JUVENILE CASE LAW UPDATE

Survey of Colorado Case Law
2018-2019
September 8, 2019
Judicial Conference

Justice Brian Boatright
Colorado Supreme Court
Brian.Boatright@judicial.state.co.us

Judge David Furman
Colorado Court of Appeals
david.furman@judicial.state.co.us

Judge Gail Meinster
District Court 1st JD
Ann.meinster@judicial.state.co.us

Special Thanks To:

Claire Collins
Law Clerk for Judge Furman
Colorado Court of Appeals

Christina Kinsella
Law Clerk for Judge Meinster
District Court 1st JD

Timothy Maffett
Judicial Intern for Justice Brian D. Boatright and Judge Meinster
University of Denver Sturm College of Law
Class of 2020

Eileen Webster
Judicial Intern for Judge Meinster
University of Denver Sturm College of Law
Class of 2019

Elena Engel
Judicial Intern for Judge Meinster
University of Denver Sturm College of Law
Class of 2020

I. Jurisdiction and Final Orders

a. People in Interest of D.C.C., 2018 COA 98

b. People in Interest of H.T., 2019 COA 72

c. Adoption of I.E.H., 2019 COA 40

II. Indian Child Welfare Act

a. People in Interest of I.B-R., 2018 COA 75

b. People in Interest of M.V., 2018 COA 163

c. People in Interest of Z.C., 2019 WL 2042014

d. People in Interest of L.R.B., 2019 COA 85

e. Brackeen v. Bernhardt, 2019 WL 3759491

III. Respondent Parents' Procedural and Substantive Rights

a. People in Interest of A.R., 2018 COA 176

b. People in Interest of A.N-B., 2019 COA 46

c. People in Interest of S.K., 2019 COA 36

d. People in Interest of M.H-K., 2018 COA 178

e. People ex. rel. T.M.S., 2019 COA 136

IV. Uniform Child Custody Jurisdiction and Enforcement Act

a. People ex. rel. A.B-A., 2019 COA 125

V. Grandparents' Rights

a. People in Interest of C.N., 2018 COA 165

VI. Juvenile Delinquency

a. People in Interest of A.C.E-D, 2018 COA 157

b. People v. Brooks, 2018 CO 77

c. People v. Barrios, 2019 CO 10

d. People in Interest of C.M.D., 2018 COA 172

e. People v. Davis, 2018 COA 113

f. People in Interest of A.V., 2018 COA 138M

g. People v. Godinez, 2018 COA 170M

h. People in Interest of G.S.S., 2019 COA 4M

VII. Mandatory Reporting Duties

a. Heotis v. Colorado State Board of Education, 2019 COA 3

Juvenile Case Law Update 2019

Jurisdiction and Final Orders

People in Interest of D.C.C., 2018 COA 98

Issue: When a dependency and neglect (D&N) case is filed, does a separate court retain jurisdiction to determine the child's parentage?

Holding: The paternity court lacked jurisdiction to make paternity findings when there was an ongoing D&N proceeding. In other words, all matters relating to a child's status must be addressed in the open D&N matter.

- Although Father never participated in genetic testing, the magistrate in the paternity action made a finding that he was not the child's legal parent. Because no one sought review of the non-parentage order, the D&N court found that the order was final. Relying on this order, the D&N court dismissed father from the D&N petition. Father appealed, contending that the court erred in relying on the non-parentage order.
- The COA concluded that the D&N court had superior jurisdiction, and the dismissal was in error. Under the Children's Code, the D&N court maintains exclusive, continuing jurisdiction over decisions related to the status of a child who has been adjudicated dependent or neglected.
- The COA also concluded that a parent is denied fundamentally fair procedures in actions under article 4 when there is an open D&N case. Parents in D&N cases receive several procedural and substantive protections that are not available under the UPA, such as the right to counsel. In this case, the paternity court effectively terminated father's parental rights without providing him the due process protections that he was being afforded in the open D&N case.
- There is a legislative preference for deciding the fate of parents who are involved in D&N proceedings under article 3.

People in Interest of H.T., 2019 COA 72

Issue: Is an initial dispositional order, by itself, a final, appealable order?

Holding: No, initial dispositional orders, by themselves, are not final and appealable.

- The county appealed the juvenile court's dispositional order directing the Department to pay for father's offense specific treatment.
    - Father stipulated to a deferred adjudication, and the Department submitted a modified treatment plan which recommended an offense specific evaluation. Father requested that the Department bear the cost for the recommended treatment. The court ordered the Department to either pay for treatment or modify or eliminate the requirements from the treatment plan

    - Father later agreed to the entry of a formal adjudication, and the court entered a dispositional order that adopted father's initial, not amended, treatment plan. The county then appealed.
- The court held that a party has a right to appeal both an adjudicatory order and an initial dispositional order, but an initial dispositional order, by itself, is not a final, appealable order.
    - The plain language of the Children's Code establishes that only an adjudicatory order is a final and appealable order.
    - The statute does not identify treatment plan orders or other dispositional orders as final, appealable orders.
    - Dispositional orders are also temporary and subject to periodic review by the juvenile court.
    - Allowing such appeals could also interject lengthy delays in D&N proceedings.

Adoption of I.E.H., 2019 COA 40

Issue: Can an appellate court review an order that terminates parental rights in anticipation of a stepparent adoption when the juvenile court has not finalized the adoption?

Holding: Yes, the termination judgment is a final, appealable order.

Citing section 19-1-109(2)(b), C.R.S. 2018, which states that an order terminating the legal relationship between a parent and a child is a final and appealable order, the court found that finalization of the adoption is no longer required to appeal.

Indian Child Welfare Act

People in Interest of I.B-R., 2018 COA 75

This is a published order of limited remand regarding compliance with the Indian Child Welfare Act of 1978 (ICWA).

Issue: Whether notice to the Bureau of Indian Affairs (BIA) under ICWA was inadequate.

Holding: When there is a report of Indian heritage from an unknown Tribe, notice must be sent to the BIA and the state the parent identified for the allegation of heritage.

- Father told the trial court that his father's lineage descended from a tribe in Arkansas. Although there is no federally recognized tribe with designated tribal agents in Arkansas, the Department did not notify the BIA of this unknown tribe.
    - ICWA does not require courts or the Department to "ferret out" tribal connections from such vague information as the name of a state with no designated tribal agents.
    - Instead, the burden shifts to the BIA, which has the resources and expertise necessary for this task.

    - Because the Department did not notify the BIA of father's possible tribal connection in Arkansas, it frustrated the BIA's ability to discharge its responsibility under ICWA to identify the potential tribe.
- Case remanded for compliance with ICWA.
    - The Department must procure the parents' appearance and inquire of such persons who may have knowledge of the children's possible Native American ancestry.
    - The court must hold a hearing and ask about native American heritage on the record. It must also direct the Department to send notice to the applicable tribes and send notice to the BIA regarding father's tribal connection to Arkansas.
- Reminder: The petitioning party must make continuing inquiries to determine whether the child is an Indian child. Trial courts also have a duty of notice and inquiry. Each party must be asked on the record at the beginning of each child custody proceeding, which includes proceedings to terminate parental rights. Termination is a separate child custody proceeding and requires a new inquiry.

People in Interest of M.V., 2018 COA 163

Issues: (1) whether a juvenile court lacks subject matter jurisdiction to enter adjudicatory and dispositional orders when it has not complied with ICWA, and (2) whether ICWA's provisions regarding foster care placement apply to adjudicatory and dispositional orders.

Holdings: (1) failure to comply with ICWA does not deprive a juvenile court of subject matter jurisdiction, and (2) ICWA's foster care placement provisions apply to a dispositional order but not to an order adjudicating a child dependent and neglected.

The dispositional order was reversed due to ICWA noncompliance. The adjudicatory order was reversed because the court admitted a video into evidence that was not testified to be accurate in the recording or the depiction of the scene.

- The court reasoned that there is a substantial difference between a lack of subject matter jurisdiction that deprives the court of its ability to act and a mistake in the exercise of establishing jurisdiction.
    - Following the majority of states, the COA concluded that the juvenile court's lack of compliance with ICWA's notice provisions did not divest it of subject matter jurisdiction to enter the adjudicatory and dispositional orders.
- An adjudicatory order does not constitute a foster care placement under ICWA.
    - The purpose of the adjudication is not to determine the children's placement.
    - An adjudicatory hearing is not a child custody proceeding under ICWA
- A dispositional order constitutes a child custody proceeding under ICWA
    - A dispositional hearing concerns the proper disposition serving the best interests of the child; if the proposed disposition is not termination of parental rights, the court must approve an appropriate treatment plan, which includes a provision concerning the child's placement. This may include a foster care placement.

    - In contrast to a temporary protective or shelter hearing, the dispositional hearing is the first time that the court addresses the child's placement once it has gained authority to intervene in the family.
- Mother stated the children had American Indian heritage and were eligible for membership in a Lakota or Sioux tribe. But the Department did not send notice of the dispositional hearing to the Sioux tribe. The court also did not make the necessary findings under 25 U.S.C. § 1912(d) and (e) before it placed the children out of the parent's care. Therefore, the record did not demonstrate compliance with ICWA and the COA reversed the dispositional order.

People in Interest of Z.C., 2019 WL 2042014

Issue: Does the Department comply with ICWA notice requirements when the return receipt from the notice is neither signed nor dated by the receiving party?

Holding: No. And if a Department fails to provide *any* return receipt from the notice, then the Department has also failed to comply with ICWA notice requirements.

- The Department complied with ICWA notice requirements as to four tribes when it provided signed and dated return receipts 22 days before the hearing. (tribes must be notified at least 10 days before the hearing described in the notice).
- The Department complied with ICWA notice requirements as to two tribes when it provided signed but not dated return receipts 22 days before the hearing. The Department's date stamp served as proof that the tribes had received the notice more than 10 days before the hearing described in the notice.
- The Department did not comply with ICWA notice requirements as to the White Mountain Apache Tribe because the return receipt was unsigned and undated. And, it did not comply with ICWA notice requirements as to the Eastern Band of Cherokee because there was no return receipt at all.
    - The Department should have followed up with the non-responding Tribes. Any method of confirmation of receipt would have satisfied the court of appeals – telephone, fax, e-mail, or "any other means to confirm receipt of the notices or otherwise work with the tribes to verify the child's membership status."
- Because the Department later supplemented the record on appeal with a letter from the Eastern Band of Cherokee stating that the child was not a member or eligible for membership, the court's error as to this tribe was harmless.
- The court remanded to the juvenile court to direct the Department to use due diligence to work with the White mountain Apache Tribe to verify the child's membership status.

People in Interest of L.R.B., 2019 COA 85

Issue 1: Is the denial of a motion to transfer jurisdiction from the state court to the tribal court a final, appealable order?

Holding: Yes. Applying the collateral order doctrine, the juvenile court's order denying the Navajo Nation's motion to transfer jurisdiction was a final, appealable order.

- The collateral order doctrine permits – in limited circumstances—appellate review of an interlocutory order despite its non-final nature as long as the decision: (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits, and (3) is effectively unreviewable on appeal from a final judgment.
- The COA concluded that the collateral order doctrine was satisfied.
    - (1) the order "conclusively determine[d]" the disputed issue of whether the Navajo Nation has jurisdiction over preadoptive and adoptive placement proceedings concerning the children.
    - (2) the order resolved an "important issue completely separate from the merits" because the transfer of jurisdiction issue is separate from the ultimate resolution of the former foster parents' adoption proceeding.
    - (3) the order is "effectively unreviewable on appeal," because delaying review would "imperil a substantial public interest." Protecting Indian children is vital to the continued existence and integrity of Indian tribes. And, if it is determined that the court erroneously denied the motion to transfer jurisdiction, the children's permanency would be seriously disrupted.

Issue 2: Did the former foster parents lack standing in the dependency and neglect case to oppose the Navajo Nation's motion to transfer jurisdiction?

Holding: Yes, for three reasons:

- The former foster parents no longer had intervenor status; they lost this status once the children were removed from their home following termination of parental rights.
- The former foster parents do not have a constitutionally protected liberty interest in the continuation of their relationships with the children
- Civil joinder rules could not confer standing; Colorado Rules of Civil Procedure (CRCP) only apply to D&N proceedings when the proceedings are not governed by the Colorado Rules of Juvenile Procedure or the procedures set forth in the Children's Code.
    - CRCP did not apply because the Children's Code, specifically 19-3-507(5)(a), addresses persons who may intervene in dependency and neglect proceedings.

***The COA reversed the court's order denying the Navajo Nation's motion to transfer jurisdiction under section 19-1-126(4)(b), C.R.S. 2018. Because the legislature recently amended the relevant provisions of this statutory section, the court's analysis in reversing the order is no longer authoritative.

***Brackeen v. Bernhardt,* 2019 WL 3759491 (5th Cir. 2019)**

Issue 1: Do certain plaintiffs have standing to challenge the constitutionality of ICWA and the Final Rule promulgated by the Bureau of Indian Affairs?

Holding 1: Yes, the states and adoptive parents had standing to bring all claims.

- The court held that the plaintiffs suffered an injury when their efforts to adopt Indian children were burdened by ICWA. The court also held that this injury was fairly traceable to ICWA, and that a decision in favor of the plaintiffs would redress the injury. The court also addressed the argument that this case was moot by pointing out that this claim was capable of repetition, yet evading review.

Issue 2: Does ICWA represent a racial or political categorization and does it comport with the Equal Protection Clause?

Holding 2: ICWA's definition of "Indian child" is not a racial, but a political classification. It is therefore subject to rational basis review. The different treatment of Indian and non-Indian children and adoptive parents passes rational basis review.

- In *Morton v. Mancari*, the Supreme Court rejected a challenge to a law affording to qualified Indian applicants a hiring preference over non-Indians within the BIA. The Court reasoned that the preference was not given on racial grounds, but, rather as members of a quasi-tribal sovereign entity—a political classification.
- Given Congress's explicit findings and stated objectives in enacting ICWA, the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protect[ing] the best interests of Indian children and [] promot[ing] the stability and security of Indian tribes."

Issue 3: Does ICWA violate the Tenth Amendment by violating the anticommandeering doctrine?

Holding 3: No, the challenged provisions of ICWA preempt conflicting state law and do not violate the anticommandeering doctrine.

- The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage. Both state agencies and private actors engage in state child custody proceedings and may fall under these provisions of ICWA. Additionally, the challenged provisions merely required states to take administrative action to comply with federal standards of child custody proceedings involving Indian children, which was permissible under the Tenth Amendment.
- Dissent: Certain sections of ICWA relating to foster care practically only apply to state officers or agents such that these provisions run afoul of the anticommandeering doctrine or should at least be remanded for additional factual findings.

Issue 4: Does ICWA represent an unconstitutional delegation of legislative authority to an agency such that it violates the non-delegation doctrine?

Holding 4: No, the challenged sections of ICWA do not represent an unconstitutional delegation of Congressional legislative power to tribes, but rather an incorporation of inherent tribal authority by Congress.

Issue 5: Is the Final Rule promulgated by the Bureau of Indian Affairs proper under the Administrative Procedure Act?

Holding 5: Yes, the Final Rule is valid.

- First, the Final Rules implements a constitutional statute. The court has already held the various provisions of ICWA constitutional above.
- Next, as to the challenge that the Final Rule exceeded the scope of the DOI in enforcing ICWA, the statute contained a provision that all rules and regulations necessary to carry out ICWA may be implemented. Under *Chevron*, this statutory provision was unambiguous with respect to the intent to grant authority to rulemake, but ambiguous with respect to the authority for this particular rule. Under step two of *Chevron*, the Final Rule was reasonable and the agency's changed position was supported by a reasoned explanation.
- Finally, regarding the claim that the Final Rule represented an impermissible construction of ICWA, the court held that there was no standard of proof specified in the statute such that the statute was ambiguous under *Chevron*'s step one. Moving to step two, the court held that the interpretation of clear and convincing in the Final Rule was reasonable.

Respondent Parents' Procedural and Substantive Rights

People in Interest of A.R., 2018 COA 176

Issue: What constitutes ineffective assistance of counsel in a termination of parental rights proceeding and what is the proper procedure for evaluating this claim?

Holding: The COA applies a modified *Strickland* test:

A parent asserting ineffective assistance of trial counsel must allege on appeal sufficient facts to demonstrate that (1) counsel's performance was outside the range of professionally competent assistance, and (2) counsel's deficit performance prejudiced the parent by rendering the proceeding fundamentally unfair or unreliable.

Previous decisions required the parent to show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the hearing would have been different.

- Mother did not appear at the termination hearing. And, following the termination hearing, the lower court stated that if it had known of the child's extended family, it likely would have denied the motion to terminate parental rights.
- Because divisions of the COA have recognized that a parent's statutory right to counsel includes the right to effective assistance of counsel, the COA concluded that respondent

parents' statutory right to counsel in termination proceedings includes the right to effective assistance of counsel.

- A parent may challenge trial counsel's effectiveness on direct appeal from a judgment terminating parental rights.
    - The COA reasoned that this is the most expedient way to address an ineffective assistance of counsel claim and mitigates delay in achieving permanency for children.
- Because the statutory right to counsel in a termination of parental rights proceeding ensures that parents receive fundamentally fair procedures, the prejudice inquiry for ineffective assistance of counsel claims should focus on whether counsel's deficient performance rendered the proceedings fundamentally unfair or the result of the proceeding unreliable.
    - A parent's ineffective assistance of trial counsel claim must first allege sufficient facts in the opening appellate brief that, if proved, would allow a juvenile court on remand to conclude that trial counsel's performance was outside the range of professionally competent assistance as defined by any chief justice directive or another standard of professional conduct.
    - A judgment terminating parental rights may be unreliable when, due to counsel's deficient performance, the court did not receive essential information favorable to the parent that directly related to the termination criteria under section 19-3-604.
    - And, a termination proceeding is fundamentally unfair if, due to counsel's deficient performance, a parent is deprived of a significant procedural safeguard to which the law entitles him or her.
- If counsel entirely fails to subject the adverse party's case to "meaningful adversarial testing," then the proceeding is "presumptively unreliable." When an appellate court concludes that counsel's deficient performance rendered the termination proceeding presumptively unfair or unreliable, it need not remand a parent's ineffective assistance claim to the juvenile court for further proceedings.
- A parent may challenge trial counsel's performance at the adjudicatory hearing on direct appeal of the termination judgment if the parent alleges sufficient facts that would allow a juvenile court on remand to conclude that
    - counsel rendered deficient performance at the adjudicatory hearing; and
    - due to counsel's deficient performance, there was not substantial compliance with the requirements for establishing a child's status as dependent or neglected.
    - NOTE: Because the fact of adjudication must be established by clear and convincing evidence at a termination of parental rights hearing, a claim attacking this fact based on counsel's performance at the adjudicatory stage is cognizable.
        - The division declines to express an opinion on whether a parent may raise an ineffective assistance of counsel claim in the direct appeal of an order of adjudication after entry of disposition.
- Offers of proof should not serve as a substitute for evidentiary termination of parental rights proceedings.

People in Interest of A.N-B., 2019 COA 46

Issue: Does the attorney-client privilege apply to a report regarding a parent-child interactional (PCI) assessment drafted by the parent's expert?

Holding: No, it does not.

- Mother requested the appointment of an expert in child psychology to evaluate her parenting time. The expert was appointed at state expense. The expert conducted a parent-child interactional evaluation, which included a clinical interview and observation of the mother with all four of her children.
- Because the report was not favorable, Mother elected not to call the expert as a witness. But the GAL requested that the expert's report be disclosed to her. Mother objected, asserting that the report was protected by attorney-client privilege.
- The juvenile court ordered the report disclosed and permitted the GAL to call the expert to testify to the results of his evaluation at the termination hearing.
- The COA reasoned that this case is analogous to *D.A.S. v. People*, 863 P.2d 291 (Colo. 1993). In that case, the supreme court held that attorney-client privilege did not attach to an expert's report regarding a PCI assessment.
    - Because much of the expert's testimony concerned his observations of the children, it did not fall within the scope of the privilege. Mother's attorney also requested the evaluation and asked that the children participate.
    - The court highlighted that the therapist had advised Mother that the report would not be confidential and was being performed to inform the juvenile court with respect to the D&N proceedings. Thus, mother had no expectation of privacy in the results of the evaluation or the clinical interview. A privilege only attaches to confidential communications.
- Notes that a parent is now able to retain an expert without a court order, and one unintended result of this change is that fewer expert reports will be court-ordered and fewer will be automatically subject to disclosure under section 19-3-607, C.R.S. 2018.

People in Interest of S.K., 2019 COA 36

Issue: The Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1974 require public entities to make reasonable accommodations for qualified individuals with disabilities. How does this requirement relate to termination of parental rights based on a disabled parent's lack of success with a treatment plan, unfitness, and unlikelihood of change?

Holding: When a parent involved in a D&N proceeding has a disability under the ADA, the Department and the juvenile court must account for and, if possible, make reasonable accommodations for the parent's disability when devising a treatment plan and providing rehabilitative services to the parent. And, the juvenile court must consider reasonable

accommodations for the parent's disabilities in deciding whether such a parent's treatment plan was appropriate and whether reasonable efforts were made to rehabilitate the parent.

- The parents completed neuropsychological evaluations and capacity to parent evaluations as part of the treatment plan. Based on these evaluations, the Department asked the court to appoint GALs for the parents based on their mental illnesses or developmental disabilities.
- Before the termination hearing, the parents filed a motion asking the court to find that DHS had not made reasonable efforts to reunify, to dismiss the motion for termination, and to amend the treatment plans to provide reasonable accommodations under the ADA. The court rejected their arguments and terminated parental rights.
- The ADA provides that a qualified person with a disability shall not "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." It imposes an affirmative duty on a public entity to make reasonable accommodations for qualified individuals. A disability includes a mental impairment that substantially limits one or more major life activities of the individual. And, a mental impairment includes any mental or psychological disorder such as "intellectual disability, organic brain syndrome, emotional or mental illness, and a specific learning disability."
- The COA reasoned that whether a parent qualifies as an individual with a disability is a case by case determination. The parent is responsible for disclosing to DHS and the court information regarding his or her mental impairment or other disability. The parent should also identify any modifications that he or she believes are necessary to accommodate the disability. Thus, before a public entity can be required under the ADA to provide reasonable accommodations, the entity must know that the individual is disabled, either because it is obvious or because someone has informed the entity of the disability.
- The ADA does not restrict a juvenile court's ability to terminate parental rights. The ADA is not a defense to termination of parental rights, but it applies to the provision of assessments, treatment, and other services that the Department makes available to parents in a D&N proceeding.
- The requirement to make reasonable accommodations for a parent's disability affects the scope of rehabilitative services offered to the parent. Absent reasonable modifications to the treatment plan and rehabilitative services offered to a disabled parent, a department has failed to perform its duty under the ADA to reasonably accommodate a disability and, in turn, its obligation to make reasonable efforts to rehabilitate the parent.
- What is a reasonable accommodation will be based on individual assessment.
- The paramount concern for the court remains the child's health and safety. The requirement for reasonable accommodations does not lower the standard as to safety risks for parents with disabilities. And, the requirement to make reasonable accommodations does not force the court to extend time that a parent is given to participate in rehabilitative services. It also does not require a public entity to make modifications that would fundamentally alter the nature of services, programs, or activities. It would not be

reasonable if it would require a prohibitive cost or extraordinary effort on behalf of the public entity.

- What constitutes a reasonable accommodation will vary from case to case based on the child's health and safety needs, the nature of the parent's disability, and the available resources

People in Interest of M.H-K., 2018 COA 178

Issue: Is it error to incorporate the entire D&N petition into the statement-of-the-case instruction in a jury trial?

Holding: Yes. The statement-of-the-case instruction should be a short, non-argumentative summary of the Department's claims. The juvenile court also erred by admitting evidence that the mother refused to submit herself and the child to voluntary drug testing before DHS filed the petition.

- The juvenile court read the entire case history portion of the petition in venire and did not explain to the jury that it was DHS's job to prove the allegations.
- The COA reasoned that the introductory instruction did not derive from a jointly prepared statement or consensus by the parties. It did not constitute brief, non-argumentative statements by counsel. And it did not otherwise impart the essential information about the case in a neutral manner.
    - Instead, the instruction amounted to a "judicially sanctioned opening statement on behalf of the Department."
- CJI Civ 41:4 should be read to the jury at the close of evidence. Regardless, the instruction here did not follow the format of CJI Civ 41:4 and was not a proper statement-of-the-case.
    - Many of the allegations in the petition were not supported by evidence at trial, and several allegations did not establish any legal basis for adjudication.
- COA held that it was not harmless error because it impaired the basic fairness of the trial in a way that likely influenced the outcome of the case.
    - The instruction was presented in language suggestive of factual report and suggested that innocuous and lawful conduct was suspicious. It also encouraged the jury to consider unadmitted evidence and included inadmissible allegations.
    - The court's analysis and disposition applied to both parties.
- COA also held that the trial court erred by admitting evidence that mother refused to submit to voluntary drug testing for herself and the child.
    - mother's refusal to comply with voluntary drug testing does not reasonably lead to the conclusion that the test results would have been positive.
    - Mother was entitled to a presumption that her refusal to consent was objectively reasonable. Before adjudication, parents enjoy the constitutional presumption that fit parents make decisions that are in their children's best interest.

- COA held that the juvenile court erred by admitting evidence that mother refused the caseworker's request to stop breastfeeding pending a drug test.
    - DHS cannot require a parent to submit to drug testing without a court order. Parents do not need to assist DHS in proving that their child is dependent and neglected.

***People ex. rel. T.M.S.*, 2019 COA 136 (Colo. App. 2019)**

Issue 1: Whether a GAL for an adult parent with an intellectual disability may advocate against the parent's goal of reunification.

Holding 1: Termination of a parent's parental rights over the parent's objection is not in the parent's best interests as a matter of law.

- The role of a parent's GAL is to assist the parent and protect the parent's best interests. A parent's GAL has an assistive role of facilitating communication between the parent and counsel and helping the parent participate in the proceeding.
- The differences between the disabilities and legal incapacities of children and mentally disabled adults require separate standards regarding the appointment duties and rights of a GAL.
- A juvenile court must appoint a GAL for the child in dependency or neglect proceedings. However, a juvenile court has discretion whether to appoint a GAL for a respondent parent who has an intellectual or developmental disability. Finally, a juvenile court must appoint a GAL for a parent who 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.
- The child's GAL has a statutory right to participate as a party in dependency or neglect proceedings. However, a parent's GAL does not. No statute authorizes a parent's GAL to make recommendations to the court concerning the parent's welfare.

Issue 2: Whether the juvenile court erred when it denied mother's motion to remove her GAL.

Holding 2: Yes, the juvenile court abused its discretion when it denied mother's motion to dismiss her GAL and when it concluded that the GAL's advocacy served mother's best interests.

- By advocating against reunification, the GAL undermined the parent's constitutional interest in preventing the irretrievable destruction of the parent-child relationship.
- While the court must appoint a GAL for parents who are mentally impaired and incapable of understanding the nature and significance of the proceeding or incapable of making critical decisions that are a parent's right to make, the juvenile court made no such findings and there is no support for an appointment on these grounds in the record.

Issue 3: Whether the court erred when it allowed mother's GAL to give closing argument.

Holding 3: Yes, the court erred in permitting this testimony for three reasons:

1. A parent's GAL has no right to participate as a party in dependency or neglect proceedings.
2. The GAL's closing argument included improper testimony. When the GAL described her person observations and included facts that were not independently entered into evidence, she was improperly acting as a witness. Additionally, by appointing a GAL and allowing the GAL to testify against mother, the juvenile court violated her right to fundamentally fair procedures.
3. It was improper for the GAL to advocate against mother's goal of protecting her fundamental liberty interest in the care, custody, and management of her child. The termination of mother's parental rights over her objection was not in mother's best interests as a matter of law. Regardless, these errors were harmless beyond a reasonable doubt for two reasons. First, there was ample evidence that supported the judgment of termination. Second, the juvenile court stated that it did not rely on the GAL's improper argument.

Nonetheless, the court held these errors to be harmless beyond a reasonable doubt because the juvenile court stated that it did not rely on the GAL's improper testimony and because there was ample evidence to support the termination.

The juvenile court properly denied the parent's motion for a continuance because the parent did not show good cause for delay or that a delay would serve the child's best interests.

Regarding, the parent's claims of ineffective assistance of counsel, the court declined to consider the parent's assertion that her first attorney rendered ineffective assistance. Additionally, the court rejected the parent's claim of ineffective assistance of counsel with respect to her second attorney because the claim was not sufficiently explained.

Uniform Child Custody Jurisdiction and Enforcement Act

***People ex. rel. A.B-A.*, 2019 COA 125 (Colo. App. 2019)**

Issue 1: Did the juvenile court have subject matter jurisdiction to terminate parental rights?

Holding 1: No, the juvenile court lacked subject matter jurisdiction to terminate parental rights and could not disregard the Iranian order.

- Colorado courts must treat a foreign country as though it were a state of the United States for purposes of jurisdiction under the UCCJEA.
- The UCCJEA provides that the foreign court that issued a child custody order retains exclusive, continuing jurisdiction over the determination.
- The foreign court's jurisdiction continues until:
    1. The foreign court determines that it no longer has exclusive, continuing jurisdiction;
    2. The foreign court declines jurisdiction on the ground that Colorado provides a more convenient forum; or

3. Either the foreign court or a Colorado court determines that the child, the parents, and anyone acting as a parent do not presently reside in the foreign country.

- The Department as the petitioning party, bears the burden of establishing the juvenile court's subject matter jurisdiction under the UCCJEA.
- In this case, father still resided in Iran and the foreign court had neither determined that it no longer had exclusive, continuing jurisdiction nor declined jurisdiction on the ground that Colorado was a more convenient forum such that the foreign court retained jurisdiction.
- A Colorado court may not modify a foreign child custody order unless:
    1. The Colorado court has jurisdiction to make an initial custody determination under section 14-13-201, C.R.S. 2018; and
    2. The foreign court has lost or ceded jurisdiction under section 14-13-203.
- A Colorado court may exercise temporary emergency jurisdiction to protect a child who is present in Colorado from mistreatment, abuse, or abandonment.
    - Temporary emergency jurisdiction under UCCJEA is limited in scope and time.
    - A Colorado court exercising temporary emergency jurisdiction may not enter a permanent custody disposition. Rather, the court must specify in its order a time period that it considers adequate to allow the person seeking a child custody determination to obtain an order from the foreign court. The Colorado order remains in effect only until the foreign court enters an order or the period expires.
- Colorado courts must recognize and enforce a foreign child custody order if it was made under factual circumstances that substantially comply with the UCCJEA's jurisdictional standards: the issuing court was in the child's home state, the parents had notice of the proceeding, and the parents had an opportunity to be heard.
- The previous "best interest" language of the UCCJA was eliminated in the UCCJEA because it tended to create confusion between the jurisdictional issue and the substantive custody determination.
- In this case, Iran was the child's home state and the order indicates that both parents participated in the hearing.

Issue 2: Did the Iranian child custody order violate fundamental principles of human rights, such that enforcement was not required?

Holding 2: No, the court was unwilling to say that Iranian child custody law violated fundamental principles of human rights, such that the juvenile court was required to recognize the Iranian child custody order.

- The UCCJEA does not require enforcement of a foreign child custody order if the child custody law of the foreign country violates fundamental principles of human rights. This provision is known as the "escape clause."
- The UCCJEA does not define "fundamental principles of human rights." This exception should only be used on the rare occasion that to do otherwise would utterly shock the conscious of the court or offend all notions of due process.

- In this case, the record did not establish that the escape clause applied because of fundamental principles of human rights that are violated in the child custody law of Iran. The record also did not support a violation of fundamental principles of human rights in this case specifically, as custody had been granted to the mother and there was no suggestion that she was in danger of losing custody because of her religion.

Issue 3: Does the lack of diplomatic relations with Iran render the juvenile court's lack of jurisdiction harmless error?

Holding 3: No, there was no authority for the proposition that a court's actions in excess of its jurisdiction are harmless. A court without jurisdiction cannot act.

- There is no absence of diplomatic relations exemption from the UCCJEA.
- The lack of diplomatic relations does not make it impossible for the juvenile court to attempt to fulfill its duty to confer with the Iranian court that issued the custody order.

Issue 4: Was service by publication on father appropriate?

Holding 4: No, the juvenile court erred when it allowed service by publication.

- Due process requires adequate notice of a dependency and neglect proceeding and an opportunity to be heard.
- When there is some evidence about the whereabouts of a party, any substituted service authorized by the trial court must have a reasonable chance of giving that party actual notice of the proceeding.
- In this case, the trial court's authorization of service by publication in an Adams County-area newspaper was insufficient and the Department's later efforts and contact with father did not cure this error.

Grandparents' Rights

People in Interest of C.N., 2018 COA 165

Issue: Does a grandparent have a constitutionally protected liberty interest in a relationship with a child? If so, does due process require that the grandparent receive notice of the termination hearing?

Holding: A grandparent does not have a fundamental liberty interest to associate with the child requiring notice of the proceeding. There is no constitutionally protected liberty interest in the society of or custody of the child where (1) the grandparent enjoys limited visitation rights derived from statute and (2) the grandparent only has a biological relationship with the child but no existing custodial relationship with the child. Thus, the grandparent does not have a right to receive notice of the termination hearing.

- Grandmother filed a motion to intervene eight months after Mother's parental rights were terminated. She also filed a motion for placement of the child with her.

- The limited rights of grandparents derive from statute.
- No Colorado case law or statute supports grandmother's claim of a fundamental liberty interest in the society or custody of the child, simply by virtue of their biological relationship. Grandmother did not have an existing custodial relationship with the child.
- Grandmother did not have a right to receive notice of the termination hearing.
    - The General Assembly has identified who should receive notice of hearings in D&N proceedings. This includes "persons with whom the child is placed."
    - The General Assembly did not grant relatives who do not have placement of the child, including grandparents, the right of notice to hearings in D&N cases.

Juvenile Delinquency

People in Interest of A.C.E-D, 2018 COA 157

Issue: Whether the competency statute for juveniles is constitutional, and whether the trial court abused its discretion in finding the juvenile, A.C.E-D., competent.

Holding: The competency statute for juveniles is constitutional both on its face and as applied. The trial court did not abuse its discretion by finding A.C.E-D. competent because it relied on credible information, namely a psychologist's competency evaluation.

- The juvenile defendant was convicted of misdemeanor theft and misdemeanor harassment. At trial, one of his claims was that he was incompetent to stand trial.
- The COA reasoned that A.C.E-D. failed to show that the statute would not be constitutional under any set of circumstances, which is required to show a statute is facially unconstitutional.
- The COA also deemed the competency statute constitutional as applied because the trial court's findings complied with *Dusky v. United States*, 362 U.S. 402 (1960), which requires that, to be competent to stand trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and must have "a rational as well as factual understanding of the proceedings against him."
- The COA reasoned that the trial court relied on credible information to determine that A.C.E-D. was competent to stand trial, namely a psychologist's competency evaluation. Although the defense presented conflicting evidence, it was not so overwhelming to allow the COA to say that the trial court was manifestly arbitrary, unreasonable, or unfair in finding A.C.E-D. competent.

People v. Brooks, 2018 CO 77

Issue: Whether the General Assembly's amended sentencing statutes violated the Colorado Constitution's Special Legislation Clause because they granted special privileges to defendants serving unconstitutional sentences for felony murder but not to other class 1 felonies.

Holding: The amended sentencing statutes do not violate the Special Legislation Clause.

- In 2012, the United States Supreme Court held that a mandatory life without parole term for those under the age of 18 at the time of their crimes violated the Eighth Amendment's ban on cruel and unusual punishments. And in 2016, it clarified that this rule applied retroactively in cases on collateral review.
- To comply with these holdings, the General Assembly amended its sentencing statutes. The amended statutes allowed defendants, who committed felony murder as juveniles, more options than those that committed other class 1 felonies. It allowed these defendants to be re-sentenced either to a determinate sentence of thirty to fifty years (if the court found, after a hearing, extraordinary mitigating circumstances) or to a term of life imprisonment with the possibility of parole after forty years. Yet, defendants serving mandatory life without parole (LWOP) sentences, who committed class 1 felonies other than felony murder when they were juveniles, had only one option: to be re-sentenced to a term of life imprisonment with the possibility of parole after forty years.
- Brooks had been convicted for felony murder when he was fifteen years old. He was tried as an adult, and pursuant to the sentencing laws in effect at the time, the trial court sentenced him to a mandatory LWOP term.
- Because of the amended sentencing statutes, Brooks sought to be re-sentenced to a determinate sentence of thirty years.
- The People objected and contended that the amended sentencing statutes violated the Special Legislation Clause[1] because they granted special privileges to defendants serving unconstitutional sentences for felony murder but not to other class 1 felonies.
- The Colorado Supreme Court held that the amended sentencing statutes did not violate the Special Legislation Clause because the class the legislation created was genuine, and it was reasonable to treat juvenile felony murderers differently than other class 1 felons.
- Brooks could return to district court to seek a determinate thirty-year sentence.

People v. Barrios, 2019 CO 10

Issue: Whether an advisement waiver was reliable considering that (1) the advisement waiver form minimized the seriousness of the offenses, and (2) the police did not bring the juvenile back

[1] The Colorado Constitution's Special Legislation Clause prohibits the General Assembly from passing legislation that applies to some classes but not others without a reasonable basis for distinguishing them. The provision is not merely a redundant equal protection clause. It was intended to curb favoritism on the part of the General Assembly, prevent the state government from interfering with local affairs, and preclude the legislature from passing unnecessary laws to fit limited circumstances.

to his house to give him an opportunity to consult with his legal guardian prior to his *Miranda* waiver.

Holding: The advisement waiver was reliable under the totality of the circumstances.

- The defendant was a sixteen-year-old who was accused of using a knife to kidnap and sexually assault a woman. Denver SWAT arrested Barrios at his great-grandmother and legal guardian's house. The great-grandmother did not want to leave the house to be present at Barrios's interview, so the lead investigator had her sign an advisement waiver form. Although the police were investigating a possible aggravated robbery, kidnapping, and sexual assault, the investigator wrote on the form that Barrios was being investigated for "taking H[ ]'s car, carrying a knife, and touching H[ ]." The investigator went over the form with the great-grandmother, including Barrios's *Miranda* rights, and she signed it. She did not speak with Barrios prior to him signing the waiver at the police station.
- At the police station, Barrios requested an interview with the lead investigator. Before the interview, the investigator verbally advised Barrios of his *Miranda* rights and told him that because he was a minor, he had an additional right to have a parent or guardian present at questioning. The investigator and Barrios reviewed the advisement waiver form, and Barrios signed it. Barrios then implicated himself in several offenses.
- At trial, Barrios moved to suppress the statements he gave to the investigator, claiming that there was a lack of an express waiver of parental presence as required by section 19-2-511, C.R.S. 2018.[2] The trial court granted the motion, relying on two primary findings: (1) the advisement waiver form minimized the seriousness of the offenses, and (2) the police did not bring Barrios back to his house to give him an opportunity to consult with the great-grandmother prior to his *Miranda* waiver.
- The Colorado Supreme Court held that the police sufficiently advised Barrios and his legal guardian of his rights before he waived them.
- It also held that the waiver was reliable under the totality of the circumstances, despite the investigator minimizing the potential offenses on the advisement waiver form and there being no consultation between the defendant and his guardian before he chose to waive his rights.
- The court reasoned that the police complied with the plain language of section 19-2-511 because the advisement waiver form listed in boldface type the parental presence right, which the investigator verbally explained to both Barrios and his great-grandmother prior to them waiving their rights.
- The court also applied the test from *Grant v. People,* 48 P.3d 543 (Colo. 2002), and looked at all the relevant factors that bear on the reliability of the waiver under the

[2] Section 19-2-511 provides that statements made by juveniles during any custodial interrogation are generally not admissible unless a parent or legal guardian is present. § 19-2-511(1). Statements may be admissible without a guardian's presence, however, if both the guardian and the juvenile expressly waive the guardian's presence in writing after they both receive a full advisement of the juvenile's rights. § 19-2-511(5).

totality of the circumstances. The court reasoned that the investigator's choice to minimize the allegations and arguably take advantage of the late hour and cold weather did not make the waiver unreliable because under the totality of the circumstances, it did not impact the great-grandmother's decision in any meaningful way. The court explained that she plainly knew it was a serious matter because the warrant was executed in the middle of the night by Denver SWAT, numerous police officers conducted a sweep of the residence as she was advised, and she testified that she "thought the worst."

- Regarding the lack of actual consultation between Barrios and his great-grandmother, the supreme court again cited *Grant*. *Grant* notes that when determining the reliability of a waiver, lack of actual consultation between the juvenile and the parent or guardian is a factor to be considered, but it is not dispositive or required by the statute. Because the great-grandmother was given, but she denied, the opportunity to consult with Barrios and Barrios initiated the request for the interview at the police station, under the totality of the circumstances, the waiver was reasonable.
- The Colorado Supreme Court reversed the trial court's order suppressing Barrios's statements and remanded for further proceedings consistent with the opinion.
- A three-justice dissent reasoned that the purpose of section 19-2-511(1) is to ensure that a juvenile has a meaningful opportunity to consult with a parent or guardian before deciding whether to waive his constitutional rights. Because that did not occur, the dissent concluded that the trial court correctly granted the motion to suppress Barrios's statements from the custodial interview.

People in Interest of C.M.D., 2018 COA 172

Issue: Whether the Colorado Sex Offender Registration Act (CSORA) is constitutional under the Eighth Amendment, as applied to juveniles.

Holding: The CSORA is constitutional as applied to juveniles.

- The juvenile, C.M.D., was adjudicated delinquent based on an incident involving unlawful sexual contact. At sentencing, he was ordered to register as a sex offender under the Colorado Sex Offender Registration Act. Because C.M.D. had a previous adjudication for unlawful sexual contact, the magistrate was statutorily precluded from waiving the registration requirement, and C.M.D. was not eligible to petition to discontinue the registration.
- On appeal, C.M.D. contended that, as applied to him and similarly situated juveniles, the CSORA violated constitutional prohibitions against cruel and unusual punishment and constitutional due process rights.
- The COA held that the CSORA was constitutional as applied to C.M.D. and similarly situated juveniles. Based on established Colorado precedent, the COA concluded that the sex offender registration requirement was not punitive. Because it was not punitive, the

Eighth Amendment did not apply, and the court did not have to reason whether it was cruel and unusual.

- The COA also concluded that mandatory, lifetime sex offender registration under the CSORA did not violate C.M.D.'s due process rights.
    - It reasoned that the following are not fundamental liberties: C.M.D.'s claimed liberty interests in living, associating with families and friends, and circulating in society without the well-established burdens imposed by CSORA; and his claimed privacy interest in keeping the information from being public.
    - It also reasoned that the mandatory sex offender registration was rationally related to protecting the public.
- The COA dismissed C.M.D.'s procedural due process claim, noting that he was not deprived of any rights during adjudication.

People v. Davis, 2018 COA 113

Issues:

1. Whether aggregate term-of-years sentences comply with recent juvenile case law, namely the *Graham* and *Miller* decisions?
2. Whether an inmate who was sentenced under Colorado's sentencing scheme in 1983—which failed to distinguish between juvenile and adult offenders—is entitled to post conviction relief because the statutory mandate violated the constitution?
3. Whether an LWPP-40 sentence violates the *Graham* and *Miller* holdings because Colorado's parole system does not provide a meaningful and realistic opportunity for release?

Holding:

1. No. Neither *Graham* nor *Miller* precludes aggregate term-of-years sentences.
2. No. The Colorado Supreme Court held that LWPP-40 complies with the holdings in *Graham* and *Miller*, and, therefore, inmates sentenced as juveniles under the 1983 scheme are not entitled to post-conviction relief.
3. No. There was insufficient evidence that Colorado's parole system runs afoul of *Graham* and *Miller*.

- In 1983, a jury convicted Davis of multiple charges arising from a premeditated robbery that resulted in the victim's death. Davis was seventeen-years-old, and a class 1 felony was punishable by a mandatory minimum sentence of life in prison with the possibly of parole after serving forty calendar years ("LWPP-40"). The law did not distinguish between juvenile and adults.
- The trial court sentenced Davis to LWPP-40 for the first-degree murder with deliberation count. The trial court also imposed a sentence of eight years and one day for aggravated robbery, which Davis would subsequently serve should he be granted parole for the LWPP-40 sentence.

- Davis later filed a Crim. P. 35(c) motion, which asserted, among other claims, that his sentence violated the Eighth Amendment. The district court denied Davis's motion.
- Davis asserted that his sentences taken together constitute a life in prison without parole ("LWOP"), a sentence that the Supreme Court deemed unconstitutional in *Graham v. Florida*. The COA rejected this argument and reaffirmed the distinction between multiple, lengthy sentences and LWOP.
    - Relying on the Colorado Supreme Court's opinion in *Lucero v. People*, the COA held that neither *Graham* nor *Miller* precludes aggregate term-of-years sentences.
- Davis next contended that Colorado's sentencing scheme in 1983 violated the Eighth Amendment because it imposed a mandatory LWPP-40 on all individuals convicted of a class I felony. Relying on *People v. Tate*, the COA concluded that LWPP-40 was a proper sentence for those juveniles unconstitutionally sentenced to mandatory LWOP for offenses committed between 1990 and 2006. Because such sentences comply with *Miller* and *Graham*, Davis's sentence did not violate the Constitution.
- Davis last contended that LWPP-40 sentences are unconstitutional because Colorado's parole system does not provide a meaningful and realistic opportunity for release.
    - The COA concluded that Davis did not present enough evidence to demonstrate how Colorado's parole system denies juveniles a meaningful opportunity for release. It highlighted that parole officers are authorized by statute to consider the totality of the circumstances, including aggravating or mitigating factors of the criminal case.
    - The COA also notes that although a parole board's decision to grant or deny parole is left to its own discretion, an inmate can seek judicial review of a decision based on the board's failure "to exercise its statutory duties."
- The COA upheld the district court's decision to deny Davis post-conviction relief.

People in Interest of A.V., 2018 COA 138M

Issue: Does 19-2-918(2), C.R.S. 2018, require a juvenile court to make specific findings of reasonableness before ordering restitution?

Holding: No. Based on a plain reading of the statute and legislative history, 19-2-918(2) does not impose such a requirement.

- A.V., a juvenile, pleaded guilty to second degree burglary in exchange for the dismissal of other charges. In his plea agreement, A.V. stipulated to the factual basis and agreed to pay restitution for all victims, including businesses involved in the dismissed counts.
- Based on testimony from business owners and invoices, the juvenile court ordered A.V. to pay $692,806 in restitution.
- On appeal, A.V. contended that 19-2-918(2), which requires restitution to "to be paid in a reasonable manner," obligated the court to make specific findings on the record about

reasonableness. Such an inquiry would consider whether the amount and repayment terms would cause serious hardship or injustice to the juvenile, the family circumstances, and the juvenile's potential ability to pay after his release from incarceration.

- The COA did not agree. Before 1996, the statute pertaining to juvenile restitution included the following language:

> "… the court shall enter a sentencing order requiring the juvenile to make restitution for actual damages done to persons or property; except that the court shall not order restitution if it finds that monetary payment or payment in kind would cause serious hardship or injustice to the juvenile. Such order shall require payment of insurers and other persons or entities succeeding to the rights of the victim through subrogation or otherwise, if appropriate. Restitution shall be ordered in a reasonable amount to be paid in a reasonable manner, as determined by the court."
>
> § 19-2-703(4), C.R.S. 1991.

- But subsequent amendments omitted the "in reasonable time" language and removed the exception that prevented restitution if it "would cause serious hardship or injustice to the juvenile."
- The COA held that these amendments demonstrated the General Assembly's intent to remove a defendant's ability to pay and concerns of hardship from the juvenile court's consideration.

People v. Godinez, 2018 COA 170M

Issue: Whether the 2012 amendments to the statute that authorizes criminal direct filing in district court against a juvenile, Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45 (the 2012 Amendments), are applicable to cases then pending, or only to cases filed on or after the effective date of the 2012 Amendments.

Holding: The 2012 Amendments are not applicable to the criminal proceedings filed against Godinez, whose case was pending when the 2012 Amendment took effect.

- Godinez was fifteen-years-old when he used a deadly weapon to kidnap and rape two women on two separate occasions. He was charged as an adult and sentenced to thirty-two years to life in prison.
- During the district court proceedings, the General Assembly amended the direct-file statute. If the 2012 Amendments applied to Godinez, it would provide an additional procedural safeguard before being charged as an adult.[3]

[3] "Under the law in effect at the time that Godinez committed these crimes, the district attorney had the authority to directly file the charges in district court, notwithstanding that Godinez was a juvenile at the time he committed the crimes. § 19-2-517(1)(b), C.R.S. 2011. At that time, the district attorney had the sole authority to decide whether to

- Godinez contended that the 2012 Amendments should apply to him retroactively, but the trial court concluded that they were intended to apply prospectively.
- The COA agreed with the trial court. It reasoned that the General Assembly has given the statutory directive that "[a] statute is presumed to be prospective in its operation." § 2-4-202, C.R.S. 2018. The 2012 Amendments are also silent as to retroactive or prospective application, so the presumption of prospective application applies. Ch. 128, sec. 1, § 19-2-517, 2012 Colo. Sess. Laws 439-45.
- The COA also considered whether the 2012 Amendments were "ameliorative, amendatory legislation," within the meaning of *People v. Stellabotte*, 2018 CO 66. The COA held that they were not and reasoned as follows:
    - *Stellabotte*, and all its antecedents, addressed statutes that either decreased the severity of a previously defined crime or reduced the maximum sentence that could be imposed for commission of that crime. The 2012 Amendments were different. They simply changed the procedure by which jurisdiction is apportioned between the district courts and the juvenile courts.
    - *Stellabotte* dealt with legislation that was a simple matter of correcting the mittimus or resentencing a defendant to reflect the reduced maximum sentence.
        - The COA declined to extend *Stellabotte*'s holding to Godinez because it would have ramifications that far exceeded the limited effects addressed in *Stellabotte*.
    - Applying the 2012 Amendments to crimes that had been committed and charged before their enactment would create substantial uncertainty regarding the finality of criminal convictions, creating havoc in both the juvenile and adult criminal justice systems.
- Because the 2012 Amendments to the direct-filing statute were silent regarding retro-activity; a statute that is silent is presumed prospective in its operation; and the *Stellabotte* exception did not apply, the COA held that the 2012 Amendments to the direct-filing statute did not apply retroactively to Godinez.

People in Interest of G.S.S., 2019 COA 4M

Issues:

---

file the charges in adult criminal court or in juvenile court, provided that the juvenile was at least fourteen years of age. *Id.*; § 19-2-517(3)(a)."

"During the course of the district court direct-file proceedings, and well before the court entered the judgment of conviction, the General Assembly amended the direct-file statute in significant ways. First, the legislature increased the direct-filing minimum age from fourteen to sixteen, section 19-2-517(1), C.R.S. 2018; though, despite this change, a juvenile aged fourteen to fifteen may still be tried in adult court if the juvenile court transfers the case to the district court on the petition of the district attorney, section 19-2-518(1)(a), C.R.S. 2018. Second, the 2012 Amendments give a direct-filed juvenile the right to have a "reverse-transfer" hearing, at which a district court judge, not the district attorney, makes the final decision whether to try the juvenile as an adult, or whether to proceed in juvenile court. § 19-2-517(3)."

1. Whether a juvenile's ongoing plea negotiations and requested continuances, which relate to his release plan, extend or toll his speedy trial period?
2. In cases where a juvenile is denied his or her right to a speedy trial under § 19-2-509, C.R.S. 2018, should the court dismiss the charges pursuant § 18-1-405(1), C.R.S. 2018, or hold a bond hearing to set bail pursuant to § 16-4-101, C.R.S. 2018?

Holding:

1. No. A juvenile's participation in plea negotiations and continuances, which relate to his release plan, do not toll, waive, or extend the speedy trial period because nothing prevented the prosecution or court from setting a trial date. The delays present in this case are the types of "procedural interruptions" that should not impact the speedy trial calculation.
2. When a court fails to try a juvenile case within sixty-days of a no-bond hearing, the court should apply the remedy found in § 18-1-405(1).

- G.S.S. was arrested and charged with two delinquent acts for threatening to shoot students at his middle school. The court later ordered G.S.S. to be held without bond pending psychological and risk assessments. In response to G.S.S.'s request for release, the court also ordered that a release plan be established but conditioned its implementation on the outcome of the psychological and risk assessments.
- Between May 2, 2017, and August 2, 2017, G.S.S.'s counsel requested several continuances, all of which focused on the delays in completing the assessments. The parties participated in several other hearings related to the status of G.S.S.'s assessments, which defense counsel said would also assist with any plea negotiations.
    - On August 2, 2017, G.S.S.'s counsel requested a hearing to determine and comply with G.S.S.'s speedy trial rights under 19-2-509(4)(b).
    - The district court granted dismissal in the juvenile's favor for violating his right to a speedy trial.
- The People appealed and contended that the plea negotiations and continuances should be excluded from the speedy trial calculation. It contended that G.S.S. must first request a jury trial before the speedy trial clock starts ticking; the sixty-day speedy trial period was either waived or extended when G.S.S. requested continuances; and defense counsel likely knew about the speedy trial issue and had an obligation to alert the court.
- The COA held that section 19-2-509 does not require a jury-trial request to trigger the juvenile's speedy trial clock. Under section 19-2-107, the party's failure to demand a jury trial can be construed as a waiver of a speedy trial under certain circumstances.
- The COA did not view G.S.S.'s continuances as extensions to the speedy trial clock. Relying on *Tongish v. Arapahoe City Court*, 775 P.2d 63 (Colo. App. 1989), the court reasoned that the delay in setting a trial date was not attributable to G.S.S. and that all actions taken by G.S.S.'s counsel were aimed at releasing the juvenile from detention, not delaying a trial.

- The COA acknowledged that it could not infer defense counsel's knowledge from the record. Even so, it held that the "obligation to bring G.S.S. to trial within the speedy trial period" fell on the court and prosecutor.
- The People also contested the district court's remedy under section 18-1-405, but the COA upheld the remedy. It acknowledged that the criminal code provides different remedies for violations of the criminal speedy trial statute and the criminal bail statute. The Children's Code does not make this distinction. And, the no-bond speedy trial clock for a detained youth is triggered by either a no-bond order or a not guilty plea. The General Assembly could have modeled the juvenile provisions after the criminal code, but it did not.
- **Dissent:** J. Jones viewed the delay created by G.S.S.'s counsel as chargeable to the defendant. That is, it was excluded from the speedy-trial calculation made by the court. And, although the continuances related to the court-mandated assessments upon which G.S.S.'s release plan was conditioned, the record shows that the assessments would also assist defense counsel in plea negotiations.

Mandatory Reporting Duties

Heotis v. Colorado State Board of Education, 2019 COA 35

Issue: Whether a public school teacher must follow the reporting duties of § 19-3-304, C.R.S. 2018, despite the circumstances in which he or she learns of or suspects child abuse and neglect.

Holding: Public school teachers must comply with their reporting duties, even if they learn of or suspect child abuse and neglect outside of their professional capacity.

- A public school teacher did not report to authorities that her then-husband had sexually abused their daughter for about eight years. The Colorado State Board of Education determined that her failure to report the abuse amounted to unethical behavior that offended the morals of the community and denied her teacher's license renewal application.
- The mandatory reporting statute unambiguously imposes a duty to report child abuse and neglect on public school employees and does not specify any circumstances under which the person must learn of the suspected abuse or neglect to be subject to this duty.
    - The reporting duty applies irrespective of the circumstances in which the reporter learns of or suspects abuse or neglect, including at home.
    - The statute does not limit this reporting duty to child abuse and neglect that public school teachers learn or suspect while working in their professional capacity.