting schedule for all involved and allow visits to occur outside the department. This type of arrangement may also help the family members maintain some normalcy in their routine.

Relatives and kin may be able to supervise visits, even if the child is not placed with them. As with relative/kinship placement providers, visits supervised by relatives and kin will likely feel much more normal and natural to both the parent and child. Colorado's broad definition of kinship care, which includes care by individuals with a prior significant relationship with the child, recognizes the important role a child's pre-placement network of support can continue to play during the child's out-of-home placement. 7.304.21.

> **TIP:** When supervision by relatives and kin is possible, counsel should maximize the opportunities presented to include the parents in everyday parenting activities, such as school functions, homework routines, meals, and bath and bedtime routines. As with other types of visits, counsel should work with the supervisor to remain informed about how visits are going.

3. Supervised Visits by Visit Host

The use of visit hosts will give families opportunities to interact in a natural environment. *See generally* Cohen and Cortese, *supra*, at 38. A visit host may have a relationship with the family that may not rise to the formal definition of kin but is still more

comfortable and familiar than the family's relationship with the department worker. Visit hosts may also have greater flexibility in their schedules than a department worker, and thus be able to support more meaningful and frequent visits than those that would occur under department supervision.

A visit host is someone who has the ability to ensure the safety of the child and support the family reunification process. A visit host may work with the family in the home or out in the community. The visit host provides feedback to the caseworker, GAL, and the court.

4. Coached Visits

Coached visits are different from supervised visits. Rather than watching the family, the visit coach actively supports the family to demonstrate the parent's best parenting skills and make each visit a positive experience for the family. The visit coach's support facilitates safe reunification by helping the parent increase his or her parenting skills and ability to meet the child's needs. Visit coaches may help a parent prepare for a child's reaction, plan to give the child his or her full attention at each visit, and cope with feelings in order to visit consistently and keep anger or depression out of the visit. *See generally* Marty Beyer, PhD, "Visit Coaching: Building on Family Strengths to Meet Children's Needs," NYC Administration for Family Services (October 2004), *available at* **http://www.martybeyer.com/user_files/documents/visit_coaching_manual[1].pdf**.

5. Monitored Visits

Monitored visits are a "step down" from supervised visits, but not quite unsupervised. Monitored visits may be described as a "check in, check out" with the department or another "supervisor" at the beginning and end of the visit.

6. Unsupervised Visits

Unsupervised visits are just as they sound—unsupervised.

7. Visits with Incarcerated Parents

When visits with an incarcerated parent are possible, the department will have a difficult time proving that a treatment plan not allowing for such visits is reasonably calculated to render the parent fit within a reasonable time. *See D.G.*, 140 P.3d at 304–5. The health and safety of the child remains the paramount concern governing any visits between the child and parent. *Id.*

- **TIP:** Counsel should contact the detention facility or, if possible, visit the detention facility to gather information about visitation conditions, such as whether in-person visits are permitted, whether the parent remains shackled during the visit, security procedures, who is permitted to visit, and whether the visitation accommodations are child-friendly. *See* Kathleen Creamer, *Representing Incarcerated Non-Resident Fathers in Child Welfare Cases*, 28 ABA Child Law Practice 49, 55 (June 2009).

- **TIP:** If in-person visits are not feasible or appropriate, counsel should explore other avenues of contact between the child and the incarcerated parent. Contact through letters, telephone calls, or video-conferencing may be available at different facilities. *See generally* Parenting from Prison: A Resource Guide for Parents Incarcerated in Colorado 42 (Barbara Bosley et al., eds., 2002), *available at* **http://www.ccjrc.org** (containing tips and resources promoting positive relationships between incarcerated parents and their children).

MODIFICATION OF VISITS

Visits between the child and the family shall increase in frequency and duration as the goal of reuniting the family is approached. 7.304.64(D). The court cannot delegate the determination of entitlement to visitation to caseworkers, therapists, and others. *D.G.*, 140 P.3d at 304. Absent safety concerns, a parent is entitled to face-to-face visits. *Id.* Visiting is a right for every family that is separated, and the department cannot succeed at the termination if it has withheld visitation for non-safety reasons. *Id.*

- **TIP:** Counsel should be vigilant in ensuring that any modification to the visiting plan is consistent with the purpose of the Children's Code and the principles outlined in Volume 7, as well as in the best interests of the child. Visits should not be

used as a privilege or a consequence for the parent's compliance, or lack thereof, with the treatment plan. *See* Edwards, *supra,* at 9, (citing Linda Bayless et al., Child Welfare Institute, ACHIEVING PERMANENCE THROUGH TEAMWORK 132 (1991)).

Counsel should also be cautioned not to automatically interpret reactions to visits as an indicator of the need to restrict visits. Visiting can be a very difficult time for families. Parents may struggle with their emotions and what to tell their children about why they have been removed or when they will be reunited. Children may struggle with separating from their parents after visits and may exhibit anger or sadness after visits. Beyer, *supra*, at 5. This is not unusual and should not necessarily be attributed to an unsuccessful visit. An informed assessment of the reasons for seemingly negative reactions by the child should be conducted to determine whether anything needs to change about the visiting routine. Beyer, *supra*, at 21.

Additionally, counsel should be critical of others' interpretations of the family's reactions to each other and behavior during visits. What one professional regards as a negative behavior may be viewed in a neutral or positive light by another professional. Counsel should attend visits or request that visits be videotaped when necessary to independently assess visits.

VISITS WITH SIBLINGS

The Children's Code sets forth procedures for requesting and arranging visits with siblings to occur with sufficient frequency and duration to promote continuity in their relationship. *See* **Siblings fact sheet**.

- **TIP:** The GAL should play an active role in ensuring that sibling visits occur, consistent with the child's best interests, with sufficient frequency and in the most natural setting possible. As with visits between parents and children, the use of visit hosts, relative and kin supervisors, and other supports may increase the options for sibling visits.

VISITS WITH GRANDPARENTS

Grandparents may seek reasonable visiting orders when there has been a child custody or allocation of parental responsibilities case related to that child. §§ 19-1-117(1), (2). Such cases include cases involving allocation of parental responsibilities to a non-parent, as well as D&N proceedings. § 19-1-117(1)(b); *People in the Interest of J.W.W.*, 936 P.2d 599, 600 (Colo. App. 1997); *People in the Interest of N.S.*, 821 P.2d 931, 932 (Colo. App. 1991). Conditions on visits are within the sound discretion of the trial court, taking the best interests of the child into consideration. *In re Oswald*, 847 P.2d 251, 254 (Colo. App. 1993).

Grandparents' visiting rights automatically terminate upon completion of adoption, regardless of whether the adoption is by strangers or kin. *N.S.*, 821 P.2d at 932–33. In *People in the Interest of J.W.W.*, 936 P.2d 599, 601 (Colo. App. 1997), the Court of Appeals held that a grandparent's right to continue visiting a child after the termination of the parent-child legal relationship under the grandparent visitation statute ended after termination of parental rights, reasoning that the grandparent no longer met the statutory definition of "grandparent" in the Children's Code. *People in the Interest of J.W.W.*, 936 P.2d 599, 601 (Colo. App. 1997).

❖ **TIP:** The holding that a grandparent may no longer be entitled to visits with the child after termination of parental rights pursuant to the grandparent visitation statute is not dispositive on whether the child should still be afforded visits with grandparents and other family members, and the GAL should continue to advocate for visits with grandparents and other family members that serve the best interests of the child. *See* **Family Finding / Diligent Search fact sheet**.

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