GUIDED REFERENCE IN DEPENDENCY

An Advocacy Guide for Attorneys in Dependency Proceedings

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Office of the Child's Representative

Office of Respondent Parents' Counsel

Office of the State Court Administrator
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Contents

FACT SHEETS

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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. 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 Hearing

PRELIMINARY PROTECTIVE HEARING CHECKLIST—GAL

BEFORE

- ❑ Review petition, affidavit, court report, Colorado Family Safety Assessment tool and Colorado Family Risk Assessment results (if completed), and/or other supporting documents to assess legal sufficiency of the allegations, basis for removal of the child (if removed) and/or protective orders, 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.
  - ❍ Discuss child's needs.
  - ❍ 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, protective orders, and determine whether child would like to speak to the judge at the hearing.

- Speak with caseworker regarding:
  - Placement; ensure there has been 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 any appointments are currently scheduled.
  - Obtain information regarding whether child is an Indian child and, if so, the identity of the child's tribe.
  - Determine, for UCCJEA compliance purposes, 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, Indian Child Welfare Act (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 hearing.
- Evaluate need to proffer evidence. Determine whether a continuance is necessary to represent the best interests of the child.
- Confirm compliance with ICWA notice requirements.

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 that the parent(s) waives advisement or 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, subject to the limitations in § 19-1-108(3)(a.5).

- 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) and (2).
    - The parental rights with respect to a sibling of the child have been involuntarily terminated unless the exception in § 19-1-115(7)(b) applies.
    - The parent has been convicted of a felony enumerated in § 19-1-115(6)(b) and (7).
  - The department will make reasonable efforts to reunite the child and family 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.
  - If the child is an Indian child or there is reason to know the child is an Indian child and the court orders an out-of-home placement, ensure the court enters the findings required for either emergency removal or, if sufficient notice was provided, foster care placement.

- Emergency removal findings:
  - emergency removal or placement is necessary to prevent imminent physical damage or harm to the child.
- Foster care placement findings:
  - clear and convincing evidence, supported by testimony of qualified expert witness, establishes that the continued custody of the child by the Indian parent/custodian is likely to result in serious emotional or physical damage to the child; and
  - active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful.

- 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 and in foster care placement, ensure court order complies with the ICWA placement preferences (extended family members, a home licensed by the Indian child's tribe, an Indian foster home, or a tribal-approved or tribal-run institution) or the court finds good cause to deviate.
  - Services for family.
  - Parentage.
  - Indian heritage (ICWA) and notice.
  - 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).
  - Relative affidavit.
  - UCCJEA jurisdictional issues.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege.

AFTER

- ❑ Provide your contact information to caseworker, counsel, parent(s), and relatives.
  - ❑ Schedule home visit with the child as soon as reasonable but no later than 30 days following appointment. When meeting with the child, discuss D&N process, role of the GAL, 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 HEARING CHECKLIST—RPC

BEFORE

- ❑ Analyze for existing and potential conflicts of interest.
- ❑ 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.
- ❑ Meet with client in private. Obtain contact information, including phone number, home address, and email address. Also obtain emergency contact information in the event the client cannot be reached.
- ❑ 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.
  - ❍ Discuss barriers to treatment and communication with the caseworker and other professionals.
  - ❍ 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.
  - ❍ Discuss client's goals for case and placement contingencies if child cannot be at home.
  - ❍ Screen client for disabilities (e.g., learning disabilities, mental health disabilities, use of medical marijuana, and need for accommodations in court, in meetings, and in treatment)
  - ❍ Determine religious and cultural practices that must be maintained in out-of-home placement and any medical needs of the child.
  - ❍ Make ICWA inquiries with client.
  - ❍ Inquire about jurisdictional issues and UCCJEA with client.
  - ❍ Inquire about paternity for all children.

- Determine whether the 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 regarding placement of the child. 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.
- ❑ Ask for accommodations for client participation in court hearing, if necessary.
- ❑ Aggressively advocate for visitation in a family-friendly setting.
- ❑ 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, subject to the limitations in § 19-1-108(3)(a.5).
  - 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) and (2).
    - The parental rights with respect to a sibling of the child have been involuntarily terminated.
    - The parent has been convicted of a felony enumerated in § 19-1-115(6)(b) and (7).
  - The department will make reasonable efforts to reunite the child and family, 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.
  - If the child is an Indian child or there is reason to know the child is an Indian child and the court orders an out-of-home placement, ensure the court enters the findings required for either emergency removal or, if sufficient notice was provided, foster care placement.
    - Emergency removal findings:
      - emergency removal or placement is necessary to prevent imminent physical damage or harm to the child.
    - Foster care placement findings:
      - clear and convincing evidence, supported by testimony of qualified expert witness, establishes that the continued custody of the child by the Indian parent/custodian is likely to result in serious emotional or physical damage to the child; and

        - active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful.
- ❑ 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. Ensure these services are ordered as part of a protective order to ensure the client maintains § 19-3-207 protections.
    - ❍ Protective orders: § 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.
    - ❍ Services for the family.
    - ❍ Parentage.
    - ❍ Indian heritage (ICWA).
    - ❍ UCCJEA jurisdictional issues.
    - ❍ Visits with client, relatives, siblings, and other appropriate persons.
    - ❍ Education and medical decision-making and involvement.
    - ❍ Maintenance of cultural and religious practices in placement, if applicable.
    - ❍ Any other specifically requested orders.
    - ❍ Setting next hearing(s).

AFTER

- ❑ Explain to the client the court's rulings and discuss barriers to compliance with the court's orders.
- ❑ Schedule meeting with client.
- ❑ Establish an action plan for the client (e.g., attend visits, follow court orders, obtain restraining order, and clean up house). Consider need to follow up with written action plan.
- ❑ Discuss with client importance of completing relative resource affidavit.

- ❑ Discuss with client importance of completing ICWA assessment forms.
- ❑ 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.
- ❑ Have client sign releases of information to allow disclosure to attorney (and social worker if indicated) to begin independent investigation.
- ❑ Discuss visitation orders with client, and discuss actions to take if visitation is not provided as ordered.
- ❑ Provide client with next court date.
- ❑ Request assignment of social worker from ORPC if indicated.

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(s) 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.

At the preliminary protective hearing, the court will also inquire whether the child is an Indian child as defined by the Indian Child Welfare Act (ICWA). If the child is an Indian child or the court has reason to know that the child is an Indian child, any removal of the child must comply with either ICWA's emergency placement or foster care placement requirements and any foster care placement must comply with ICWA's placement preferences. *See* **ICWA fact sheet**.

TIMING OF HEARING

The timing of the preliminary protective 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 preliminary protective 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 by a law enforcement officer and placed in a shelter facility or temporary holding

facility not operated by the Colorado Department of Human Services (CDHS), 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 preliminary protective 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.

Hearings regarding the emergency removal or emergency placement of an Indian child do not need to be set outside the time frames provided in the Colorado Children's Code. *See* 25 C.F.R. §§ 23.2, 23.113; 2016 ICWA Guidelines C.1–C.3; **ICWA fact sheet**. However, the emergency removal or placement is time-limited. *See* **ICWA fact sheet**. If the evidence does not support findings that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child, the court cannot order emergency placement and ICWA's notice and timing requirements applicable to child custody proceedings and foster care placement must be fulfilled. *See* 25 C.F.R. § 23.112; **ICWA fact sheet**.

NOTICE REQUIREMENTS

All parties must receive notice of the preliminary protective 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.* Law enforcement or department personnel must provide all parents and families from whom children are removed by court order or by law enforcement a standardized detailed informational notice of rights and remedies form as well as a copy of the order directing the removal (if any). § 19-3-212(1)–(2).

When a child is taken into temporary custody by a law enforcement officer, the parent, guardian, or legal custodian of the child must be notified and 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). When a newborn child is

taken into temporary custody by a law enforcement officer, the notice required by §§ 19-3-212 and 19-3-402 must be provided directly to the newborn child's identifiable birth parent(s) verbally and in writing, in a language the birth parent(s) understand; and the officer may designate someone to assist in providing such notices, if necessary. § 19-3-401(3)(d).

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 Colorado Rule of Civil Procedure 4(h). § 19-3-503(8)(b); *see also In Interest of A.B.-A.*, 2019 COA 125 (holding that juvenile court erred in allowing department to serve a parent by publication when the record did not establish that the department had exercised due diligence to obtain personal service). Service may be by single publication and must be completed not less than five days prior to the time set for hearing. *Id.*

If the child is an Indian child or there is reason to know or believe the child is an Indian child, additional notice requirements will apply. *See* **ICWA fact sheet**.

TIP If the parent's identity and some information about the parents' whereabouts are known, "service by publication alone is unlikely to pass constitutional muster." A.B-A., p 22 (citing *Synan v. Haya*, 15 P.3d 1117, 1119 (Colo. App. 2000)). Counsel should consider advocating for service that would "have a reasonable chance of giving that party actual notice of the proceeding" when it is known that a parent is in another country or out of state. *Id.* Parties should carefully review motions for publication to ensure that they provide support for a finding of due diligence in finding parents, and where they do not, should advocate for additional methods that would be likely to assist in finding parents. If RPC have been appointed to the case, they should consider requesting an investigator through ORPC to assist in this process.

TIP At the preliminary protective 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.

TIP Parents who are incarcerated are presumptively eligible for court-appointed counsel and should have RPC provisionally appointed at the preliminary protective hearing. *See* CJD 16-02(VI)(c). Available counsel should also inquire with caseworkers and county attorneys about contact information for missing clients. Counsel should attempt to reach missing parents to secure their attendance by telephone for the preliminary protective hearing and seek provisional appointments for those parents pursuant to CJD 16-02(VI)(d).

PROCEDURAL ISSUES/CONSIDERATIONS

1. Jurisdiction

The juvenile court has exclusive original jurisdiction over proceedings concerning any child who is dependent or neglected, as defined in § 19-3-102. § 19-1-104(1)(b). A "child" is a person under 18 years of age. § 19-1-103(18). The juvenile court does not have jurisdiction over an unborn child. *People in the Interest of H.*, 74 P.3d 494, 495 (Colo. App. 2003).

The requirements of the UCCJEA must be met for the court to have jurisdiction to make a child custody determination. *See* **Jurisdictional Issues fact sheet**.

TIP To ensure compliance with the UCCJEA, 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(a).

2. Venue

Venue is in the county where the child resides or is present. § 19-3-201(1)(a). When proceedings are commenced in a county other than the county of the child's residence, the Children's Code permits the court upon adjudication to order a change of venue to the county where the child's legal parent or guardian is located under certain circumstances. *See* **Venue fact sheet**.

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 public. § 19-1-106(2). When the court orders the matter closed to the public, the court shall admit only such persons as have an interest in the case or the work of the court, including persons whom the district attorney, the county or city attorney, the child, or the parents, guardian, or custodian of the child wish to be present. *Id.*

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. 1; *People ex rel. 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.*

Unless a parent waives a formal advisement of rights, a magistrate presiding over a preliminary protective hearing must inform the parties of their right to have a judge preside over other hearings and 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); *People ex rel. T.E.M.*, 124 P.3d 905, 908 (Colo. App. 2005). The magistrate's findings and recommendations may be subject to judicial review. § 19-1-108(5.5). Request for judicial review must be filed within seven days of the parties' receipt of notice of the magistrate's ruling. *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, as review of a magistrate's decision is often faster than an appeal of a 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 hearing. These procedures allow the GAL to begin an independent investigation of the child's safety and needs, as well as any potential relative placements prior to the preliminary protective hearing. 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.C.P. 1.7, 1.8, 1.9, 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 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 the RPC's consent before interviewing the respondents. C.R.C.P. 4.2; CJD 04-06(V)(D)(4)(c). 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 proceeding 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, 1117–21 (Colo. 1986). The court must 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.* If "a parent, although mentally disabled to some degree, understands the nature and significance of the proceeding, is able to make decisions in her own behalf, and has the ability to communicate with and act on the advice of counsel" then a court would not abuse its discretion in not appointing a GAL to that parent. *See id.* at 1120. The court must make findings to support the appointment of a GAL for a parent. See *In the Interest of T.M.S.*, 2019 COA 136.

TIP In *In Interest of T.M.S.*, 2019 COA 136, a division of the Court of Appeals clarified expectations regarding the role of a parent's GAL. Specifically, the division explained that the GAL for a parent serves an assistive role of facilitating communication between the parent and counsel and helping the parent participate in the proceeding. The parent's GAL, however, does not have a statutory right to participate as a party. The division held that the GAL improperly participated in the proceeding when she attempted to represent the parent's best interests and to file pleadings independent of the parent and the parent's counsel. The GAL also undermined the parent's fundamental liberty interest in the care, custody, and control of her child by advocating for a reduction in parenting time and supporting a concurrent permanency goal of adoption. Finally, the court erred in allowing the GAL to give closing argument, as she was not a party to the proceeding, and in allowing the GAL to give improper testimony during closing argument rather than requiring the GAL to limit her argument to facts that had been introduced into evidence.

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.

TIP The role of a parent's GAL is to assist the parent in understanding the proceeding and the parent's rights. While Colorado courts have not addressed a parent's GAL waiving substantive rights, other courts have held a guardian or conservator may not waive the rights of their ward. *See Ortman v. Kane*, 60 N.E.2d 93, 98 (Ill. 1945); *Jeanblanc v. Mellott*, 504 N.E.2d 990, 997 (Ill. App. 1987); *In re S.H.*, 987 P.2d 735, 741 (AK. 1999); *In re Jessica G.*, 93 Cal. App. 4th 1180 (2001) (holding that prior to appointment of a GAL for a parent, the parent must be provided with a hearing and opportunity to be heard and that appointment of a GAL without the required hearings and findings violated Mother's due process rights). While these cases do not specifically address the GAL's role, RPC may find them helpful in their advocacy.

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). RPC shall be appointed no later than the first temporary custody / shelter / initial hearing. *See* CJD 16-02(VIII)(a). Courts shall not appoint one RPC to represent more than one respondent parent in a case. *See* CJD 16-02(III)(d).

TIP RPC must conduct a conflict analysis, guidelines for which are provided in the Colorado Rules of Professional Conduct. *See* C.R.C.P. 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 the 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

Unless a parent waives a formal advisement of rights, the court presiding over the preliminary protective hearing must fully advise respondent parents, guardians, and legal custodians of their legal rights and the possible consequences of a finding that a child is dependent or neglected and 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. § 19-3-202(1); C.R.J.P. 4.2; *People ex rel. T.E.M.*, 124 P.2d at 908 (Colo. App. 2005).

TIP Even though the court may address the parents' rights during the preliminary protective 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 before the parent makes an admission to the petition.

9. Filing of Petition

Unless otherwise directed by the court, the petition in dependency and neglect must be filed within 14 days from the day a child is taken into custody. C.R.J.P. 4(a). Frequently, the petition is filed by the preliminary protective 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. ICWA

At the preliminary protective hearing, the court must also ask whether each participant knows or has reason to know whether the child is an Indian child. 25 C.F.R. § 23.107(a); § 19-1-126(2); *People in Interest of L.L.*, 395 P.2d 1209, 1212 (Colo. App. 2017). All responses must be made on the record. 25 C.F.R. § 23.107(a). The court must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. *Id.* Any out-of-home placement must comply with either ICWA's emergency placement or foster care placement requirements. *See* **ICWA fact sheet**.

11. 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). 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)(a)(I)(C). The original form affidavit shall be filed with the court no later than five business days after 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. 12 CCR 2509-1: 7.000.2(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 with children about relatives and kin to make sure that all placement/support possibilities are explored, keeping in mind CDHS regulations' 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(V)(D)(4)(a) 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. 12 CCR 2509-4: 7.304.21(E)(2)(d). *See* **Relative and Kinship Placement fact sheet**.

12. 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)(I).

13. 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. 12 CCR 2509-4: 7.304.52(A)(1).

TIP From the outset, counsel should ensure that fathers are identified, located, served, and engaged in case planning and services, as the early involvement of fathers leads to better outcomes for children and families. *See* **Family Finding/Diligent Search fact sheet**.

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. Although § 19-3-403 does not specify a burden of proof, § 13-25-127(1) provides that the burden of proof in civil actions shall be by a preponderance of the evidence, unless the law provides otherwise.

TIP Counsel should ensure that the court's findings are based on objective facts, not subjective conclusory statements, and that that families' cultural background, customs, and traditions are taken into consideration. *See* Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline III.E at 128 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016).

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 issue orders regarding the legal custody, protection, support, medical evaluation or treatment, surgical treatment, psychological evaluation or treatment, or dental treatment as it deems in the best interests of the child. § 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; and 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.

TIP HB 18-1104 provides that an individual's disability alone must not serve as the basis of denial of temporary custody or foster care of a child unless the disability impacts the health or welfare of the child. *See* § 24-34-805(1)(c).

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)(I–III); (iii) reasonable efforts have been made or will be made to reunite the child and the 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; 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.* ****SEE COMMENT**

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. § 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.*

If the child is an Indian child as defined by ICWA, 25 U.S.C. § 1901(4), or the court has reason to know that the child is an Indian child, the court must make the required findings for either emergency placement or foster care placement of the child and any foster care placement must comply with ICWA's placement preferences. *See* **ICWA fact sheet**.

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 the added safeguard of protective orders. Likewise, if the child is an Indian child or there is reason to know the child is an Indian child, counsel should ensure compliance with ICWA's more protective active efforts requirement. *See* **ICWA fact sheet**.

TIP The department must complete an assessment of any report of known or suspected abuse or neglect. § 19-3-308(1)(a). State regulations require such assessments to include use of the Colorado Family Safety Assessment and Colorado Family Risk Assessment tools. 12 CCR 2509-2: 7.104.1(C)(8)–(9). The Colorado Family Safety Assessment tool evaluates the extent of maltreatment, surrounding circumstances of maltreatment, child functioning, adult functioning, general parenting practices, and disciplinary parenting practices. 12 CCR 2509-2: 7.104.1(C)(2). The Colorado Family Risk Assessment tool is used to determine the risk of future abuse and/or neglect, as well as to aid in determining whether services should be provided and the appropriate level of services. 12 CCR 2509-2: 7.107.21(B). The responses to the Family Safety Assessment tool must be entered in the state system as soon as possible and no later than 14 days after the alleged victim was interviewed or observed, and the completed Family Risk Assessment tool must be documented in the state automated case management system within 30 days of referral. 12 CCR 2509-2: 7.104.14(G), 7.107.24(A). If the department has tried to serve a family through a differential response/"family assessment response" track, the department will have documented the treatment and prevention plan. *See* 12 CCR 2509-2:7.104.131. Review of the department's assessment tools 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 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 comparable to the existing situation. *Id.* The presumption is that remaining in the school that 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)(II); *see also* 12 CCR 2509-4: 7.301.241(D). Foster parents may be reimbursed for reasonable costs to transport children to the school they attended prior to placement, and GALs should make sure that this option is explored. 12 CCR 2509-5: 7.418.1(A); 12 CCR 2509-5: 7.406.1(JJ). 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); § 22-32-113; 12 CCR 2509-4: 7.301.241(D)(6). *See* **Education Law 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 to care for the child if doing so is in the best interests of the child and no suitable parent is available. §§ 19-1-115(1)(a), 19-3-403(3.6)(a)(V). If in the best interests of the child, preference may be given to placing the child with the child's grandparent if the grandparent is appropriate, capable, willing, and available to care for the child. §19-1-115(1)(a). If considering placement or custody with a grandparent, the court shall consider any credible evidence of the grandparent's past conduct of child abuse or neglect. § 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 (where a 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 in the previous section.

Sections 19-3-406 and 19-3-407 require background checks for emergency placement, noncertified kinship care, and licensed placements to include fingerprint-based and other background check requirements for relatives and kin, as well as for other adults residing in the home. The court must inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of a relative. § 19-3-508(8). The department must share the results of the fingerprint-based background checks with a GAL pursuant to a court order. § 19-3-203(2). *See* **Relative and Kinship Placement fact sheet**.

If the child is an Indian child or the court has reason to know the child is an Indian child, the court must make the required findings for either emergency placement or foster care placement of the child and any foster care placement must comply with ICWA's placement preferences. *See* **ICWA fact sheet**.

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 to grant temporary custody 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. Visits

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). At the temporary custody hearing, the court shall enter temporary orders for reasonable visitation if such temporary orders are in the best interest of the child. §19-3-217(1). Additionally, the court is to order contact (phone, virtual or in-person) between the child and parent within 72 hours, excluding weekends and holidays,

unless the parties agree to a delay or if the court finds that a delay is in the best interest of the child. *Id. See* **Visits fact sheet**. The health and safety of the child are the paramount concerns. *People ex rel. B.C.*, 122 P.3d 1067, 1070 (Colo. App. 2005). Sections 19-7-204(3) and (4) require sibling visits if a sibling requests an opportunity to visit a sibling or ongoing visits with a sibling. The controlling standard is the best interests of the child. § 19-7-204(5). A grandparent may also request reasonable grandchild visits under § 19-1-117(2). The controlling standard is the best interests of the child. § 19-1-117(3).

3. 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 Other protective orders may also benefit the child and family. For example, to promote the respondent's and/or child's participation in services without unintended consequences in a criminal proceeding, counsel must ensure the services are court-ordered in a protective order or an interim treatment plan. *See* **§ 19-3-207 fact sheet**. Additionally, legislation enacted in 2017 now provides the D&N court with jurisdiction to enter civil protection orders. *See* **Civil Protection Orders fact sheet**. Such orders may protect the child's safety while placed with a parent or in the home of a relative or kin.

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.

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.

Children in D&N proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child's interests are adverse to those of his or her parents. *Id.* at 945, 950. Information that is protected by this privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *Id. See generally* **Children's Psychotherapist-Patient Privilege fact sheet**.

TIP GALs must ensure that the court has made a ruling on the holder of the privilege prior to the introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advo-

cate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950–52 (setting forth waiver procedures and considerations).

SPECIAL ISSUES/CONSIDERATIONS

1. Sibling Placement

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; 12 CCR 2509-8: 7.708.22(B)(3).

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 voluntarily or involuntarily joined in a D&N proceeding for the limited purposes of protective orders or inclusion in a treatment plan. § 19-1-103(100). The court may join a person it deems necessary to the action 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. § 19-3-403(4)(a). The court must refer a child who appears to be developmentally 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. *Id.*

4. Allegations of Emotional Abuse

If the allegation is based solely on emotional abuse, the court on its own motion or the 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.

6. Civil Protection Order

In a D&N proceeding, the court has jurisdiction to enter a civil protection order pursuant to Article 14 of Title 13. § 19-4-101(1)(a). Such orders have the same force and effect as protection orders issued pursuant to Article 14 of Title 13. *See* **Civil Protection Orders fact sheet**.

TIP A civil protection order may serve as an important safeguard for children placed with parents, relatives, or kin and should be explored as part of any safety planning.

NEXT STEPS/SETTING THE 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 pursuant to C.R.C.P. 59. *See In re Marriage of Phelps*, 74 P.3d 506, 509–10 (Colo. App. 2003); *but see People in Interest of J.D.*, 464 P.3d 785 (Colo. 2020) (holding that a magistrate may modify or reconsider their own orders if such orders are not final and appealable orders subject to review by a judge). 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 seven 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)(I)(II). *See* **Magistrates fact sheet**.

5. Adjudication Hearing

In some instances, a case may be set for an adjudicatory hearing upon conclusion of the preliminary protective hearing. Section 19-3-505(3) sets forth the time frames for scheduling an adjudication hearing. The adjudicatory hearing to the court may be held before a magistrate or judge. Section 19-3-202(2) 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 wants the adjudicatory hearing before a judge, the party must request the 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 seven days after receipt of notice of the setting if the matter is set for hearing outside the presence of counsel or if the matter is set on notice. § 19-1-108(3)(c)(I), (II). *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 RPC 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, RPC must request or waive a jury trial as directed by the client.

TIP RPC are required to complete a thorough and independent investigation at every stage of the proceeding, including prior to adjudication. Rarely do counsel have sufficient time to complete a thorough and independent investigation sufficient to assist a client with an adjudicatory hearing immediately following the preliminary protective hearing. RPC should rarely, if ever, advise a client to admit the allegations in the petition at the preliminary protective hearing.

6. Review of ICWA Emergency Placement/ICWA Foster Care Placement Hearing

An emergency proceeding terminates by the initiation of an ICWA-defined child custody proceeding, transfer of jurisdiction to the appropriate tribe, or restoration of the child to the parent or Indian custodian. 25 C.F.R. § 23.113(c). An emergency placement should not last longer than 30 days unless the court finds that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, the court has been unable to transfer jurisdiction to the appropriate Indian tribe, and initiating an ICWA-defined child custody proceeding has not been possible. 25 C.F.R.

§ 23.113(e). Hence, if the court has ordered emergency removal of an Indian child, then the court should set a foster care placement or review of emergency placement hearing within 30 days. *See* **ICWA fact sheet**.

TIP Given the time-limited nature of ICWA's emergency placements or removals, it is important to promptly initiate an ICWA-defined child custody proceeding in any case involving the out-of-home placement of an Indian child (or when there is reason to know the child is an Indian child). As ICWA sets forth strict notice requirements and time frames for child custody proceedings and foster care placements must be supported by testimony from a qualified expert witness, *see* **ICWA fact sheet**, it is important that GALs supporting continued out-of-home placement immediately begin working to identify a qualified expert witness and ensure timely notice to all identified tribes.

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 Family Safety Assessment and Colorado Family Risk Assessment tools).
- ❑ Review relative affidavit. Confirm county's diligent search for relatives and kin; independently conduct additional investigation as necessary.
- ❑ Investigate potential placements or visit hosts/supervisors.
  - ❍ 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 sibling visits are taking place.

- Consult with child in a 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 and whether child would like to attend court.

- ❑ Interview caregiver(s). Inquire about medical and dental care, school enrollment, academic needs and attendance, behavior, and special needs.
- ❑ Observe visits or interactions between child and respondent(s). Ensure that 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 parents (if unrepresented) regarding their 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).
- ❑ Advocate for elimination and/or mitigation of barriers impeding child's participation in court.
- ❑ Formulate position on adjudication, treatment plan, and visits.
- ❑ Assess whether any additional information provides reason to know the child is an Indian child.
  - Confirm compliance with ICWA notice requirements.
- ❑ Determine, for UCCJEA compliance purposes, 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.

DURING

- ❑ Determine whether notice was sent to parties, CASA, and caregivers.
- ❑ Actively participate in settlement discussions.

- Address all areas in OCR Court Observation Form, including advocating for a position and informing 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 an advisement was not previously given or waived, 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 applicable:
  - Placement.
  - Services for family.
  - Parentage.
  - Indian heritage (ICWA) and notice.
  - Visits with respondents, siblings, relatives, and other appropriate persons.
  - School placement and transportation, if needed.
  - Any other necessary orders.
  - Setting next hearing(s).
  - UCCJEA jurisdictional issues.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

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. Calendar deadlines from the orders and plans.
- ❑ Request social worker be assigned to case by ORPC if indicated.
- ❑ Complete thorough and independent investigation.
  - ❍ Retain expert witness(es) as indicated. Request approval from ORPC as soon as possible.
  - ❍ Review related court files (domestic relations, restraining orders, paternity/child support, guardianship, juvenile delinquency, immigration, criminal, prior D&N, etc.).
  - ❍ Obtain and review discovery (e.g., TRAILS records, investigation report, the Colorado Family Safety Assessment and Colorado Family Risk Assessment tools).
  - ❍ 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; request funds for investigator to assist if necessary.
  - ❍ Take depositions if needed, and request approval for discovery costs from ORPC.
- ❑ Meet with client.
  - ❍ Advise client about rights to go to trial.
  - ❍ Discuss accuracy and completeness of information in petition.
  - ❍ Inquire about position regarding truth of allegations.
  - ❍ Discuss desired outcomes and direction of litigation.
  - ❍ Discuss alternative strategies and probable outcomes.
  - ❍ Discuss potential placements and or visit hosts/supervisors.
  - ❍ Inquire about legal parentage (maternity/paternity).
  - ❍ Inquire about collateral cases such as prior custody, immigration, or criminal cases.
  - ❍ Review upcoming dates.
- ❑ If client is in custody, visit client and ensure client is either transported or appears by telephone for the hearing.
- ❑ Prepare client for court hearing. Discuss possible settlement options. Prepare for admission if anticipated, including thorough

advisement. Discuss witnesses and exhibits in preparation for trial if anticipated.

- ❑ Identify any pretrial motions that need to be filed; prepare and file motions in compliance with case management orders.
- ❑ Identify whether client needs or wants any evaluations or referrals for services prior to disposition.
- ❑ Have client sign release of information forms authorizing disclosure to you. Discuss release of information forms requested by 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 safety plan and return home.
- ❑ Assess department's efforts to locate and place child with relatives/kin or other appropriate persons.
- ❑ Ensure regular visits are scheduled and occurring if child is placed out of the home. Identify and address issues with transportation to scheduled visits. Advocate for telephone 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.
- ❑ Set for trial if requested by client.
- ❑ 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 provide copy to the client.
- ❑ Monitor compliance with court orders.
- ❑ Set meeting with client to prepare for the next hearing.
- ❑ If client made admission, advise client about appeal rights, and obtain appellate waiver or submit appellate transmittal form.

BLACK LETTER DISCUSSION AND TIPS

The time between the preliminary protective hearing 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 preliminary protective hearing itself, the hearings that take place between the preliminary protective hearing and the adjudicatory hearing are generally the first opportunities 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 simul-taneously preparing for a possibly contested adjudication hearing and investigating appropriate placement, services, visits, and sup-ports for the child and parent.

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, in addition to possible motions practice at this stage in the D&N court process, will be discussed below. 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 occur 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 identify 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 REQUIREMENTS

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).

Pretrial hearings, while part of a child custody proceeding as defined by ICWA, do not represent the commencement of a new child custody proceeding. *See* **ICWA fact sheet**. While neither ICWA's statutory scheme nor the 2016 ICWA Regulations require notice to be sent regarding each individual hearing within a proceeding, a change of the child's placement, or a change to the child's permanency plan or concurrent plan, the 2016 ICWA Guidelines recommend that state agencies and/or courts provide notice to tribes and Indian custodians of those events. 2016 ICWA Guideline D.1; *see* **ICWA fact sheet**.

TIP Pretrial hearings provide an important opportunity to monitor compliance with ICWA's notice provisions. Counsel should ensure that the court receives any additional information providing reason to know or believe that a child is an Indian child, that all required notices have been sent, and that proof of notice has been filed. *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 hearing. 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 hearing and the adjudicatory trial, the court may also address 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 efforts findings at this hearing. § 19-1-115(6.5). If the child is an Indian child or there is reason to know the child is an Indian child, the court should make findings that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and, if the child is in foster care placement, that these efforts have proven unsuccessful. *See* 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120 (requiring active efforts to be documented in detail in the record); **ICWA fact sheet**.

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 provided by 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 discussion of ground rules for mediation/settlement discussions, the department's attorney typically starts by briefly covering the allegations, 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 discussed at 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, facts relating to the allegations, and the child's/client'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 possibilities for a preliminary treatment plan are also important, because these topics 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 at 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 decides not to pursue its case and plans to withdraw or dismiss it, as 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, 1034 (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.*; C.R.E. 408(a)(2).

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. Other districts proceed by having the parent file a written admission following the settlement conference 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. Foster Care Placement Hearings Pursuant to ICWA

When foster care placement of an Indian child (or a child for whom there is reason to know the child may be an Indian child) is sought, but the timing of the preliminary protective hearing did not allow the notice required by ICWA, a foster care placement hearing may occur between the preliminary protective hearing and the adjudicatory hearing. *See* **ICWA fact sheet**. At this hearing, the court will need to assess compliance with ICWA's foster care placement notice provisions and determine whether the evidentiary burdens applicable to foster care placement have been met. *See Id.*

TIP If the court ordered emergency placement of an Indian child at the preliminary protective hearing, the emergency placement must terminate within 30 days unless the court finds that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, the court has been unable to transfer jurisdiction to the appropriate Indian tribe, and initiating an ICWA-defined child custody proceeding has not been possible. *See* 25 C.F.R. § 23.113(e); **ICWA fact sheet**. Pretrial hearings provide an opportunity for the court to review emergency placements, enter appropriate findings and orders regarding emergency placements, and address any barriers to the initiation of an ICWA-compliant child custody proceeding.

5. 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. 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. As a result of the independent investigation during this stage of the proceeding, counsel may identify a need for amendments to the protective and placement orders entered at the preliminary protective hearing. For example, a suitable relative placement may be located, a visit host who supports 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 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 may access sample motions and orders in the OCR's Litigation Toolkit at **www.coloradochildrep.org**.

TIP RPC should consider consulting with ORPC staff about trial strategy, motions practice, and potential expert witnesses. RPC may also access sample pretrial motions in the ORPC motions bank. To access the ORPC motions bank, RPC must contact the ORPC.

b. Motions relating to the adjudicatory hearing. If a case is set for a contested adjudication hearing, both GALs 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.C.P. 1.2, C.R.C.P. 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. RPC must also comply with practice standards in CJD 16-02, including meeting with clients, advocating for visitation, conducting independent investigations, and preparing for hearings. GALs must fulfill the duties outlined in CJD 04-06, including conducting timely visits with the child in placement, maintaining contact with the child, and consulting with the child in a developmentally appropriate manner. The information obtained from CJD 04-06's other initial investigative requirements—such as observations of visits with parents, interviews with parents, and firsthand information from schools, treating professionals, and other individuals involved in the child's life—will also assist the GAL in building rapport with the child.

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 hearing 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 complete a diligent search for grandparents, adult relatives, and parents of siblings within 30 days. 12 CCR 2509-4: 7.304.52(A)(1)–(2). *See* **Family Finding / Diligent Search fact sheet**. The GAL is required to confirm the department has conducted a diligent search or to personally conduct one. CJD 04-06(V)(D)(4)(f). 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. 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/supervisors. *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 § 19-7-204 requires the department to arrange visits between siblings if a sibling makes a 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*, **SEE COMMENT 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 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, 214 (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."

Counties, particularly the large metropolitan counties, often have standard protocols in place for the parties to exchange informa-

tion. Many even have "open file" policies, where counsel may 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. § 19-1-303, and C.R.S. § 19-1-307(2). 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, the Colorado Family Safety Assessment tool must be completed within 14 days. 12 CCR 2509-2: 7.104.14(G). The completed Colorado Family Risk Assessment tool must be documented in the state automated case management system within 30 days of referral. 12 CCR 2509-2: 7.107.24(A). The caseworker's documentation regarding these instruments 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. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA

By the time of any pretrial hearing, counsel will have been able to investigate the existence of any child custody actions or orders in other states. Counsel must provide such information to the court. § 14-13-109(1). In the companion cases of *People in Interest of S.A.G.*, 487 P.3d 677 (Colo. 2021), and *People in Interest of B.H.*, 488 P.3d 1026 (Colo. 2021), the Colorado Supreme Court provided substantial guidance to practitioners and juvenile courts in determining whether Colorado has jurisdiction under the UCCJEA, and what steps juvenile courts must take to resolve jurisdictional questions. *See* **Jurisdictional Issues fact sheet**.

8. 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.**EXTREME FAILURE BY RPC

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.

9. 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**.

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 derivatively 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 as part of a treatment plan or a protective order. 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, 656–59 (Colo. 1987) (addressing protective orders preventing the questioning of parents regarding alleged criminal acts and prohibiting the use of statements made during treatment).

10. Psychotherapist-Patient Privilege

Children in D&N proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child's interests are adverse to those of his or her parents. *See id.* at 945, 950.

Information protected by the privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *See id.*; **Children's Psychotherapist-Patient Privilege fact sheet**.

TIP GALs must ensure that the court has made a ruling on the holder of the privilege prior to the discovery or introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advocate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950–52 (setting forth waiver procedures and considerations).

11. Paternity

The juvenile court has exclusive, continuing jurisdiction to determine paternity during an ongoing D&N proceeding and may not rely on paternity findings issued by other courts during the pendency of the proceeding. *See People in the Interest of D.C.C.*, 2018 COA 98. While the juvenile court may join a paternity action with the D&N proceeding, the juvenile court must follow the procedures outlined in the Uniform Parentage Act (UPA) in order to have subject matter jurisdiction to decide paternity. See *People in the Interest of N.S.*, 2017 COA 8, ¶¶ 19–26; *People in the Interest of J.G.C.*, 318 P.3d 576, 578–80 (Colo. App. 2013). Failure to comply with the UPA notice provisions outlined in § 19-4-110 will deprive the court of subject matter jurisdiction to determine paternity. *N.S.*, 2017 COA 8, ¶¶ 19–26; *J.G.C.*, 318 P.3d at 578–80.

In *People in Interest of K.L.W.*, 492 P.3d 392, 397, 402 (Colo. 2021), the Colorado Court of Appeals held that the UPA does not allow a court to recognize more than two legal parents for a child, and that the juvenile court should have applied a preponderance of the evidence standard of proof, rather than a clear and convincing standard when weighing competing presumptions under the UPA.

TIP The time period before an adjudicatory hearing is a critical stage for finding noncustodial parents and including them in the case. *See* **Family Finding / Diligent Search fact sheet**. 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. 12 CCR 2509-4: 7.304.52(A)(1)–(2). Counsel should ensure this process is happening.

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 Procedures fact sheet**. In a non-EPP case, the dispositional hearing should be set within 45 days. *Id.*; *see also* **Dispositional Hearing chapter** (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).

****EXTREME FAILURES****

RPC may request funding for experts from ORPC to evaluate clients prior to the dispositional hearing to help tailor successful services for a family. Even if a parent makes an admission to a petition, RPC may request a contested dispositional hearing.

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 the following:
  - ❍ 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.
  - ❍ Assess whether the petition includes all allegations or needs to be amended.

- 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.
  - If privilege holder for child, assess whether waiver of privilege is in child's best interests. Consult with child regarding waiver and seek court orders regarding limited waiver if necessary.
- 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 trial notebook.
  - Draft opening statement.
  - Prepare direct examinations.
  - Prepare cross-examinations.
  - Prepare *voir dire* for all endorsed expert witnesses.
  - Outline closing argument.
  - Prepare caselaw and rules for anticipated objections and evidentiary issues.
  - Prepare documentary exhibits for trial in accordance with case management order.
- Prepare *voir dire* questions, if needed.

- ❑ Prepare jury instructions, if needed.
- ❑ Ensure that any applicable inquiries and conferences necessary to establish court's jurisdiction under the UCCJEA have been finalized.
- ❑ Ensure that ICWA inquiries have been made and, if applicable and to the extent possible, that ICWA notices have been sent.

DURING

- ❑ Be aware of the law and applicable burdens of proof.
- ❑ Actively participate in trial and ensure record is complete.
  - ❍ Engage in *voir dire*.
  - ❍ Make opening statement.
  - ❍ Examine witnesses.
  - ❍ Make arguments and appropriate objections.
  - ❍ Finalize and deliver closing statement.
- ❑ Ensure record is preserved to raise or defend any appellate issues. 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 the following:
  - ❍ 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.
- ❑ Ensure any additional information providing reason to know the child is an Indian child is provided to the court.

- ❑ Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by the court. Seek modification of privilege holder as appropriate.

AFTER

- ❑ Communicate with the child in a developmentally appropriate manner to explain court rulings and process, 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.
- ❑ Ensure court enters a written adjudication order and review court order for accuracy.
- ❑ File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.

ADJUDICATORY HEARING CHECKLIST—RPC

BEFORE

- ❑ Meet with client well ahead of hearing and as often as indicated to prepare client for hearing.
- ❑ 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.
- ❑ If client is in custody, visit client and ensure client is either transported or appears by telephone for the hearing.
- ❑ Complete thorough and independent investigation.
  - ❍ Retain expert witness(es) as indicated. Request approval from ORPC as soon as possible.
  - ❍ Review related court files (domestic relations, restraining orders, paternity / child support, guardianship, juvenile delinquency, criminal, prior D&N, etc.)
  - ❍ 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, TRAILS reports, safety and risk assessments, and caseworker notes.
  - ❍ Interview potential witnesses; request funds for investigator to assist if necessary.
  - ❍ Take depositions if needed, and request approval for discovery costs from ORPC.
  - ❍ Assess and formulate position on:
    - ■ Strength of evidence supporting each allegation, especially whether there is a nexus between the alleged behavior and risk of harm to the child.
    - ■ Parent's protective capacity as it relates to the allegations and whether any in-home services could alleviate the alleged safety risks.
    - ■ 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.

- ❑ Ensure legal parentage (i.e., maternity, paternity) or legal custodian status (i.e., guardianship, allocation of parental responsibilities, etc.) has been established as to your client prior to the hearing.
- ❑ Review case management order and ensure compliance with order.
- ❑ Negotiate with counsel and GAL as indicated.
- ❑ Determine what evidence you will proffer during hearing.
  - ❍ Evaluate the need for expert testimony and documentary evidence.**EXTREME FAILURE**
  - ❍ 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, child hearsay, pretrial statement).
- ❑ Respond to all motions filed.
- ❑ Prepare trial notebook:
  - ❍ Draft opening statement.
  - ❍ Prepare direct examinations.
  - ❍ Prepare cross-examinations.
  - ❍ Prepare *voir dire* for all endorsed expert witnesses.
  - ❍ Outline closing argument.
  - ❍ Prepare caselaw and rules for anticipated objections and evidentiary issues.
  - ❍ Prepare documentary exhibits for trial in accordance with case management order.
- ❑ Prepare *voir dire* questions, if needed.
- ❑ Prepare jury instructions, if needed.
- ❑ Ensure that any applicable inquiries and conferences necessary to establish court's jurisdiction under the UCCJEA have been finalized.

DURING

- ❑ Be aware of the law and applicable burdens of proof.
- ❑ Actively participate in trial and ensure record is complete.
  - ❍ Make opening statement.

- Examine witnesses.
- Make arguments and appropriate objections.
- Ensure all potential appellate issues are preserved during trial.
- Consider motion to dismiss after the department's case.
- Finalize and deliver closing argument.

- 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.None. Even FCS verbalized this
  - Abuse or mistreatment.None. FCS/GAL/CA have refused investigation
  - Lack of proper parental care.None.
  - Injurious environment.None
  - Neglect.None
  - "No fault," i.e., the child is homeless, without proper care, or not domiciled with parents.Always have had housing and backup
  - Beyond control of parent.Never. Then only when FCS prevented & by lying
  - Testing positive at birth for a controlled substance.n/a
  - Identifiable pattern of habitual abuse of another child by the respondent.not even a little bit
- 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.
- Ensure any additional information providing reason to know the child is an Indian child is provided to the court.

AFTER

- Communicate and consult with client to explain court rulings and answer questions.
- Advise client about appeal rights, and obtain appellate waiver or submit appellate transmittal form.
- 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.**EXTREME FAILURE
- Request that caseworker meet with client to develop a treatment plan before the caseworker submits a treatment plan to the court.**EXTREME FAILURE
- 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 Interest of J.W.*, 406 P.3d 853, 859 (Colo. 2017); *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). "[T]he child's status as dependent or neglected establishes the court's continued jurisdiction over the child and permits state intervention into the family relationship to protect the child and to provide rehabilitative services. . . ." *J.W.*, 406 P.3d at 859. An adjudication order "vests the court with extensive and flexible dispositional remedies." *People in Interest of A.M.D.*, 648 P.2d 625, 639 (Colo. 1982).

TIP Because adjudication establishes the court's jurisdiction over the child, the determination whether to adjudicate a child dependent or neglected implicates the rights of parents and children. This area of the law is dynamic and evolving, and the Colorado Court of Appeals and Supreme Court decisions regarding the court's jurisdiction and the bases for adjudication often involve nuanced analysis of the unique factual circumstances of the case reviewed. This chapter identifies the cases relevant to each aspect of adjudication but cannot account for all potential implications of each decision. Counsel should carefully read the decisions in their entirety to analyze their implications for any given case.

TIP In *People in Interest of J.W.*, the Colorado Supreme Court considered whether the failure to enter a written order of adjudication after accepting the mother's admission to the petition deprived the juvenile court of jurisdiction to terminate parental rights. *J.W.*, 406 P.3d at 858. Rejecting the mother's argument that the court lacked subject matter jurisdiction because of this error, the Supreme Court distinguished subject matter jurisdiction from personal jurisdiction, explaining that subject matter jurisdiction pertains to a "court's authority to deal with a class of cases in which it renders judgment, not its authority to enter a particular judgment." *Id.* at 24. As the case at issue "unquestionably [fell] within the class of cases that a juvenile court may hear," the trial court had subject matter jurisdiction over the proceedings. *Id.* at 25. The Supreme

Court characterized the relevant question before it as "whether the court had jurisdiction *over the children* when it terminated the parent-child legal relationship." *Id.* (emphasis added).

Prior to *J.W.,* some Court of Appeals decisions considered adjudication necessary to establish the court's subject matter jurisdiction. *See, e.g., People in interest of A.H.*, 271 P.3d 1116, 1122–23 (Colo. App. 2011) (holding that the court's subject matter and personal jurisdiction terminated upon jury findings in father's favor, even though mother had entered an admission); *People in Interest of S.T.*, 361 P.3d 1154, 1156–57 (Colo. App. 2015) (holding that juvenile court lacked subject matter jurisdiction to allocate parental responsibilities after the father prevailed at adjudicatory hearing and that it was error for the court to maintain jurisdiction based on mother's admission). While it is possible that the reasoning of those decisions would stand regardless of whether they turned on a subject matter jurisdiction or "jurisdiction over the child" analysis, this remains to be determined.

The distinction between subject matter jurisdiction and personal jurisdiction has clear implications for the timing of when challenges to the court's jurisdiction must be made. Lack of subject matter jurisdiction may be raised at any point during the proceeding (*see, e.g., S.T.*, 361 P.3d at 1156), but challenges to personal jurisdiction are waived if not raised in a timely manner. *See* C.R.C.P. 12(h); **Appeals fact sheet**.

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.****EXTREME FAILURE- 7months, no contestation, despite my repeated sounding alarm and protest**

The Children's Code provides that an adjudicatory hearing must occur within 90 days of service of the petition. § 19-3-505(3). An adju-dicatory 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 sched-ule 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 ting the delay. § 19-3-104.

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

TIP

In *People in the Interest of A.W.*, 363 P.3d 784, 787 (Colo. App. 2015), a division of the Court of Appeals noted that CJD 96-08's manifest injustice standard may at times conflict with § 19-3-505(3)'s "best interests of the child" standard for granting continuances. However, the division concluded that the court did not abuse its discretion under either standard when it denied the respondent mother's request for a continuance based on the unavailability of a witness when the mother failed to meet her burden of demonstrating due diligence to procure her witness's presence. *See id.* at 788.

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 Adams County*, 520 P.2d 742, 745 (Colo. 1974) (stating that the failure to hold a temporary custody hearing according to time frames does not deprive court of jurisdiction).

**EXTREME FAILURE; SEE COMMENT

NOTICE REQUIREMENTS

All parties, including GALs and tribes that have intervened in the proceeding, 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 and/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).

The adjudication hearing itself, while part of a child custody proceeding as defined by ICWA, does not represent the commencement of a new child custody proceeding. *See* **ICWA fact sheet**. While neither ICWA's statutory scheme nor the 2016 ICWA Regulations require notice to be sent to each identified tribe regarding each individual hearing within a child custody proceeding, the 2016 ICWA Guidelines recommend that state agencies and/or courts provide notice to tribes and Indian custodians of those events. 2016 ICWA Guideline D.1; **ICWA fact sheet**.

TIP Although notice of the hearing itself may not be required, it is important to confirm that all ICWA inquiry and notice requirements applicable to the commencement of a child custody proceeding are met prior to the adjudication hearing. *See* **ICWA fact sheet**. Otherwise, counsel faces the risk that the adjudication may be overturned on appeal.

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). However, C.R.C.P. 26, applying to disclosure and discovery, 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. 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 21 days of its filing. C.R.C.P. 15(a) (establishing a 21-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 shall continue the hearing on the motion of any interested party and may continue the hearing if it finds that doing so is in the best interests of the child or any other 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 If the GAL has obtained additional information about the status of the child relevant to the adjudicatory hearing, the GAL should ensure that the department amends the petition sufficiently in advance of trial in order to avoid delay of the adjudicatory hearing.

3. 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. *E.A.*, 638 P.2d at 282. *See* **Appeals fact sheet**.**EXTREME FAILURE - rpc took this to mean she was incapable of protesting for district review, rehearing, reconsideration, esp when it was a summary judgement, had submitted no affidavit/evidence, & she was "out of country"

509. 19-1-109(1) authorizes an appeal from any final judgement in D&N proceeding. See *R.S. v. G.S.*, 416 P.3d 905, 914 (Colo. 2018). While a "no adjudication" order dismissing the proceeding in its entirety would constitute a final judgment, an order dismissing just one parent from the proceeding does not. *Id.* 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).

Counsel should ensure the court issues a written, dated, and signed order. *See* C.R.C.P. 58(a).

TIP RPCs who are appointed for clients after a client has been adjudicated by default or adjudicated at a hearing at which they were not present or represented by counsel should investigate the circumstances of the adjudication and advise the client regarding any right to appeal or to request the court reconsider the adjudication. Respondent Parents will likely not be able to raise appellate issues regarding adjudication on appeal of a termination order. *See* A.R. v. D.R., 456 P.3d 1266, 1277 (Colo. 2020). As a result, it is crucial that RPCs appointed post-adjudication act swiftly to investigate and advise the client so that any claims the client may have are not waived and the case is not delayed. If appointed in such circumstances, RPCs should consider requesting the assistance of an investigator and/or requesting discovery. **EXTREME FAILURE

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 seven days after the parties have received notice of the mag-istrate's ruling. § 19-1-108(5.5).**INCREDIBLE FAILURE

ADJUDICATION PRINCIPLES AND IMPLICATIONS

The following adjudication principles and implications of adjudication provide a framework analyzing the procedural means for resolving adjudicatory issues and the required findings for adjudication.

1. Focus on the Child's Status

The Colorado Supreme Court has repeatedly held that, consistent with the Children's Code's emphasis on the best interests of children, the adjudication determination relates to the status of the child. *See, e.g., A.M.D.*, 648 P.2d at 639; *K.D. v. People*, 139 P.3d 695, 699 (Colo. 2006); *S.N. v. S.N.*, 329 P.3d 276, 280 (Colo. 2014); *People in the Interest of J.G.*, 370 P.3d 1151, 1162–63 (Colo. 2016).

Because adjudication relates to the status of the child, the primary focus at the adjudicatory hearing is not necessarily a parent's conduct or condition. *J.G.*, 370 P.3d at 1162–63. Whether a parent's conduct or condition is relevant at the adjudication hearing depends on which statutory basis for adjudication the department or GAL pursues. *Id.* When a statutory ground references parental conduct, the adjudication must be based on findings or admissions related to those actions or omissions. *Id.* When a statutory basis does not reference the actions or omissions of a parent, parental conduct, while relevant to the treatment plan, is not relevant to adjudication. *Id.*

TIP Several Colorado Court of Appeals decisions establish that each parent is entitled to an adjudicatory trial and that one parent's admission cannot furnish the basis of adjudication of the child "as to" the other parent. *See* **Admissions subsection**, *infra.* When the basis for adjudication rests on the statutory grounds not specifically related to actions or omissions of the parent (injurious environment and no fault), *see* **Required Findings / Bases for Adjudication subsection**, *infra*, these decisions should not be read to impose a substantive requirement that adjudicatory findings must relate to acts or omissions of the parent electing to exercise his or her right to trial. *See J.G.*, 370 P.3d at 1162–63; *People in Interest of M.M.*, 2017 COA 144, ¶¶ 22–24 (Colo. App. 2017) (holding that the father's statements regarding children's status while

under the mother's care supported the juvenile court's adjudication, by summary judgment, of the children under § 19-3-102(1)(c) and (e)).

TIP A respondent parent wishing to preserve the right to go to trial may consider objecting to a no-fault or injurious environment admission by the other parent(s), since the other parent's admissions may be dispositive of the adjudicating issue. *See, e.g., J.G.*, 370 P.3d at 1162–63 (Colo. 2016); *M.M.*, 2017 COA 144.

2. Troxel Presumption

In *Troxel v. Granville*, the United States Supreme Court held that Washington state's overbroad grandparent visitation statute, as applied to the facts of the case, violated the mother's due process rights. *Troxel v. Granville*, 120 S. Ct. 2054, 2056 (2000). In doing so, the Court announced a "presumption that fit parents act in the best interests of their children," along with requirements that judicial review of a fit parent's decision "must accord at least some special weight to the parent's own determination" and that "special factors" must "justify the State's interference" with a parent's fundamental right to make decisions regarding the rearing of their children. *Id.* at 2061–62.

Since the *Troxel* decision, Colorado courts have grappled with whether these constitutional principles require specific findings to adjudicate a child dependent or neglected and whether and how the adjudication of a child as dependent or neglected impacts a presumption of parental fitness.

a. **Required findings for adjudication.** In *J.G.*, the Colorado Supreme Court held that *Troxel* does not require findings of a parent's lack of availability, fitness, and willingness or findings as to parental fault at the adjudication stage. *J.G.*, 370 P.3d at 1160, 1163. Overturning a Court of Appeals decision to the contrary, the Supreme Court stated that the appellate division had "extend[ed] *Troxel* beyond its holding" and reasoned that the Children's Code provided sufficient statutory protections for parents' due process rights at the adjudication stage. *Id.* at 1159.

b. ***Troxel* implications of adjudication order.** In rejecting the need for specific findings of unfitness at the adjudication stage, the Colorado Supreme Court in *J.G.* reasoned that "the special factor warranting the State's intervention is the children's injurious environment." 370 P.3d 1151. Because injurious environment does not require a finding as to parental fault, "parental conduct and

condition is relevant to the treatment plan rather than the adjudication." *Id.* at 1160.

TIP

In *People ex rel. N.G.*, a division of the Colorado Court of Appeals considered whether the *Troxel* presumption of fitness survived the entry of a deferred adjudication in a case in which a parent had entered a no-fault admission but later requested an evidentiary hearing on the status of the children. *People ex rel. N.G.*, 303 P.3d 1207, 1215 (Colo. 2012). Reasoning that "each parent is constitutionally presumed to be a fit parent capable of making decisions in the best interests of the child, unless and until the court has found that the child was (or would be) dependent or neglected in the parent's care," the court regarded the entry of a deferred adjudication as a postponement of a final determination of whether the child was dependent or neglected. *Id.* at 1213. The court held that a parent subject to a deferred adjudication is entitled to request an evidentiary hearing, at which "such a parent will usually enjoy the constitutional presumption that a fit parent makes decisions which are in his or her child's best interests." *Id.* at 1210.

N.G. decision identified many case-specific factors supporting its determination that the father's admission and entry of the deferred adjudication had not overcome the *Troxel* presumption, including that the magistrate did not address *Troxel* implications, the father neither expressly or impliedly waived his right to the presumption of fitness, and the deferral agreement was silent about *Troxel*. *See N.G.*, 303 P.3d at 1219. While the extent to which the *N.G.* court's reasoning survives the *J.G.* decision remains to be determined, to avoid later litigation regarding the *Troxel* implications of any stipulated deferred adjudication order, counsel should advocate for such stipulations to clearly state the parties' agreement regarding the ongoing presumption of fitness.

Findings regarding fitness are not static and may change over the course of the case. In *People in Interest of N.G.G.*, 459 P.3d 664 (Colo. App. 2019), the Colorado Court of Appeals determined that a parent was entitled to a *Troxel* presumption as a fit parent after she successfully completed her treatment plan and was awarded primary allocation of parental responsibilities. *See also People in Interest of J.G.*, 486 P.3d 504, 509-10 (Colo. App. 2021).

TIP RPC should consider whether a parent has become fit after entry of adjudication and consider filing a motion to determine fitness of the parent if parental fitness is an outcome determinative factor in an upcoming proceeding. GALs should also consider whether a parent is entitled to a *Troxel* presumption when making recommendations regarding APR and grandparent visitation.

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 Hearing 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 because 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 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. When clients are facing criminal charges, RPC should collaborate with defense counsel when advising clients about trial. RPC should collaborate with the defense attorney to ensure the decisions regarding visits and contact with the children is decided by the D&N court—not the criminal court.

TIP Regardless of the procedural means used to resolve the adjudication, the GAL should advocate for the court record supporting the adjudication to clearly and accurately state the facts supporting the adjudication. This record helps all parties understand the safety risks justifying the court's jurisdiction, informs treatment planning and future decisions regarding the disposition of the child, and facilitates informed and targeted review of case progress. *See* Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guidelines IV(B) at 180, IV(C) at 182, and IV(H) at 190 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016), *available at* **https://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf**.

Additionally, the GAL should ensure that written adjudication orders are entered in a timely manner. Such orders provide a clean record of the factual basis sustaining the court's adjudication and prevent future arguments and prolonged litigation. *See, e.g., J.W.*, 406 P.3d at 859 (upholding termination despite failure to enter written order but analyzing whether the circumstances presented in the record indicated that the court's failure to enter an adjudicative order after accepting the mother's admission impaired the fundamental fairness of the proceedings or deprived the mother of due process).

TIP In order to have subject matter jurisdiction over any custody decisions concerning a child, the court must have jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). Counsel should ensure the resolution of all questions regarding the

court's jurisdiction under the UCCJEA and the fulfillment of all UCCJEA inquiry and consultation obligations prior to entering an order of adjudication. *See* **Jurisdictional Issues fact sheet**.

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, 1225–26 (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, evidentiary aids such as a list of common objections and a hearsay "cheat sheet," 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.* In *People in the Interest of J.J.M.*, a division of the Colorado Court of Appeals clarified that while this rule allows the GAL and department each three peremptory challenges, all respondents must share the three challenges allocated to respondents. *People in Interest of J.J.M.*, 318 P.3d 559, 561 (Colo. App. 2013). The court also held that the rule does not give the trial court discretion to increase the number of peremptory challenges given to each respondent or to decrease the number of challenges given to the department and the GAL. *Id.* In *People in Interest of R.J.*, 2019 COA 109, the Court of Appeals held that a juvenile court's exercise of peremptory

challenges that the GAL had not used did not require reversal when the court's explanations for its challenges did not suggest bias, parents' counsel did not object, and the parents on appeal did not articulate how the court's actions undermined the fundamental fairness of the proceedings or otherwise prejudiced parents.

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 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. By the end of the *voir dire*, the jury should be able to articulate the case theory for each party to the case.

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 ver-

dict. *See* C.R.C.P. 59 and 60. *See, e.g., A.W.*, 363 P.3d at 789–90 (holding that juvenile court did not abuse its discretion in denying motion for a new trial when respondent parent did not file an affidavit as required by C.R.C.P. 59(d)(1)).

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, and 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, motions, and other litigation forms and resources through the Litigation Toolkit on OCR's website (**www.coloradochildrep.org**). RPC may access jury instructions specific to D&N cases through ORPC-supplied Westlaw and motions and other forms from the ORPC Motions Bank.

Counsel should ensure that any instructions the court gives the jury are in compliance with the Civil Rules and constitutional due process and fundamental fairness considerations. In *People in Interest of M.H.K.*, 2018 COA 178, a division of the Court of Appeals held that a juvenile court erred in reading detailed allegations from the petition in its introductory remarks to the jury trial, reversing the judgment and remanding the case for a new adjudicatory trial.

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). However, failure to appear at the jury trial alone does not constitute a failure to defend supporting the entry of a default adjudication under C.R.C.P. 55(b). *See* **Default Adjudications subsection**, *infra*.

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)(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 Despite this caselaw, it is better practice to present evidence supporting the adjudication through traditional evidentiary means. Doing so will prevent later issues and delays in the event the adjudication is appealed.

TIP It is important for counsel to anticipate and resolve as many evidentiary issues as possible in advance of trial. Knowing what evidence is admissible and what evidence may be excluded promotes competent trial preparation. *See* **Pretrial Hearing chapter** (discussing motions 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, evidentiary aids such as a list of common objections and a hearsay "cheat sheet," and at least a skeletal outline for anticipated closing argument.

3. Default Adjudications

A default adjudication is only appropriate when proof of notice is established, followed by a failure to plead or otherwise defend. C.R.C.P. 55(a)–(b). *See In Interest of K.J.B.*, 342 P.3d 597 (Colo. App. 2014) (holding that nonappearance at an adjudicatory trial alone does not constitute a failure to defend under C.R.C.P. 55(b) and that the court erred in entering a default judgment against mother who had actively participated in the proceeding but who had failed to

appear for trial). When a party fails to appear for trial, the court may proceed with the adjudicatory hearing by receiving evidence in the party's absence and rendering judgment on the merits. *See id.* at 600.

TIP Given the difficulties defining failure to plead or otherwise defend in a D&N proceeding, counsel should establish a clear record of the evidentiary basis for adjudication supporting all default adjudication orders.

TIP When clients do not appear and parents are represented by counsel, RPC should object to an entry of default judgment. *See K.J.B.*, 342 P.3d at 600 (noting that mother had "participated in the proceedings through counsel, who had appeared on her behalf at every hearing, including the adjudicatory trial"). RPC must continue to advocate for their client's last known position, even in their client's absence. *See* Colo. Bar Ass'n, Ethics Op. 114: Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings, Oct. 14, 2006 (Mod. Jun. 19, 2010); *see also* CJD 16-02.

4. Summary Judgment

Summary judgment is a permissible method to adjudicate a child dependent or neglected. *See* C.R.C.P. 56; *People in Interest of S.N.*, 329 P.3d 276, 281–84 (Colo. 2014); *see also S.B.*, 742 P.2d at 938–39. However, summary judgment is a drastic remedy warranted only if the court finds "not only that the material facts are undisputed but also that reasonable minds could draw but one inference from them and that the moving party is entitled to judgment as a matter of law." *S.N.*, 329 P.3d at 282 (quotations omitted); *see also People in Interest of M.M.*, 2017 COA 144, ¶ 12; *In Interest of S.N.*, 338 P.3d 508 (Colo. App. 2014); *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). For adjudications based on prospective harm, summary judgment may be entered pursuant to traditional rules governing summary judgment, but the factual circumstances that justify its use in this situation are limited. *In Interest of S.N.*, 329 P.3d at 283–84.

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.*; *see also S.N.*, 329 P.3d at 282 (stating that the nonmoving

party cannot rely on pretense, apparent formal controversy, allegations or denials in pleadings, argument, or mere assertion of a legal conclusion to avoid summary judgment).

TIP Several Court of Appeals decisions hold that one parent's admissions cannot support summary judgment against the other parent. *See, e.g., U.S.*, 121 P.3d 326 (Colo. 1982) (holding that the father's admissions regarding fault of the mother were legally insufficient to sustain a motion for summary judgment against mother); *M.M.*, 2017 COA 144, ¶ 22 (sustaining summary judgment against the father not based on the mother's admission but on the father's own acknowledgment that children were in an injurious environment while in the mother's care). Recent caselaw holding that findings concerning the acts or omissions of the specific parent are not required for injurious environment or lack of proper parental care through no fault of the parent, *see* **Required Findings / Bases for Adjudication section**, *infra*, may result in more motions for summary judgment against a parent who has requested a jury trial when the other parent has admitted to one of these grounds as the basis for adjudication. Counsel seeking summary judgment under such circumstances should include supporting documentation that meets the requirements of C.R.C.P. 56. RPC can consult the ORPC Motions Bank for samples of summary judgment motions and responses.

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 D&N 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 D&N 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).

Because adjudication is to the status of the child, a parent does not have to be adjudicated to be at fault for the dependency 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, 627–28 (Colo. App. 1983).

Several Court of Appeals decisions analyze the implications of one parent's admission when the other parent requests an adjudicatory trial. These cases articulate the following principles:

- 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 or 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; *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).
- 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 A.H.*, 271 P.3d at 1121–23 (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) (D&N 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); *In Interest of N.G.*, 303 P.3d 1207, 1216 (Colo. App. 2012) (adjudication of the child "as to" the mother did not avoid the need for adjudication of the child "as to" the father); *In the Interest of S.T.*, 361 P.3d 1154, 1156 (Colo. App. 2015) (holding that the juvenile court lacked subject matter jurisdiction to allocate parental responsibilities to grandparents after the father prevailed at an adjudicatory trial to the court, even though the mother had admitted that the child was dependent or neglected based on injurious environment). But see *R.S.*, 416 P.3d at 914 (not questioning trial court's decision to maintain jurisdiction after dismissing one parent).

TIP Some of these Court of Appeals decisions reference the court's subject matter jurisdiction. While the Supreme Court's decision in *J.W.* clarifies that the adjudication determination implicates the court's jurisdiction over the child rather than subject matter jurisdiction, *J.W.*, 406 P.3d at 858, the Court of Appeals decisions requiring dismissal do not necessarily rest on a subject matter jurisdiction analysis. However, as personal jurisdiction challenges are waived if not raised in a timely manner, to the extent that these decisions allow challenges to be raised late in the proceeding or on appeal, they should be read with caution. *See* tip in **Purpose of the Hearing section**, *supra.* Additionally, the procedural right to a hearing articulated by these cases should not be read to impose a substantive requirement that adjudication be made "as to" the parent. *See* **Focus on the Child's Status subsection**, *supra.*

- 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 may 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. RPC should likewise advise clients as to the implications of an agreement to treat all issues.

TIP Even if a parent enters into a written admission, RPC should ensure the court advises the parent prior to accepting the admission, not only to ensure the parent understands his or her rights but also to make appropriate inquiries to establish the admission is knowing and voluntary.

TIP Even a parent who makes an admission retains the right to appeal after disposition. If a parent enters an admission, RPC must continue to advise parents as to this right so the parent can appeal in the event of an irregularity in the admission or disposition. *See* **Appeals section** *in* **Dispositional Hearing chapter**.

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*

EPP Procedures 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).

TIP In *People in Interest of J.W.*, the Colorado Supreme Court held that the juvenile court's jurisdiction rests on the factual status of the child as dependent or neglected rather than the formal entry of the adjudication order. 406 P.3d at 859 (Colo. 2017). The court took care to state that this case did not involve a deferred adjudication. In *N.G.*, 303 P.3d at 1213, a division of the Court of Appeals characterized a continued adjudication as "postponement of a final decision of whether the child is or remains dependent or neglected, subject to presentation of additional evidence." Accordingly, the court held that because adjudication relates to the status of the child on the date of the adjudication, a parent who has entered into a deferred adjudication that is neither revoked nor expired is not barred by an earlier admission from requesting an evidentiary hearing. *N.G.*, 303 P.3d at 1210. At that hearing, the court must consider the child's current status, and relevant evidence may include "new" evidence incurred during the deferral period. *Id.* at 1213–14. The court also held that the *Troxel* presumption of fitness will ordinarily survive the entry of a deferred adjudication, particularly when the deferred adjudication is based on a no-fault admission. *Id.* at 1215. While *J.W.*'s impact on the *N.G.* decision remains to be resolved, deferred adjudication orders should clearly state whether they are intended to resolve the factual status of the child and impact the *Troxel* presumption of fitness. *See* **Adjudication Principles and Implications section**, *supra*.

TIP RPC must advise parents who enter into a deferred adjudication that they do not have a right to appeal, unless or until an adjudication and disposition are entered at a later date.

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* **EPP Procedures fact sheet**.

BURDEN OF PROOF

To adjudicate a child dependent or neglected, the court must find one of the bases set forth in § 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); *A.M.D.*, 648 P.2d at 639–40; *O.E.P.*, 654 P.2d at 316–17 (applying a 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). A finding that a child is dependent or neglected must be based on more than the mere possibility that a child is abused or neglected—the facts must be established by credible and admissible evidence. *People in Interest of D.M.F.D.*, 497 P.3d 14, 19 (Colo. App. 2021) (internal citations omitted).

TIP ICWA does not set forth a higher burden of proof for the adjudicatory hearing. *See* 25 U.S.C. § 1912; *People in the Interest of L.L.*, 395 P.3d 1209, 1217 (Colo. App. 2017). 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, born affected by alcohol or substance exposure where the infant's health or welfare is threatened by substance abuse, and habitual abuse of another child by the parent/guardian. Specific considerations for each of these criteria will be detailed below. Adjudication relates to the status of the child as of the date of adjudication. *J.G.*, 370 P.3d at 1163.

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). The child must be under the age of 18 at the time of the adjudication for the court to have subject matter jurisdiction. *In Interest of M.C.S.*, 327 P.3d 360, 361–62 (Colo. App. 2014). Evidence that child abuse or nonaccidental 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. *People v. Interest of T.T.*, 128 P.3d 328, 331 (Colo. App. 2005); *P.D.S.*, 669 P.2d at 628.

There is no distinction between findings of dependency and findings of 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; *see also S.N.*, 329 P.3d at 281. Evidence related to a parent's past treatment of other children or prior actions may be relevant to a determination of dependency or neglect based on prospective harm. *See A.W.*, 363 P.3d 784, 788–89 (Colo. App. 2015); *D.L.R.*, 638 P.2d at 42.

The possibility that court action, such as modification of a parenting plan, will ameliorate the situation does not mean that the children are not dependent or neglected. *M.M.*, 2017 COA 144, ¶ 11.

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 (1) 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 (2) 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 a parent providing for child's well-being by placing care in a trusted family member or friend, indicating the parent's proper concern for the child, from a parent leaving his or 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 reincarceration 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. *T.R.W.*, 759 P.2d at 771–72. 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 the 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).

Findings regarding parental fault are not necessary to adjudicate a child dependent or neglected under this ground. *See J.G.*, 370 P.3d at 1161. "[T]he focus of the inquiry is on the existence of an injurious environment rather than who caused it . . . a child may be dependent or neglected for reasons that are distinct from the parents' conduct or condition." *Id.* at 1162.

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). Similarly, a parental decision not to immunize a child on the basis of medical, religious, or personal belief considerations shall not be, on its own, the basis for a finding of abuse or neglect. § 19-3-103(3).

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 (Colo. 1982); *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). An adjudication under this provision "does not turn on parental fault, but instead looks only to whether the child is without proper care." *M.M.*, 2017 COA 144, ¶ 21. 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. Infant Threatened By Substance Use

In 2020, the Colorado legislature changed the provision that allowed a child to be adjudicated dependent or neglected solely on the basis

of testing positive for a Schedule I or II controlled substance. Now, if a child is born affected by alcohol or substances and the newborn's health or welfare is threatened by substance use, the infant can be determined dependent or neglected. If a mother is taking a drug as prescribed or recommended and monitored by a licensed healthcare provider, the child shall not be dependent or neglected based on this provision alone. § 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 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 these criteria, the county department must engage in concurrent planning to expedite the permanency planning process. § 19-3-312(5).

EVIDENTIARY ISSUES/CONSIDERATIONS

1. Applicability of Colorado Rules of Evidence

A contested adjudicatory hearing is a formal hearing at which standard evidentiary rules apply. *See, e.g., G.E.S.*, 2016 COA 183, ¶¶ 7, 28, 34 (holding that the juvenile court erred in admitting evidence that the father would not take a polygraph examination, that error was not harmless, and that the "prejudice to father was increased by the testimony of several witnesses improperly vouching for the victim's credibility"); *People in Interest of D.M.F.D.*, 497 P.3d 14, 19–20 (Colo. App. 2021) (holding that the Department's reliance on hearsay tes-

timony of two caseworkers which was not admitted for the truth of the matter was not sufficient to uphold an adjudication by preponderance of the evidence); *see also* **Hearsay in D&N Proceedings fact sheet**.

TIP In *People in Interest of D.M.F.D.*, 497 P.3d 14, 17 (Colo. App. 2021), the Court of Appeals held that that the department must introduce sufficient admissible evidence to meet its burden of proof that a child is dependent or neglected, and that the department cannot rest its case on hearsay or other evidence that, in response to a parent's objections, the court admitted for a limited purpose other than for the truth of the matter asserted. Additionally, the Court of Appeals determined that the court's reliance on a parent's criminal convictions without evidence of a connection to whether the parent could care for his child was likewise insufficient to support an adjudication. Thus, practitioners should strongly consider obtaining witnesses with firsthand knowledge of the facts in question rather than relying exclusively on hearsay testimony by caseworkers, even when such caseworkers are qualified as experts.

2. Inapplicability of Exclusionary Rule

The exclusionary rule does not apply to D&N cases because the societal cost of excluding relevant evidence does not outweigh the deterrent benefits of applying the rule. *A.E.L.*, 181 P.3d 1186, 1192.

3. Self-Incriminating Testimony

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). Parents testifying in a dependency and neglect proceeding have the right to the advice of counsel on a question-by-question basis to determine whether to assert their 5th Amendment privilege against self-incrimination *People in Interest of K.S-E.*, 497 P.3d 46, 54, 56 (Colo. App. 2021).

TIP RPC should consider the best way to protect their client's 5th Amendment right against self-incrimination and discuss arrangements with the court and parties in advance if their client is expected to testify. Counsel should give special consideration

to how to advise clients with disabilities or language barriers of their rights on a question-by-question basis. Arrangements might include requesting permission to remain next to the client at the witness stand or requesting recesses so that clients may be fully advised.

4. Psychotherapist-Patient Privilege

Children in D&N proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child's interests are adverse to those of his or her parents. *See id.* at 945, 950. Information that is protected by the privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *See id.* at 945, 950. Waiver of the privilege may be express or implied. *Id.* at 950; *see also* **Children's Psychotherapist-Patient Privilege fact sheet**.

TIP GALs must ensure that the court has made a ruling on the holder of the privilege prior to the introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advocate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950–52 (setting forth waiver procedures and considerations).

TIP When their client is not determined to be the privilege holder, RPC must ensure that assertions of privilege do not exceed its proper use. *See* **Children's Psychotherapist-Patient Privilege fact sheet**.

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 In re People in the Interest of Murley*, 239 P.2d 706, 709 (Colo. 1951); *Peterson v. Schwartzmann*, 179

P.2d 662, 663–64 (Colo. 1947). 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).

TIP RPC must advise their client about the collateral implications of confirmed TRAILS findings and, when a client prevails at adjudicatory trial, the necessity for clients to ensure the records have been expunged for employment and background checks.

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.
    - ■ Ensure the child's needs have been fully assessed and addressed, including physical, mental, emotional, developmental, health and dental, education, ability to participate in extracurricular and other age-appropriate activities, and general well-being.
    - ■ Ensure parenting time and contacts with relatives, kin, and siblings, as determined by the needs of the child.
    - ■ Determine whether the child is able to comply with the proposed orders and whether orders regarding the child are appropriate and necessary.
    - ■ Ensure each child has been consulted in the development of the child's treatment plan. Further, for children 14 years

of age or older, ensure they have been consulted and have been allowed to choose two members of the case planning team to assist them.

- 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 § 19-1-107(2.5).
- Conduct independent investigation and consider whether:
  - Services can be consolidated.
  - Any additional services are needed.
  - If family time/visitation is occurring in the appropriate environment and with the appropriate frequency.
  - 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 proper notice has been sent.
- Respond to motions filed by parties and intervenors, as appropriate.
- Contact the child and discuss the treatment plan in a developmentally appropriate manner.
  - Explain the components of the treatment plan and obtain the child's input and position regarding:
    - The child's perspective on the family's needs.
    - Proposed 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.

- Determine whether child wants you to report his or her position to the court and whether the child would like to attend court. Advocate for elimination and/or mitigation of barriers impeding child's participation in 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 any services necessary for a successful transition to adulthood, 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 need to proffer expert testimony and, if necessary, request approval from OCR.
  - Serve subpoenas on needed witnesses.
- Review respondents' compliance with interim services and get updates from service providers.
- Ensure parents were involved in the case plan or that efforts were made to engage the parent.
- Obtain information about family time and visitation services, and determine if they are sufficient or if any changes are recommended and review any available reports.
- Consider whether to seek placement change, service provider input, evaluations, visitation changes, sibling visitation or reunification, kinship placement, or interpreter services.
- Assess whether any additional information provides reason to know the child is an Indian child.

- ❑ 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. If the child appears, introduce the child to the court before stating the position.
- ❑ Ensure that any information providing reason to know the child is an Indian child is reported to the court and, if so, ensure compliance with ICWA's required notice provisions.
- ❑ Ensure the court:
  - ❍ 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.

- If the child/youth is in a QRTP, ensure the court engages in the review required by FFPSA and Colorado's implementing legislation.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.
- If the child is an Indian child or there is reason to know the child is an Indian child, seek finding on whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and, if the child is in foster care placement, whether these efforts have proven unsuccessful.

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

- ❑ Consider whether expert evaluation or testimony will promote a more successful treatment plan. If so, request the expert as early as possible from ORPC, and consider consulting with ORPC staff.
- ❑ 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 and 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 § 19-1-107(2.5).
  - ❍ Provides appropriate accommodations for a parent with a disability.
- ❑ 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, coworker, 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.
- If client is in custody, visit client and ensure client is either transported or appears by telephone for the hearing.
- Determine whether a contested or uncontested dispositional hearing will be necessary. If a contested hearing is needed, RPC should decline magistrate jurisdiction to eliminate the need for judicial review if an appeal is necessary.
- 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, visits in a less restricted setting, 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.
- If proceeding to a contested hearing, formulate position and litigation strategy and:
  - Issue subpoenas.
  - Exchange witness and exhibit lists.
  - Conduct witness interviews.

- Prepare trial notebook (including opening, direct and cross-examinations, law to support positions, closing).
- Comply with pretrial orders.

DURING

- Advocate client's position and proffer necessary evidence.
- Request orders to seal any mental health or substance abuse treatment reports or records that may be part of or attached to the dispositional report.
- Request protective orders preventing sharing of sensitive treatment and evaluation results with other parties or special respondents, as necessary.
- 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.
  - 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.
- If the child/youth is in a QRTP, ensure the court engages in the review required by FFPSA and Colorado's implementing legislation.
- 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

- Meet with client to explain court rulings and answer questions.
- Advise client about appellate rights, and obtain appellate waiver or submit appellate transmittal form to ORPC.
- 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.
- Discuss interim objectives with client (e.g., when should services begin, when should visits increase, etc.) and instruct client to contact you when appropriate.
- File necessary pleadings if pursuing rehearing, reconsideration, judicial review, or appeal.
- Set schedule for future meetings with client.
- Obtain court orders and review for accuracy and sufficiency. Provide client with copy of court orders.

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 an important hearing in the D&N proceeding, and if the case ultimately proceeds to termination of the parent-child legal relationship, failure to hold a dispositional hearing will result in reversal of the termination order. *See People in Interest of B.C.*, 2018 COA 45.

TIP The dispositional hearing is a critical time to ensure the family is getting individualized treatment and services and not just boilerplate treatment plans. These are the building blocks of reunification; they should be tailored to each family and appropriate for the individuals. Early engagement in services can help achieve success. In addition, it is important that the GAL and other professionals identify stable and supportive adults in the child's life to ensure the child remains in contact with family (including extended family) and other people important to the child.

TIP RPC should consider whether early expert testimony will promote a more successful, individualized treatment plan. RPC can request experts from ORPC but need to do so early in the case so as not to inordinately delay disposition.

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). Since each parent is entitled to their own adjudicatory process (*see* **Adjudicatory Hearing chapter**, *supra*), a dispositional hearing for a parent cannot take place until adjudication occurs for that parent.

The dispositional hearing may be held the same day as the adjudicatory hearing. § 19-3-508(1). It is the legislative intent that these 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. *See* §§ 19-3-508(1), 19-3-104; **EPP Procedures 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). 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).

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 D&N proceeding. § 19-3-104. *See* **EPP Procedures 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).

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. While it is 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. §§ 19-3-104, 19-3-505(7)(b), 19-3-508(1).

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 child nor the parent in a D&N 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. RPC should consider, if only portions of the treatment plan are objectionable, setting a hearing on only those issues that are contested and simply continue that portion of the hearing.

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 and 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 as well as available in the community where the child resides. If a parent has a disability, any identified accommodations and modifications must be listed in the report prepared for the dispositional hearing. *See* Section 19-3-507(1)(c); **Disabilities and Accommodations fact sheet**. § 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 sanctions may be imposed if such filing and service are not obtained. CJD 96-08(3).

TIP GALs serving as the holder of the child's psychotherapist-patient privilege should ensure that the caseworker's report does not contain privileged information and move to strike any such information contained in the report. The failure to do so may be construed as an implied waiver of the child's privilege. *See generally L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013); **Children's Psychotherapist-Patient Privilege fact sheet**.

TIP It is important that the GAL receive the dispositional hearing report in a timely manner as the treatment plan ordered by the court sets the framework for the entire case. The GAL must review the report for accuracy, ensure the treatment plan contains all services necessary to successfully reunite the family and is individually tailored to the unique needs of the child and family, and assess the ability of the family and child to comply with the expectations in the treatment plan. Additionally, the GAL must consult with the child regarding the proposed treatment plan and, for children 14 years of age or older, ensure the child was able to utilize two team members to assist them in the treatment planning process. *See* 42 U.S.C. § 675(1)(B); 12 CCR 2509-4: 7.305.2(A) and (C).

TIP RPC should continue their thorough and independent investigation and 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 RPC to review the report in advance of the hearing to confirm the accuracy of the information in the report and for 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 RPC 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. RPC 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 RPC to be sufficiently prepared for the hearing.

TIP In districts in which dispositional reports are not 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 effective cross-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 and tribes that have intervened, 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.

Unless combined with a termination hearing, *see* **No Appropriate Treatment Plan section**, *infra*, the dispositional hearing is not defined as a separate child custody proceeding under ICWA. *See* **ICWA fact sheet**. While neither ICWA's statutory scheme nor the 2016 ICWA Regulations require notice to be sent to all identified tribes regarding each individual hearing within a proceeding, the 2016 ICWA Guidelines recommend that state agencies and/or courts provide notice to tribes and Indian custodians of those events. *See* 2016 ICWA Guideline D.1; **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). If the child is an Indian child or there is reason to know the child is Indian child, a clear and convincing burden of proof will apply to some of the specific findings the court must make before ordering the child into foster care placement. *See* **ICWA fact sheet**.

Certain presumptions apply at the dispositional hearing. Before a disposition other than remaining with a parent or guardian can be made, the court must find by a preponderance of the evidence that a separation of the child from the parents or guardian is in the best interests of the child. § 19-3-508(2). There is a presumption that placement of siblings in a joint placement is in the best interests of

the children, which can be overcome by showing by a preponderance of the evidence that such placement is not in the best interests of a child or children. §§ 19-3-508(1)(c), 19-3-508(5)(b)(II).

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, 822–23 (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).

If the child is an Indian child or the court has reason to know that the child is an Indian child, any removal of the child must comply with either ICWA's emergency placement or foster care placement requirements, and any foster care placement must comply with ICWA's placement preferences. *See* **ICWA fact sheet**.

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 and, if the child is in foster care placement, the court must find that these efforts have proven unsuccessful. *See* 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120 (requiring active efforts to be documented in detail in the record); *see also* **ICWA fact sheet**.

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; protective orders; respite care or protective day care; the presence of an appropriate relative, kin, or neighbor in the home during key points of the day; and intensive in-home services, coaching, 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 out of the home. Child support orders may also allow a parent to obtain housing and financial stability supportive of an in-home placement. *See People in Interest of E.Q.*, 2020 COA 118 (holding that a juvenile court has subject matter jurisdiction to order child support over dependent and neglected children, and that the court must comply with the provisions for determining child support set forth in § 19-6-106 and the child support guidelines set forth in § 14-10-115).

TIP HB 18-1104 requires a court to find, when a parent's disability is alleged to impact the health or welfare of a child, whether reasonable accommodations and modifications were provided to avoid non-emergency removal on the basis of disability alone. *See* § 24-34-805(e).

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); 12 CCR 2509-4: 7.304.21. Kin is defined in the Children's Code and in Volume 7 as a relative of the child, a person ascribed by the family as having a family-like relationship with the child, or a person that has a prior significant relationship with the child. § 19-1-103(71.3); 12 CCR 2509-4: 7.304.21.

Although relatives/kin may ultimately serve as placements for children through an allocation of parental responsibilities, designation as legal 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/kin (up to 90 days absent enumerated circumstances per 12 CCR 2509-4: 7:304.21(C)(5)).

Temporary legal custody granted to a relative/kin may be ordered pursuant to § 19-3-508(1)(b). The court may enter protective supervision under such conditions as the court deems necessary and appropriate. *Id.* 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. Background checks and fingerprints are required for relative placements in accordance with § 19-3-406. The court may order the department to share this information with the GAL pursuant to § 19-3-203(2). *See also* **Relative and Kinship Placement fact sheet**.

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**.

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 The GAL should ensure the county is meeting its obligation to assess the possibility of certification and fully explore all

possible supports as set forth in 12 CCR 2509-4: 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. *See* **Relative and Kinship Placement fact sheet.**

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 orders placement of the child in the temporary legal custody of the department for placement with relatives, the court must make findings required in § 19-1-115(6) including that continuation of the child in the home would be contrary to the child's best interests, reasonable efforts have been made to prevent or eliminate the need for removal of the child from the home, reasonable efforts have been made or will be made to reunite the child and the family or that reasonable efforts to reunite the child and the family have failed or are not required, and 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. *See* § 19-1-115(6) and **Legal Custody in the County Department of Social Services section**, *infra*.

TIP It is important for the GAL to review any relatives considered for placement. The GAL should thoroughly review the background information for any relative placements to assess the appropriateness of the placement and determine whether any

services may be necessary while the child is placed. In addition, if kin has been ruled out through the background check or fingerprint history, the GAL should review the records (including the court's electronic database) and interview the family to assess if the placement may be appropriate for the child or if the adult could be a support to the child without placement. While the department has strict guidelines for who is automatically disqualified, a GAL can do a more individualized investigation to assess placement options in the best interests of the child. The GAL may file a motion for placement and the court has the ultimate authority to order placement of the child. *See T.W.*, 642 P.2d at 17; §§ 19-3-407(3), 19-3-508; 12 CCR 2509-4: 7.304.21(D)(8) and (9).

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:

- Separation of the child from the parents or guardian is in the best interests of the child;
- Continued placement of the child with the parent is contrary to the child's best interests;
- Reasonable efforts to prevent out-of-home placement have been made or are not required under § 19-1-115(7);
- 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);
- 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).

A relative/kin may serve as a placement when temporary legal custody is ordered to the department. *See* 12 CCR 2509-4: 7.304.21(E). The background check and fingerprint procedures required by

§ 19-3-406 apply to such placements. 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. 12 CCR 2509-4: 7.304.21(E)(2)(c). Relative/kin placements are considered child-specific placements subject to the 60-day waiver for emergency placements. 12 CCR 2509-4: 7.304.21(E)(2)(e); 7.500.311(C)–(D). The county director or his/her designee may waive non-safety certification standards for kinship providers on a case-by-case basis. *See* 12 CCR 2509-8: 7.708.7. *See generally* **Relative and Kinship Placement fact sheet**.

When the court places the child in the temporary legal custody of the department, the parent may be ordered to pay a fee for the residential care based on the parent's ability to pay. § 19-1-115(4)(d)(I).

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, most family-like 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, and GALs should also independently investigate the appropriateness of placements and ensure that all potential relative and kinship placements have been explored.

TIP Once Colorado has implemented FFPSA, special procedures and findings will apply to any placement in a Qualified Residential Treatment Program (QRTP). *See* **Qualified Residential Treatment Program** section in **Placement Review Hearings** chapter.

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 by the court after notice to all parties, including the Department of Human Services. § 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 that 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). A county jail or detention facility, as described in Article 2 of the Children's Code, is not considered a suitable facility for evaluation, although a mental health disorder prescreening may be conducted in any appropriate setting. § 19-3-506(1)(d).

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. The purpose of a treatment plan is to preserve the parent-child legal relationship by assisting the parent in overcoming the problems that required intervention into the family. *See People in Interest of M.M.*, 726 P.2d 1108, 1121 (Colo. 1986).

TIP If part of the treatment plan is deemed by any party to not be reasonable and counsel is unable to correct the problems with the treatment plan through negotiation or other non-adversarial means, counsel should request an evidentiary hearing to contest disputed issues.

TIP The treatment plan should address only the issues that bought the case to the attention to the department. RPC should object to treatment plan components that are unrelated to the reasons for filing.

TIP Although effective advocacy entails out-of-court inquiry and advocacy for reasonable efforts, in instances in which RPC or the GAL have determined reasonable efforts have not been made, counsel must make a record of lack of reasonable efforts. If not, it is possible the issue will be deemed to have been waived for appellate review. *See, e.g., 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). In light of Court of Appeals decisions allowing challenges to the appropriateness of the treatment plan to be raised at the termination hearing even when parents have not challenged their appropriateness at the dispositional stage (*see, e.g., People in the Interest of K.B.*, 369 P.3d 822 (Colo. App. 2016); *People ex rel. S.N-V.,* 300 P.3d 911 (Colo. App. 2011)), it is vital that GALs ensure the treatment plan is adequate and addresses all of the issues parents need to resolve. It is equally vital for the GAL to continue to evaluate the treatment plan's appropriateness throughout the case and advocate to amend the treatment plan to address any newly identified issues.

Additionally, while parental conduct or condition may not be relevant to some of the bases for adjudication (i.e., injurious environment and no-fault), *see* **Adjudicatory Hearing chapter**, the Colorado Supreme Court has indicated that parental conduct and condition is relevant to the treatment plan. *See People in the Interest of J.G.*, 370 P.3d 1151 (Colo. 2016). The GAL should ensure a good

record is made of the conduct and condition of the parent that the treatment plan will address.

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 shall 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).

Children must be consulted in the development of their treatment plan (*see* 12 CCR 2509-4: 7.301.22(A)(3)), and children who are 14 years of age or older are entitled to select up to two members of their case planning team in addition to the caseworker or a foster parent (42 U.S.C. § 675(1)(B); 12 CCR 2509-4: 7.305.2). Additionally, children who are 14 years of age or older must be assessed for transition to adulthood services and receive an emancipation transition plan, and a written description of the programs and services that will help them prepare for the transition from foster care to a successful adulthood. 42 U.S.C. § 675(1)(D); 12 CCR 2509-4: 7.305.2(A) and (C).

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) and 19-3-508(1)(a).

The appropriateness of the treatment plan is measured by the factors existing at the time of its implementation, and the treatment plan provisions must be designed to assist the parent in overcoming the problems that led to the State's intervention and to the adjudication of the child as dependent and neglected. *In the Interest of A.G.-G.*, 899 P.2d 319, 322 (Colo. App. 1995). For a parent's treatment plan to be appropriate, it must be approved by the court, be related to the child's needs, and provide objectives that adequately address safety concerns and are reasonably calculated to render the parent fit within a reasonable period of time. *See K.B.*, 369 P.3d at 826.

TIP The services the department is required to provide to children and families are outlined in the Children's Code. *See* §§ 19-3-208, 19-1-107(2.5). Volume 7 also addresses services to be provided in 12 CCR 25093: 7.202.1 *et seq.*; 12 CCR 2509-4: 7.301.2 *et seq.*; 12 CCR 2509-4:

7.303.1 *et seq.* The services provided are directed at the areas of need identified in the department's assessment and are designed to ensure that the child/youth receives safe and proper care. *See* §19-1-130; 12 CCR 2509-4: 7.301.23. Services provided must be culturally and ethnically appropriate. *Id.* 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." 12 CCR 2509-4: 7.301.23(A). For children placed out of the home the plan should include visitation requirements including the frequency, type of contact, and the person(s) who will make the visit. 12 CCR 2509-4: 7.301.24(K). Parents and children with disabilities are entitled to reasonable accommodations through the Americans with Disabilities Act (ADA) to the provision of their assessments, treatment, and other services by the department. *People in the Interest of C.Z.*, 360 P.3d 228, 233 (Colo. App. 2015); **Disabilities and Accommodations fact sheet**; HB 18-1104 (modifying § 19-3-507(1)(c) to require reasonable accommodations to ensure that the treatment plan components are accessible and that the identified accommodations and modifications be listed in the report prepared for the dispositional hearing). In addition to the individual needs of the child and family, these requirements should inform the RPC's and GAL's assessment of the reasonableness of the treatment plan.

Additionally, the NCJFCJ Enhanced Resource Guidelines provide helpful considerations to guide an effective review of the treatment plan. These guidelines indicate that the treatment plan should identify issues to be resolved before the court involvement ends; changes in parental behavior to be achieved; services provided to help parents achieve the targeted change; deadlines and respective responsibilities of each party; any special needs of the juvenile and services necessary to address; and terms and conditions for family time and sibling visits. Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline V at 230 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016).

The treatment plan is one place in which the department documents the provision of reasonable efforts and, for ICWA cases, active efforts. *See* **Reasonable Efforts fact sheet**; **ICWA fact sheet**. For children in out-of-home placement, this will include visits with parents. *See* § 19-3-208(2)(b). 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).

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 RPC must play an active role in the development of the treatment plan. RPC 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 12 CCR 2509-4: 7.301.22. Effective participation in the treatment plan necessarily entails advance review of the treatment plan. Whether achieved 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. RPC 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. In addition, RPC should review the department's records, including information from the assessments it has performed as required by the Colorado Family Safety Assessment continuum. *See* 12 CCR 2509-4: 7.301.1 *et seq.*; 12 CCR 2509-2: 7.107.1 *et seq.* Safety and risk assessments performed must be integrated into the treatment plan. 12 CCR 2509-4: 7.301.231.

TIP 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, § 19-3-604(1)(c)(I), the treatment plan must be objected to if determined to be unreasonable. 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 likelihood 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 dispositional order.

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. Counsel should also ensure that the department provides funding and access to services for parents living out of state. The department must make reasonable efforts to reunify children with out-of-state parents, and referring for an ICPC is not enough on its own to constitute reasonable efforts. See *People in Interest of I.J.O.*, 465 P.3d 66 (Colo. App. 2019). *See* **Funding and Rate Issues** and **Reasonable Efforts fact sheets**.

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**.

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 transition to adulthood programs or services, should be considered for inclusion in the treatment plan. *See* **Transition to Adulthood fact sheet**.

Pursuant to the Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, child welfare agencies must formulate policies and procedures for identifying, documenting, and determining appropriate services for children for whom the State has reasonable cause to believe are victims, or at risk of becoming a victim, of sex trafficking. *See* 42 U.S.C. § 671(a)(9); 12 CCR 2509-4: 7.303.4; **Trafficking 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). 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. 19-3-604(1)(b); *T.W.*, 797 P.2d at 822–23.

TIP The department bears the burden of proving that that no appropriate treatment plan can be devised. If necessary, counsel should request an independent expert to testify as to the parent's ability to benefit from services.

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). While the

court must consider whether reasonable accommodations can alleviate the facts that are the basis for a finding that an appropriate treatment plan cannot be devised, the ADA does not preempt this potential ground for finding that no appropriate treatment plan can be devised. *See C.Z.*, 360 P.3d at 235. The court also must make findings that the provision of reasonable accommodations and modifications to the treatment plan will not remediate the impact of the parent's disability or the health or wellness of the child. § 19-3-604(1)(b).

TIP A parent is a "qualified individual" within the ADA if the parent's impairments are disabilities as defined by the ADA and if the department can provide the parent with reasonable accommodations. *C.Z.* 360 P.3d at 233. When a parent's disability poses a safety risk that cannot be accommodated, the ADA terms that a direct threat. *See* **Disabilities and Accommodations fact sheet**. Whether a parent is a direct threat as defined by the ADA is a complicated, fact-intensive determination that must be based on facts, not stereotypes, and an objective risk assessment, medical evidence, or other objective evidence. *See id.* In determining whether reasonable accommodations can be made to accommodate a parent's disability in a D&N proceeding, the child's health and safety must remain the court's paramount concern. *C.Z.*, 360 P.3d at 236; *see also* **Disabilities and Accommodations fact sheet**.

- 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 and factors such as the age of the child, length of the parent's incarceration, nature of the parent's criminal conduct, and circumstances of the prior parent-child relationship may be considered. *People in the Interest of M.C.C.*, 641 P.2d 306, 309 (Colo. App. 1982). 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 parental abuse or neglect. § 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).
- 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).

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, relative, or foster parent who has cared for the child for more than three months and has information or knowledge concerning the care and protection of the child is a matter of right. The three-month requirement does not apply to parents, grandparents, or relatives. *See In Interest of O.C.*, 308 P.3d 1218, 1222 (Colo. 2013); § 19-3-507(5)(a). Intervenors may proceed with or without counsel. *Id. See* **Intervenors fact sheet**.

2. Appeals

An order adjudicating a child dependent or neglected is final for purposes of appeal upon entry of the § 19-3-508 dispositional order, and an appeal of an adjudication may include an appeal of the initial dispositional order. § 19-1-109(2)(c); *People in the Interest of T.R.W.*, 759 P.2d 768, 770 (Colo. App. 1988); *People in Interest of C.L.S.*, 934 P.2d 851 (1996); *People in Interest of H.T.*, 2019 COA 72. However, the initial dispositional order alone is not final for the purposes of appeal. *See H.T.*, 2019 COA 72.

Certain dispositional orders are final for purposes of appeal. *See, e.g.,* § 19-1-109(2)(b) (designating orders terminating or refusing to terminate parental rights as final appealable orders); *People in the Interest of M.R.M.,* 2018 COA 10, ¶¶ 13–36 (holding that an APR order is a final appealable order). *But see People ex rel. M.S.*, 292 P.3d 1247, 1247 (Colo. App. 2012) (holding than an order adjudicating a child dependent or neglected after a finding of no reasonable treatment plan was not a final appealable order because "[w]hen the *proposed* disposition is termination of the parent-child legal relationship, the termination hearing serves as the dispositional hearing").

TIP If a parent wants to appeal a dispositional order entered by a magistrate, RPC must file for judicial review within seven days. RPC should immediately request approval for expedited transcripts from ORPC and seek an extension of time to file the petition for review.

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

The trial court is vested with flexibility to modify an existing dispositional order or to adopt new dispositional orders. *People in Interest of Z.P.S.*, 369 P.3d 814, 819 (Colo. App. 2016); *see* **Placement Review Hearing chapter**. 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); *C.Z.*, 360 P.3d at 228; *People in Interest of A.G.*, 264 P.3d 615, 622 (Colo. App. 2010).

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 90 days after the date of the dispositional decree. § 19-3-702(1)(a). 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 RPC must advise clients about their right to appeal after the dispositional hearing and obtain an appellate waiver or submit an appellate transmittal form to ORPC. RPC should advise clients that an appeal does not stay the proceedings, and parents should work on their treatment plan during the pendency of the appeal. RPC should meet with parents frequently and address issues with service provision as soon as they are known.

V
Permanency Hearing

PERMANENCY HEARING CHECKLIST—GAL

BEFORE

- ❑ Review caseworker's report. The caseworker's report must be provided five working days before the hearing and should include a permanency goal and estimated date of completion.
- ❑ Request and review department's file if needed.
- ❑ Request and review visit notes. Observe interactions between child and parents.
- ❑ 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.
- ❑ Ensure diligent search was done to locate family and kin. Conduct independent diligent search as necessary.
- ❑ Assess whether any additional information provides reason to know the child is an Indian child.
- ❑ 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 how the 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.
- Determine whether the placement provider is following the reasonable and prudent parenting standard.

- If the proposed permanency goal is OPPLA, confirm the youth is at least 16 years of age or an unaccompanied refugee minor and arrange for the youth to attend the hearing. Prepare the youth to speak to the judge about his/her desired permanency outcome.
- If child wants to appear in court, follow local court rules. Advocate for elimination and mitigation of barriers to child's participation in court. 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. Discuss child's potential appearance in court and transportation for the child to court.
- 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 a relative is possible. Determine whether concurrent planning is necessary.
- 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 (Interstate Compact on the Placement of Children), increased visitation, discovery, and sibling reunification.
- Determine if notice has been provided to the parties, CASA, the caregiver, the tribe or Bureau of Indian Affairs (where applicable), and child.
- If permanent home findings must be made, prepare a written or verbal report specifying efforts/services provided to identify/facilitate a permanent home. Ensure report does not waive privilege or convert GAL into witness.

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.
- State position on permanency goal and proposed completion date.
- Inform court of the child's position. Introduce the child to the court if the child is present. Request that the child address the court in a suitable manner.
- Ensure that any new information providing reason to know the child is an Indian child is reported to the court, and if so, ensure compliance with ICWA's required notice provisions.
- 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.
  - Any additional information or deficiencies with diligent search for relatives and kin.
  - Whether placement is following the reasonable and prudent parenting standard.
- 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 ongoing efforts have been made to identify kin and relatives available as a permanent placement.
  - Whether the permanency plan for a child age 14 or older includes transition to adulthood services.
  - Whether the current placement of the child/youth could be a permanent placement if necessary.
  - Whether the child can be returned to the physical custody of the child's parent or guardian. If not, ensure the court enters a permanency goal for each child and determines whether there is a substantial probability that the child will return to a parent or legal guardian within six months. Possible permanency goals:

- return home;
- adoption with a relative;
- permanent placement with a relative through legal guardianship or APR;
- adoption with a non-relative;
- permanent placement with a non-relative through legal guardianship or APR;
- Other Permanent Planned Living Arrangement, either through emancipation or long-term foster care (only allowed in exceptional circumstances and for youth aged 16 or older).

- Ensure the court addresses the respondent's compliance with the treatment plan and respondent's progress toward alleviating or mitigating the causes necessitating placement in foster care.
- If the child/youth is placed in a QRTP, ensure the court makes findings required by FFPSA and Colorado's implementing legislation.
- If concurrent permanent goals are entered, ensure they are meaningful and in the child's best interests. Ensure OPPLA is not entered as a concurrent goal.
- If OPPLA is entered as a goal, ensure that the:
  - Youth is at least 16;
  - Court asks youth about his/her desired outcome;
  - Court reviews whether placement is following reasonable and prudent parenting standard.
- 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 the caseworker and GAL to return the child home without further court order.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.
- If the child is an Indian child or there is reason to know the child is an Indian child, obtain ruling on whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and, if the child is in foster care placement, that these efforts have proven unsuccessful.

- For cases designated as EPP, at the permanency planning hearing immediately prior to 12 months after the original placement out of the home, ensure the court makes a finding regarding whether the child is in a placement that can provide legal permanency.
  - If the court determines by a preponderance of the evidence that the child is not in a permanent home, ensure the court makes findings regarding whether reasonable efforts were made to find the child a permanent home and that such a home is not available or whether a child's needs or situation prohibit the child from successful placement in a permanent home.
  - If a written report was not submitted verbally report on what specific efforts have been made to identify a permanent home and/or what services have provided to the child or youth to facilitate identification of a permanent home.
  - Ensure the court considers placement of the children together as a sibling group.
- If a placement change (other than return to a parent or legal guardian) is contested by a party, ensure the court has been provided and has considered the following:
  - Child's wishes;
  - Individualized Assessment of the child's needs;
  - Whether the current home is safe and potentially permanent;
  - The child's actual age and developmental stage as well as the child's attachment needs;
  - Whether the child has significant psychological ties to the person who could provide the permanent home;
  - Whether the person who could provide the permanent home is willing to maintain appropriate contact after an adoption with the child's relatives, particularly sibling relatives, when safe, reasonable and appropriate;
  - Whether the person aware of the child's culture and willing to provide the child positive ties to his/her culture;
  - Whether the person can meet the child's medical, physical, emotional, or other specific needs;
  - The child's attachment to the caregiver and possible effects on the child's emotional well-being if removed.

AFTER

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

PERMANENCY HEARING CHECKLIST—RPC

BEFORE

- ❑ Review caseworker's report. The caseworker's report must be provided five working days before the hearing.
  - ❍ Conduct thorough independent investigation before the hearing, including, but not limited to, requesting and reviewing the department's file and visit notes and the 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 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.
- ❑ Meet with client well before the hearing and discuss possible outcomes and positions on the following:
  - ❍ Possible permanent plans and appropriateness of concurrent plan.
  - ❍ The department's proposed permanent plan and recommendations.
  - ❍ Frequency and quality of visits and the client's 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.
  - ❍ Availability of kin/relative placements.
- ❑ Assess whether any additional information provides reason to know the child is an Indian child.
- ❑ Update client's contact information.
- ❑ Provide client with a copy of court report.
- ❑ 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.
- Advocate for client's positions.
- Aggressively advocate to advance visitation, such as the following:
  - 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.
- Proffer information/evidence regarding the following:
  - 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.
  - Availability of kin/relative placements.
- Ensure that any new information providing reason to know the child is an Indian child is reported to the court, and if so, ensure compliance with ICWA's required notice provisions.
- 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 14 or older includes transition to adulthood services.
- Whether ongoing efforts have been made to identify kin and relatives available as a permanent placement.
- Whether the current placement of the child/youth could be a permanent placement if necessary.
- Whether the child can be returned to the physical custody of the child's parent or guardian. If not, ensure the court enters a permanency goal for each child and determines whether there is a substantial probability that the child will return to a parent or legal guardian within six months. Possible permanency goals:
  - return home;
  - adoption with a relative;
  - permanent placement with a relative through legal guardianship or APR;
  - adoption with a non-relative;
  - permanent placement with a non-relative through legal guardianship or APR;
  - Other Permanent Planned Living Arrangement, either through emancipation or long-term foster care (only allowed in exceptional circumstances and for youth aged 16 or older).

- If the child/youth is placed in a QRTP, ensure the court makes findings required by FFPSA and Colorado's implementing legislation.
- For cases designated as EPP, at the permanency planning hearing immediately prior to 12 months after the original placement out of the home, ensure the court makes a finding regarding whether the child is in a placement that can provide legal permanency.
  - If the court determines by a preponderance of the evidence that the child is not in a permanent home, ensure the court makes findings regarding whether reasonable efforts were made to find the child a permanent home and that such a home is not available or whether a child's needs or situation prohibit the child from successful placement in a permanent home.
  - If a written report was not submitted verbally report on what specific efforts have been made to identify a permanent home

and/or what services have provided to the child or youth to facilitate identification of a permanent home.
    - Ensure the court considers placement of the children together as a sibling group.
- 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.
- If the child is an Indian child or there is reason to know the child is an Indian child, ensure active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and, if the child is in foster care placement, that these efforts have proven unsuccessful.
- If a placement change (other than return to a parent or legal guardian) is contested by a party, ensure the court has been provided and has considered the following:
    - Child's wishes;
    - Individualized Assessment of the child's needs;
    - Whether the current home is safe and potentially permanent;
    - The child's actual age and developmental stage as well as the child's attachment needs;
    - Whether the child has significant psychological ties to the person who could provide the permanent home;
    - Whether the person who could provide the permanent home is willing to maintain appropriate contact after an adoption with the child's relatives, particularly sibling relatives, when safe, reasonable and appropriate;
    - Whether the person aware of the child's culture and willing to provide the child positive ties to his/her culture;
    - Whether the person can meet the child's medical, physical, emotional, or other specific needs;
    - The child's attachment to the caregiver and possible effects on the child's emotional well-being if removed.

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.
- Set meeting with client.

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's Children's Code sets forth stricter timeframes.

The initial permanency hearing for a child must take place as soon as possible after a dispositional hearing but no later than 90 days after the decree of disposition (unless the federal 12-month limit occurs sooner). § 19-3-702(1)(a).

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 within 30 days after that finding. § 19-3-702(1)(b). 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. § 19-3-702(1)(b).

Subsequent permanency hearings must take place every six months while the case remains open and more frequently if deemed necessary by the court or upon the motion of any party. § 19-3-702(1)(a).

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, the parents or guardians, placement providers, and named children or youth. § 19-3-702(2)(a). The notice must comply with § 19-3-502(7). *Id.* The notice must briefly describe the purpose of the hearing, as well as the constitutional and legal rights of the child and the child's parents or guardian. § 19-3-702(2)(a). 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.* The 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**. While neither ICWA's statutory scheme nor the 2016 ICWA Regulations require notice to be sent regarding each individual hearing within a proceeding, a change of the child's placement, or a change to the child's permanency plan or concurrent plan, the 2016 ICWA Guidelines recommend that state agencies and/or courts provide notice to tribes and Indian custodians of those events. 2016 ICWA Guideline D.1; **ICWA fact sheet**.

PROCEDURAL ISSUES/CONSIDERATIONS

1. Participation of Parties and Others

The court must hold the permanency hearing in person and provide all parties the opportunity to be heard. § 19-3-702(1)(a); *see also People ex rel. M.B.*, 70 P.3d 618, 623 (Colo. App. 2003). 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).

2. Participation of Child in Permanency Planning Hearings

At any permanency planning hearing, the court is required to consult with the child in a developmentally appropriate manner regarding the child's permanency plan. § 19-3-702(1)(b). . 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. If considering the goal of Other Permanent Planned Living Arrangement, the court must ask the youth about his or her desired permanency outcome. Section 19-3-702(4)(a)(VI)(D).

TIP The GAL should explain to the child the statutory requirement of consultation regarding the permanency plan and should discuss 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* § 19-1-106(5); **Children in Court fact sheet**. If the court consults with the child through an *in camera* interview, a record of the interview must be made unless waived by the parties and, if the RPC is not present, counsel should have the opportunity to submit questions to the child, which the court may ask in its discretion. See *People in the Interest of H.K.W.*, 2017 COA 70 (2017); *People in Interest of S.L.*, 2017 COA 160, ¶ 49 (2017).

3. Advance Submission of Proposed Permanency Plan

The department must prepare a permanency plan for each child. § 19-3-702(2)(a). The department must submit the plan to the court and the parties at least five 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. § 19-3-702.5.

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)(b). 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.

REQUIRED FINDINGS

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

- First, the court must determine whether the child or youth should be returned to his or her parent or guardian. § 19-3-702(3).
  - If applicable, the court must also find the date on which the child may be returned. *Id.*
  - If the child/youth cannot be returned home, the court shall determine whether reasonable efforts have been made to find a safe and stable permanent home. *Id. See also* **Reasonable Efforts fact sheet.**
- Whether:
  - Procedural safeguards to preserve parental rights have been applied in any change in the child's placement or determination impacting visits. § 19-3-702(3)(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; *In Interest of M.D.*, 338 P.3d 1120, 1125 (Colo. App. 2014).

  - Reasonable efforts have been made to finalize the permanency goal. § 19-3-702(3)(b).
  - Ongoing efforts have been made to identify kin and relatives that are available to be in a permanent placement. § 19-3-702(3)(c).
  - An out-of-state placement, if applicable, remains appropriate and in the best interests of the child. § 19-3-702(3)(d).
  - If the child/youth is 14 years of age or older, whether the child is receiving transition services to successful adulthood. § 19-3-702(3)(e).

- The child's placement could be a permanent placement if necessary. § 19-3-704(3)(f).

- If the child is an Indian child or there is reason to know the child is an Indian child, the court should make findings that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and, if the child is in foster care placement, that these efforts have proven unsuccessful. *See* 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120 (requiring active efforts to be documented in detail in the record); **ICWA fact sheet**.
- If the court determines the child cannot be returned to the physical custody of a parent or legal guardian on the date of the hearing, the court must enter one or more of the following permanency goals:
  - return home;
  - adoption with a relative;
  - permanent placement with a relative through legal guardianship or APR;
  - adoption with a non-relative;
  - permanent placement with a non-relative through legal guardianship or APR;
  - Other Permanent Planned Living Arrangement, either through emancipation or long-term foster care (only allowed in exceptional circumstances and for youth aged 16 or older). § 19-3-704(a)(I)-(VI); *see* **Permanency Goals section, *infra*.**
- The department shall document in the family services plan and the court shall review:
  - The compelling reasons why it is not in a child's best interests to return home, be placed for adoption, be placed with a legal guardian or fit and willing relative (including an adult sibling), as well as the department's intensive, ongoing, and unsuccessful efforts to achieve these goals, including the use of technology and social media. § 19-3-702(4)(b)(I).
  - Whether the child's placement is following the reasonable and prudent parenting standard and whether the child has regular, ongoing opportunities to engage in age-appropriate activities. § 19-3-702(4)(b)(II).
- For children in EPP cases, the Court must make permanent home findings. *See* **Permanent Home subsection,** *infra.*
- Once Colorado has implemented FFPSA, the Court will need to make specific findings regarding any placement in a

Qualified Residential Treatment Program (QRTP). *See* **Qualified Residential Treatment Program** section in **Placement Review Hearings** chapter.

PERMANENCY GOALS

The Children's Code enumerates the permanency goals as follows: return home; adoption with a relative; permanent placement with a relative through legal guardianship or APR; adoption with a non-relative; permanent placement with a non-relative through legal guardianship or APR; Other Permanent Planned Living Arrangement. Section 19-3-704(a)(I)-(VI). All goals except for the OPPLA goal may be adopted as concurrent goals.

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).

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.

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(4)(a)(1); *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 and

whether return home is in the best interests of the child. *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)).

Efforts to place a child for adoption or with a legal guardian or custodian may be made concurrently with reasonable efforts to preserve and reunify the family. § 19-3-508(7).

2. Adoption

Another permanency goal available to the court is adoption. § 19-3-702(4)(a)(II), (IV).

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(4)(e). Cause may include, but is not limited to, the following circumstances:

- The parents or legal guardians have maintained regular parenting time and contact, and the child would benefit from continuing this relationship;
- The criteria for termination of parental rights have not been met;
- 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 emotional well-being;
- The child objects to the termination (children 12 and older). *See* § 19-3-702(4)(e)(I)-(IV).

Efforts to place a child for adoption or with a legal guardian or custodian may be made concurrently with reasonable efforts to preserve and reunify the family. § 19-3-508(7).

TIP Adoption assistance may be available to support the permanency goal of adoption for a child. *See* **Adoption fact sheet**. The GAL should be familiar with this possibility and the procedure for determining eligibility for adoption assistance. 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)(a)(III), (IV). 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). *See also* HB 19-1219 (clarifying in Section 19-3-702(4) that APR/guardianship to relative or non-relative are both available permanency goals).

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* **APR/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.

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 has also made it available for allocation of parental responsibilities and in limited circumstances for foster homes serving children 12 or over. *See* § 26-5-110; 12 CCR 2509-4: 7.311 *et seq.*; **APR/Guardianship fact sheet**.

TIP As with adoption assistance, advocacy by a GAL for an appropriate relative/kinship guardianship assistance agreement may advance the best interests of a child by ensuring the relative or kin has the necessary financial stability and support to provide for the child on a long-term basis. In advocating for appropriate relative/kinship

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 or kin in any capacity.

Efforts to place a child for adoption or with a legal guardian or custodian may be made concurrently with reasonable efforts to preserve and reunify the family. § 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)(a)(VI)(A). 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 or emancipation, it is a disfavored goal. This goal is limited to youth age 16 or older who have co-occurring complex conditions that preclude the other permanency goals. § 19-3-704(4)(a)(VI)(B) (exempting unaccompanied refugee minors from these requirements). OPPLA cannot be entered as a concurrent goal. § 19-3-704(4)(a)(VI)(C). For youth with a permanency goal of OPPLA, federal law requires additional documentation and findings at each permanency hearing as follows (note that the Children's Code requires many of these findings for all children during permanency hearings):

- The department must document "intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts" made to return the child home or secure a placement for the child with a relative, legal guardian, or adoptive parent. *See* 42 U.S.C. § 675a(a)(1); s*ee also* 12 CCR 2509-4: 7.301.24(R); § 19-3-702(4)(c).
- The court should ask the child about the desired permanency outcome, make a judicial determination explaining why, as of the date of the hearing, OPPLA is the best permanency plan for the child, and provide compelling reasons why it continues to not be in the best interests of the child to return home, be placed for adoption, be placed with a legal guardian or be placed with a fit and willing relative. *See* 42 U.S.C. § 675a(a)(2)*;* § 19-3-702(4)(a)(VI)(D).
- The state agency shall document the steps it is taking to ensure that the child's foster home or institution is following the reasonable and prudent parent standard and that the child has regular, ongoing opportunities to engage in age or

developmentally appropriate activities. *See* 42 U.S.C. § 675a(a)(3); *See also* 19-3-702(4)(b)(II). The reasonable and prudent parent standard requirements are documented in 12 CCR 2509-8: 7.701.9.

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 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). In cases in which the permanency goal of OPPLA has been ordered, GALs should pay careful attention to the services provided to the youth to ensure that they are tailored to support the youth in making a successful transition to independence. Note that the Preventing Sex Trafficking and Strengthening Families Act replaced the term "independent living" with "transition planning for successful adulthood." *See* 42 U.S.C. § 675(1)(D), (5)(C)(i)–(ii). *See also* **Transition to Adulthood fact sheet**.

TIP GALs should also advocate that permanent connections be established for children and youth in out-of-home care. *See* 12 CCR 2509-4: 7.305.1 (requiring services for all children and youth in out-of-home are to include efforts to build permanent connections). 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**.

TIP Youth who meet Colorado's Foster Youth in Transition Program (FYTP) eligibility criteria have the right to receive services through this program at least until the age of 21. §19-7-304 (eligibility and enrollment). Youth may access this program by entering into a Voluntary Services Agreement (VSA), §19-7-306, at which point, a new case is created by the filing of a petition with the court in an Article 7 case, §19-7-307. For additional information on the FYTP program, *see* **Transitions to Adulthood fact sheet.**

Permanent Home

For children and youth placed out of home in an EPP case, the court must make additional permanent home findings. § 19-3-702(5). A permanent home is defined as the place in which the child or youth may reside if the child or youth is unable to return home to a parent or guardian. § 19-3-702(5)(a). The purpose of permanent home findings is to ensure that a child or youth who has been removed from his or her home has been placed in a permanent home as expeditiously as possible. § 19-3-702(5)(c).

TIP HB 19-129 repealed former § 19-3-703 and clarified the legislature's intent regarding permanent home findings.

The requirement for permanent home findings begins at the permanency planning hearing that occurs immediately prior to twelve months after the original placement of the child or youth out of home. § 19-3-702(5)(a). At this hearing, the court must find whether the child or youth is in a placement that can provide legal permanency. § 19-3-702(5)(c). If the court determines by a preponderance of the evidence that permanent home is not currently available or that the child's or youth's current needs or situation prohibit placement, the court must be shown that reasonable efforts were made to find the child or youth an appropriate permanent home and that such a home is not currently available or that a child or youth's needs or situation prohibit the child or youth from a successful placement in a permanent home. § 19-3-702(5)(a). The court must make findings regarding these efforts and needs. *Id.* When a child has siblings, the court's finding must include consideration of the children together as a sibling group. § 19-3-702(5)(f).

Until the court finds that a child or youth is in a permanent home, the court must review this finding at a permanency hearing at least

every six months. § 19-3-702(5)(d). the court must be provided evidence of one the following:

- That the child or youth is in a permanent home or
- That reasonable efforts continue to be made to find the child or youth an appropriate permanent home and that such a home is not available or that the child's or youth's needs or situation prohibit the child or youth from successful placement in a permanent home.

§ 19-3-702(5)(d). At each permanency planning hearing, the caseworker and the child or youth's GAL must provide a verbal or written report specifying what efforts have been made to identify a permanent home for the child or youth and what services have been provided to the child or youth to facilitate identification of a permanent home. § 19-3-702(5)(e).

TIP: In reporting on the progress of finding a child a permanent home, the GAL should be careful not to convert himself or herself into a witness or to share any privileged information. *See* **Children's Psychotherapist-Patient Privilege fact sheet**.

The court's findings regarding permanent home do not alter the department's obligation to make reasonable efforts to return the child or youth home, and any findings regarding permanent home shall not delay or interfere with reunification of a child or youth with a parent or legal guardian. § 19-3-702(5)(b); *see also* **Reasonable Efforts 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). Permanency goals other than OPPLA may be entered as concurrent goals. 19-3-702(4)(a).

2. Placement Determinations at the Permanency Hearing

If a placement change is contested by a party or a child or youth and the child is not reunifying with a parent or guardian, the court shall consider all pertinent information related to modifying the placement of the child prior to removing the child from his or her placement,

including the child's or youth's wishes. § 19-3-702(6). This consideration must include the following:

- 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.

§ 19-3-702(6)(a)—(h).

If the child is an Indian child or the court has reason to know that the child is an Indian child, any removal of the child must comply with either ICWA's emergency placement or foster care placement requirements. *See* **ICWA fact sheet**. Additionally, 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. *See* **Siblings fact sheet**. The court shall not delay permanency planning by considering joint placement by a sibling group. § 19-3-702(3).

4. 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 may be subject to judicial review under § 19-1-108(5.5). Request for judicial review must be filed within seven 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**.

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*.

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.
  - ❍ The need for modifications, if any, to the case plan.
  - ❍ If the child is in the custody of the department, whether the placement is applying the reasonable and prudent parent standard in allowing activities that encourage the emotional and developmental growth of the child while maintaining the health, safety, and best interests of the child.
  - ❍ Whether any additional information provides reason to know the child is an Indian child.
  - ❍ Whether, if the child has reached the age of 14, the child has been provided with a document describing his or her rights, a plan has been developed to assist the child to make the transition from foster care to a successful adulthood, and the child has had the opportunity to participate in that plan and select two members of the case planning team.

- 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 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.
- If child wishes to attend court, advocate for elimination and/or mitigation of barriers impeding child's participation in court.

DURING

- Present information/evidence regarding services, placement, visits, treatment, assessments, child's psychological ties/attachment, child's needs, child's participation in developmentally appropriate extracurricular and social activities, and permanency issues.
- Ensure that any information providing reason to know the child is an Indian child is reported to the court and, if so, ensure compliance with ICWA's required notice provisions.
- Advocate for any necessary modifications to the case plan.
- 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 determining 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 timeframe in which the child or youth will be returned to a parent or legal guardian or be in a safe and permanent home, and if the child or youth is not likely to be returned to a parent or legal guardian within six months, a finding about whether the child is in a potential permanent placement.
- 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 successful transition to adulthood living services.

- If child is in foster care, whether, through the application of the reasonable and prudent parenting standard, the child has regular, ongoing opportunities to engage in age- or developmentally appropriate activities.
- When applicable, ensure the court makes findings regarding ICWA's active efforts requirement and that any change of placement complies with ICWA's burden of proof, required findings, and placement preferences.
- Request contested hearing if appropriate or necessary to further the best interests of the child.
- If a placement change (other than return to a parent or legal guardian) is contested by a party, ensure the court has been provided and has considered the following:
  - Child's wishes;
  - Individualized Assessment of the child's needs;
  - Whether the current home is safe and potentially permanent;
  - The child's actual age and developmental stage as well as the child's attachment needs;
  - Whether the child has significant psychological ties to the person who could provide the permanent home;
  - Whether the person who could provide the permanent home is willing to maintain appropriate contact after an adoption with

the child's relatives, particularly sibling relatives, when safe, reasonable and appropriate;
    - Whether the person aware of the child's culture and willing to provide the child positive ties to his/her culture;
    - Whether the person can meet the child's medical, physical, emotional, or other specific needs;
    - The child's attachment to the caregiver and possible effects on the child's emotional well-being if removed.
- Ensure court sets the next appropriate hearing.
- If the child is in a QRTP, ensure the court engages in the review required by FFPSA and Colorado's implementing legislation.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

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.

PLACEMENT REVIEW HEARING CHECKLIST—RPC

BEFORE

- ❑ Continue thorough and independent investigation:
  - ❍ Contact service providers for records and for updates about progress.
  - ❍ Obtain visitation reports, and either observe visits or watch visit recordings if possible.
- ❑ 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 cultural considerations.
  - ❍ Discuss case plan progress and whether motions to progress visitation or loosen restriction should be filed.
  - ❍ Discuss whether treatment components are completed and should be discontinued.
  - ❍ Discuss potential accommodations with a parent with a disability.
  - ❍ Discuss whether motions for a finding of no reasonable efforts should be filed.
  - ❍ Discuss whether treatment plan amendments need to occur.
- ❑ If client is in custody, visit client and ensure client is either transported or appears by telephone for the hearing.
- ❑ Determine whether notice has been sent to client.
- ❑ 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.
- ❑ File motions as necessary.

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.
- Request orders to seal any mental health or substance abuse treatment reports or records that may be part of the case plan.
- Request protective orders preventing sharing of sensitive treatment and evaluation results with other parties or special respondents as necessary.
- Request contested hearing if appropriate.
- Ensure the court makes findings about:
  - The necessity of out-of-home placement.
  - Reasonable efforts.
  - Procedural safeguards.
  - Treatment plan compliance.
- In an ICWA case, ensure the court makes findings that the department is making active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family.
- If a placement change (other than return to a parent or legal guardian) is contested by a party, ensure the court has been provided and has considered the following:
  - Child's wishes;
  - Individualized Assessment of the child's needs;
  - Whether the current home is safe and potentially permanent;
  - The child's actual age and developmental stage as well as the child's attachment needs;
  - Whether the child has significant psychological ties to the person who could provide the permanent home;
  - Whether the person who could provide the permanent home is willing to maintain appropriate contact after an adoption with the child's relatives, particularly sibling relatives, when safe, reasonable and appropriate;
  - Whether the person aware of the child's culture and willing to provide the child positive ties to his/her culture;

- Whether the person can meet the child's medical, physical, emotional, or other specific needs;
- The child's attachment to the caregiver and possible effects on the child's emotional well-being if removed.

- ❑ If the child is in a QRTP, ensure the court engages in the review required by FFPSA and Colorado's implementing legislation.
- ❑ Ensure that the court sets the next appropriate hearing.

AFTER

- ❑ Meet and confer with client. Explain the court's findings and orders.
- ❑ Set the next meeting with client.
- ❑ Help client develop timeline and of important dates and calendar reminders.
- ❑ Discuss with client how to keep track of important dates and contact information for service providers.
- ❑ Obtain court orders and review for accuracy and sufficiency. Provide client with a copy of court 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; whether reasonable efforts continue to be made to achieve permanency for the child in a timely manner; a likely date for the child to be returned to and safely maintained in the home or placed in adoption or legal guardianship; and for children with a permanency goal of OPPLA, whether the application of the reasonable and prudent parenting standard has provided regular and ongoing opportunities to engage in age- or developmentally appropriate activities. *See* 42 U.S.C. § 675(5)(B); §§ 19-1-115(4), 19-3-507(4), 19-3-702.5. 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 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. Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline VI at 257 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016) (hereafter "NCJFCJ Enhanced Resource Guidelines"). Many of the statutorily required inquiries for placement review hearings are important questions for the court to ask at all review hearings.

TIP At review hearings, the GAL should advocate for the court's careful examination of case goals, the parents' progress, the department's compliance with its obligations, and the needs of the child. GALs should advocate for court orders setting targeted time frames and specific actions that need to take place to minimize the time the child must spend in out-of-home placement. The NCJFCJ Enhanced Resource Guidelines pertaining to review hearings note

that "[r]eviews can malfunction if they become a rubber stamp for agency recommendations or produce arbitrary decisions based on inadequate information." Guideline VI.B. at 259. As a result of the GAL's ongoing investigative responsibilities, the GAL will continue to assess the child's and family's needs as well as the provision and effectiveness of services throughout the case. At review hearings, the GAL should ensure that the treatment plan continues to address the needs of the child and family, and the GAL should advocate for any necessary modifications to the treatment plan. Finally, review hearings provide yet another opportunity to make sure that all procedural requirements are met, including, but not limited to, the entry of adjudication orders, findings regarding the UCCJEA, and ICWA notice. *See* **ICWA** and **Jurisdictional Issues fact sheets**. Depending on the stage of the case and the family's circumstances, review hearings also serve as an opportunity to obtain formal updates on the status of ICPC requests, guardianship/adoption subsidy negotiations, and any other processes in place to support appropriate placement and permanency for the child.

TIP At review hearings, RPC should promote client progress, aggressively advocate for visitation in as natural a setting as possible, and advocate to eliminate barriers to treatment. RPC must always be mindful of potential kin placements and advocate for home studies, ICPC requests, and placement with relatives if children must remain in out-of-home placement. Review hearings are also opportunities for counsel to address problems with service provision and visitation, but oral discussions and requests during review hearings must not be a substitute for written motions practice.

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. Section 19-3-702.5 requires reviews to be conducted every six months. § 19-3-702.5(1); *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.

TIP RPC should advocate for frequent review hearings, particularly when frequent court contact assists client with engagement, and court oversight provides reinforcement for the client. Frequent review hearings in complicated cases, particularly in EPP cases, allow counsel to quickly address issues, rather than allowing them to linger unaddressed.

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 providing care for the child 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). The 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 and 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 placement review hearing is not defined as a separate child custody proceeding under ICWA. *See* **ICWA fact sheet**. While neither ICWA's statutory scheme nor the 2016 ICWA Regulations require notice to be sent to all identified tribes regarding each individual hearing

within a proceeding, the 2016 ICWA Guidelines recommend that state agencies and/or courts provide notice to tribes and Indian custodians of those events. 2016 ICWA Guideline D.1; *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)(a).

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). Colorado law allows courts, if a party does not object, to order review hearings to be conducted by the Administrative Review Division of the Colorado Department of Human Services. §§ 19-1-115(4)(c). If an administrative review is ordered, all counsel of record must be notified of the review and may appear at the review. *Id*. An administrative review must be open to the participation of the parents. 42 U.S.C. § 675(6).

TIP As recognized by the National Council of Juvenile and Family Court Judges, judicial review plays an important role in advancing case progress, holding all parties accountable, and giving parties and children a voice in the proceedings. *See generally* NCJFCJ Enhanced Resource Guidelines VI.B. and V.D. Given the importance of court oversight, GALs and RPC should object to administrative reviews taking the place of judicial review.

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." § 19-1-107(2).

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.

TIP Social studies and reports often contain mental health and or substance abuse treatment records. These records are protected information. *See, e.g.,* 42 U.S.C. § 290dd-2 and 42 C.F.R. § 2.1 *et seq.* RPC should request protective orders preventing redisclosure of this protected information without further court order. Additionally, RPC should seek orders sealing these records in the court file.

4. Non-Appealable Order

Orders resulting from a placement review hearing are generally considered interlocutory rather than final and appealable orders as defined by § 19-1-109(1) and § 13-4-102(1). *See, e.g., People in the Interest of P.L.B.*, 743 P.2d 980, 981–82 (Colo. App. 1987) (holding that a change in placement while the child was in the legal custody of the department did not affect legal custody of the child and was therefore not a final order for purposes of appeal). Request for judicial review of a magistrate's order must be filed within seven days of the magistrate's order. § 19-1-108(5.5); *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**.

TIP If RPC wish to seek appointment of appellate counsel for an interlocutory appeal, they must consult with the ORPC appellate director.

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 GALs serving as the holder of the child's psychotherapist-patient privilege should ensure that any reports or materials submitted do not contain privileged information and move to strike any such information contained in the report. The failure to do so may be construed as an implied waiver of the child's privilege. *See* **Children's Psychotherapist-Patient Privilege fact sheet**. GALs seeking to introduce privileged information as evidence should ensure that any waiver of the privilege effectuated serves the child's best interests and should seek rulings and stipulations on limited waivers as appropriate. *See id.*

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 child is an Indian child or the court has reason to know that the child is an Indian child, any removal of the child must comply with either ICWA's emergency placement or foster care placement requirements, and any foster care placement must comply with ICWA's placement preferences. *See* **ICWA fact sheet**.

REQUIRED FINDINGS

The required findings for the placement review hearing are set forth in §§ 19-1-115(6.5), 19-3-507(4), and 19-3-702.5. 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. § 19-3-702.5(a).
- Whether reasonable efforts have been made to find a safe and permanent placement. § 19-3-702.5(b).

  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. §§ 19-3-702.5(c), 19-3-507(4).

TIP This statutory finding requires review of both the ongoing need for placement and the appropriateness of the placement.

With regard to 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.

With regard to the appropriateness of the placement, the GAL should provide the court independent, accurate information about the child's current needs and functioning in the placement. If questions are 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.

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 fact sheet**.

- ❑ 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. § 19-3-702.5(1)(d).

TIP Sometimes a treatment plan that appeared appropriate at the time of the dispositional hearing may require modification. At review hearings, counsel may have more infor-

mation 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. For GALs, such advocacy is vital not only to addressing the immediate needs of the family to support reunification but also to advocating for permanency for the child in the event that reunification goals fail. *See, e.g., People in the Interest of K.B.*, 369 P.3d 822, 827 (Colo. App. 2016) (allowing challenge to the appropriateness of the treatment plan to be raised at the termination hearing even when parents stipulated to its appropriateness earlier in the proceeding); *People ex rel. S.N-V.*, 300 P.3d 911, 914–17 (Colo. App. 2011) (allowing challenge to the appropriateness of the treatment plan to be raised at the termination hearing even when parents had not challenged its appropriateness at the dispositional stage). 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. Some divisions of the Court of Appeals have held that 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. D.P.*, 160 P.3d 351, 355–56 (Colo. App. 2007); *People ex rel. T.E.H.*, 168 P.3d 5, 8–9 (Colo. App. 2007); *People ex rel. M.S.*, 129 P.3d 1086, 1087–88 (Colo. App. 2005).

- A likely date by which the child may be returned to a parent or legal guardian or be in a safe and permanent home. Section 19-3-702.5(e).

  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**.
- If the child or youth is not likely to be returned to a parent or legal guardian within six months, whether the child is in a potential permanent placement and, if not, a likely timeframe when he or she will be in a safe and permanent home. Section 19-3-702.5(f).
- If a child/youth is placed in a QRTP, the court will need to make special findings regarding the child's needs and that level of care. *See* **Qualified Residential Treatment Program** section in **Special Issues/Considerations**, *infra*.

Placement review hearings also serve as an important opportunity for review of whether the child has regular, ongoing opportunities to engage in developmentally appropriate activities. While federal law specifically requires this for children with an OPPLA goal, *see* 42 U.S.C. § 675(5)(B), findings regarding the application of the reasonable and prudent parenting standard promote normalcy for all children in foster care. *See* Heidi Redlich Epstein and Anne Marie Lancour, *The Reasonable and Prudent Parent Standard*, 35 ABA Child Law Practice Vol. 10 (October 2016), *available at* **https://www.americanbar.org/content/dam/aba/administrative/child_law/clp/vol35/oct16.authcheckdam.pdf**. Colorado law contemplates the application of the reasonable and prudent parenting standard to promote the entitlement of all children in out-of-home care, regardless of age, to participate in age- or developmentally appropriate extracurricular, enrichment, cultural, and social activities as part of their well-being needs. *See* 12 CCR 2509-4: 7.304.21(E)(2)(h), 7.304.62(P); 12 CCR 2509-8: 7.701.200. 12 CCR 7.2509-1:7.700.2 defines the "reasonable and prudent parent standard" as "careful and sensible parental decisions that maintain the health, safety, and

best interests of the child or youth while encouraging the emotional and developmental growth of the child or youth that a provider shall use when determining whether to allow a child or youth in foster care . . . to participate in extracurricular, enrichment, cultural, and social activities." 12 CCR 2509-8: 7.701.200 provides criteria for the application of this standard.

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, step-parents, 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. Independent Living Services

For children ages 14 and older, the department is required to provide independent living services to promote a successful transition to adulthood. *See* 42 U.S.C. § 675(1)(D); *see* **Transition to Adulthood fact sheet**. This plan must be developed in consultation with the child and with up to two individuals (in addition to the foster parent

and caseworker) selected by the child. 42 U.S.C. § 675(1)(B). Note that the Preventing Sex Trafficking and Strengthening Families Act replaced the term "independent living" with "transition planning for successful adulthood." *See* 42 U.S.C. Section 675(1)(D), (5(C)(i)–(ii). Colorado also refers to this plan as a "Roadmap for Success." *See* 12 CCR 2509-4: 7.305.2(C); *see also* **Transition to Adulthood fact sheet**.

TIP Counsel should bring to the court's attention at the placement review hearing any issues related to transition to adulthood services. Additionally, as the department is required to complete this planning process within 60 days of the child's fourteenth birthday or case opening, *see* 12 CCR 2509-4: 7.301.21(C), the GAL should ensure this process is completed in a timely manner for any child who has turned 14 during the case.

4. 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**.

5. 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).

6. Modification of Placement Considerations

In making placement decisions, the court shall consider all pertinent information related to modifying the placement of the child prior to removing the child from his or her placement unless the child is reunifying with a parent or legal guardian. §19-3-702(6). This consideration must include the following:

- An individualized assessment of the child's needs;
- Whether the current home is a safe and potentially permanent home;
- The child's age, developmental state, and attachment needs;

- The child's psychological ties to any person who could provide a permanent home for the child, including a relative, and whether that person has maintained contact with the child;
- Whether a person who could provide a permanent home 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 home 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 or there is reason to know the child is an Indian child, any removal of a child from the home must comply with ICWA foster care or emergency placement criteria, and 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**.

Pre-adoptive foster parents do not have a liberty interest in the child, and the Colorado Children's Code does not prohibit the removal of a child from a foster placement. *See M.S. v. People ex rel. A.C.*, 303 P.3d 102, 105 (Colo. 2013). The court must consider and act on the child's best interests in making placement modification decisions. *Id.*

7. 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). In ordering child support, the court should follow the child support guidelines set forth in §§19-6-106 and 14-10-115. *See People in Interest of E.Q.*, 2020 COA 118. 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.

8. Human Trafficking

When there is reason to believe a child is, or is at risk of being, a victim of human trafficking, the department has an affirmative obligation to screen the child, determine service needs, and provide responsive services. *See* 42 U.S.C. § 671(a)(35); 12 CCR 2509-4: 7.303.4; 12 CCR 2509-1:7.000.2; **Trafficking fact sheet**. The placement review hearing provides an opportunity to ensure ongoing compliance with these provisions.

9.Qualified Residential Treatment Program (QRTP)

The Family First Prevention Services Act (FFPSA) was signed into law on February 9, 2018 and has largely been implemented in Colorado (for an update on Colorado's progress in implementing the FFPSA, see Colorado Family First Implementation Dashboard | CO4KIDS, **https://co4kids.org/family-first-dashboard**). In accordance with the FFPSA, special procedures and findings apply to any placement in a Qualified Residential Treatment Program (QRTP). First, whether this level of treatment is necessary must be assessed by a Qualified Individual as defined by the FFPSA, who must not be an interested party or participant in the proceeding and who must be free of any personal or business relationship that would cause a conflict of interest. § 19-1-115(4)(h). This assessment must identify whether the QRTP level of treatment is the most effective, appropriate, and least restrictive placement for the child/youth and identify child-specific short- and long- term goals for the child/youth and family. § 19-1-115(4)(h).

Second, the court must hold a hearing to determine whether the needs of the child/youth can be met with a parent, legal guardian, kinship provider, or foster care home or whether placement of the child in a QRTP is the most effective and appropriate level of care for the child/youth in the least restrictive environment and whether placement is consistent with the short and long term goals for that child/youth as outlined in the permanency or family services plan for the child. § 19-1-115 (4)(e). The court must hold this hearing within sixty days after a placement or within thirty days after a placement if the evaluation by the Qualified Individual does not support the QRTP level of care or the child/youth, GAL, or any party objects to the placement. *Id.*

As long as the child/youth remains in a QRTP, the court must review the placement at every permanency and placement review

hearing and no less frequently than every 90 days. § 19-1-115(4)(g). At these hearings, the department must submit evidence that ongoing assessment continues to support the initial findings required for the placement and documenting the specific treatment or service needs that will be met for the child in the placement, the length of time the child is expected to need the treatment or services, and the efforts made to return the child home or to a less restrictive placement. § 19-1-115(4)(f). Parties may consent to the Administrative Review Division (ARD) of the Colorado Department of Human Services conducting this periodic review instead of the court; attorneys of record must be notified of these periodic reviews. § 19-1-115(4)(g); 12 CCR 2509-4: 7.304.651. In reviewing the placement, the court or ARD must give great weight to the assessment of the Qualified Individual; any decision that deviates from the assessment must be based on specific findings of fact regarding the most effective, appropriate, and least restrictive placement for the child or youth and whether the placement is consistent with the child-specific short and long term goals for the child/youth and family. § 19-1-115(4)(h). The court shall consider all relevant information, including but not limited to: whether the Qualified Individual followed the assessment protocol; the strengths and specific treatment or service needs of the child/youth and family; the expected length of stay; and the placement preference of the child/youth and family. *Id.* The CDHS regulations describing the requirements for QRTPs can be found at 12 CCR 2509-8:7.705.200.

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)(c), 19-3-702.5(1).

VII
Termination Hearing

TERMINATION HEARING CHECKLIST—GAL

BEFORE

- ❑ Review or file motion to terminate.
  - ❍ Determine timeliness of motion and whether notice was properly given.
  - ❍ Analyze compliance with ICWA inquiry and notice provisions (e.g., dates court made ICWA inquiries, dates and copies of documentation provided by the parents regarding possible Native American ancestry, dates and copies of notices sent, dates and copies of responses received, dates court entered findings as to whether the child is or may be Native American).
  - ❍ 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 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 and discuss with child options for participation and conveying child's position.

- ❑ Obtain, review, and analyze discovery.
- ❑ Obtain adjudication transcript/record if necessary.
- ❑ Obtain service provider records, including visit notes and videotapes.
- ❑ Interview potential witnesses.
- ❑ Secure and endorse expert witnesses if necessary.
- ❑ Prepare timeline regarding key events (e.g., filing of petition, date of adjudication, date treatment plan adopted).
- ❑ Develop litigation strategy and prepare trial notebook.
  - ❍ Draft opening statement.
  - ❍ Prepare direct examinations.
  - ❍ Prepare cross examinations.
  - ❍ Prepare *voir dire* for all endorsed experts.
  - ❍ Outline closing argument.
  - ❍ Prepare caselaw and rules for anticipated objections and evidentiary issues.
  - ❍ Prepare documentary exhibits for trial.
- ❑ Identify any relatives that have not already been located. Investigate appropriateness of placement.
- ❑ Prepare and distribute witness and exhibit lists. Subpoena witnesses.
  - ❍ If privilege holder on behalf of the child, evaluate whether waiver of privilege is necessary to support GAL's position and advocate for any limited waiver stipulations or orders supporting the best interests of the child.
- ❑ Conduct depositions or send out admissions and 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.

- Ensure that any applicable inquiries and conferences necessary to establish court's jurisdiction under the UCCJEA have been finalized.

DURING

- Actively participate in trial and ensure record is complete.
  - Make opening statement.
  - Examine witnesses.
  - Make arguments and appropriate objections.
  - Finalize and deliver closing argument.
- 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 of beyond a reasonable doubt for specific 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 (applicable burden beyond a reasonable doubt and finding must be supported by testimony from a qualified expert witness).
  - Active efforts have been made to prevent the breakup of the Indian family but have proven unsuccessful.

- ❑ 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).
- ❑ Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

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

- ❑ Meet with client well ahead of hearing and as often as indicated to prepare client for hearing.
- ❑ Discuss with client:
  - ❍ Accuracy and completeness of information in termination motion.
  - ❍ Position regarding truth of allegations.
  - ❍ Effect of termination of parental rights if motion is granted.
  - ❍ Desired outcomes and direction of litigation.
  - ❍ Alternative strategies and probable outcomes.
  - ❍ If client is not contesting TPR, discuss relinquishment and confession possibilities.
  - ❍ If client is not contesting TPR, discuss voluntariness of any continuing contact with child.
  - ❍ Identify any relatives that have not already been located.
  - ❍ Notify relatives of time frames for request for placement.
- ❑ If client is in custody, visit client and ensure client is either transported or appears by telephone for the hearing.
- ❑ Continue thorough and independent investigation.
- ❑ Determine timeliness of motion and whether notice was properly given.
- ❑ Retain expert witness(es) as indicated. Request approval from ORPC as soon as possible.
- ❑ Obtain prior hearing transcripts if necessary.
- ❑ Obtain service provider records, including visit notes and videotapes.
- ❑ Review related court files (domestic relations, restraining orders, paternity/child support, guardianship, juvenile delinquency, criminal, prior D&N, etc.).
- ❑ Obtain updated discovery: make formal 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, TRAILS reports, safety and risk assessments, visitation notes, and caseworker notes.

- Interview potential witnesses and request funds for investigator to assist if necessary.
- Take depositions if needed, and request approval for discovery costs from ORPC.
- Assess and formulate position on:
  - Strength of evidence supporting termination motion
  - Availability of less drastic alternatives
  - Appropriateness of treatment plan
  - Success of treatment plan
  - The provision of reasonable efforts
  - The prongs of unfitness
  - Change in conduct
  - Best interests of the child
  - Likelihood of future improvement
- Ensure all ICWA inquiries were made and confirm receipt of notices at least ten days prior to the hearing.
- File any necessary motions:
  - Requests for report writers.
  - *Shreck* motions.
  - Subpoenas *duces tecum*.
  - Telephone testimony.
  - Motions *in limine*.
  - Reasonable efforts motions.
- 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.
- Ensure new ICWA inquiries have been made prior to the termination hearing. *See* **ICWA fact sheet**.
- Review case management order and ensure compliance with order.
- Negotiate with counsel and GAL as indicated.
- 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 and make appointments to prepare witnesses for hearing.
- ❑ Exchange witness and exhibit lists.
- ❑ File any pretrial motions (i.e., motions *in limine*, motion to dismiss, motion for discovery, child hearsay, pretrial statement).
- ❑ Respond to all motions filed.
- ❑ Prepare trial notebook.
  - ❍ Draft opening statement.
  - ❍ Prepare direct examinations.
  - ❍ Prepare cross-examinations.
  - ❍ Prepare *voir dire* for all endorsed expert witnesses.
  - ❍ Outline closing argument.
  - ❍ Prepare caselaw and rules for anticipated objections and evidentiary issues.
  - ❍ Prepare documentary exhibits for trial in accordance with case management order.
- ❑ Ensure that any applicable inquiries and conferences necessary to establish court's jurisdiction under the UCCJEA have been finalized.
- ❑ 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.

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.)
- ❑ Actively participate in trial and ensure record is complete.
  - ❍ Make opening statement.
  - ❍ Examine witnesses.
  - ❍ Make arguments and appropriate objections.
  - ❍ Ensure all potential appellate issues are preserved during trial.
- ❑ Finalize and deliver closing argument
- ❑ 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.
- [ ] Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

AFTER

- [ ] Communicate and consult with client to explain court rulings and answer questions.

Termination Motion Granted

- [ ] Advise client about appeal rights and obtain appellate waiver or submit appellate transmittal form.
- [ ] Obtain court orders and give a copy to the client and appellate counsel if an appeal is being filed.
- [ ] Confer with appellate counsel.
- [ ] Facilitate good-bye visit, if necessary.

Termination Motion Denied

- [ ] File appropriate motions (e.g., reunification, amendment of treatment plan).
- [ ] Ensure that the client continues to engage in treatment and attend 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 Procedures 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. *People ex rel. D.Y.*, 176 P.3d 874, 876 (Colo. App. 2007). However, a parent must be afforded a reasonable time to comply with an appropriate treatment plan before parental rights may be terminated. *Id.* The determination of a reasonable period of time is fact specific. *Id.*; *see also People in the Interest of S.L.*, 2017 COA 160, ¶¶ 23–24 (rejecting parent's argument that 77 days after adoption of treatment plan provided insufficient time for compliance when parents had received services for approximately nine months prior to filing pursuant to voluntary agreement with the department and the termination hearing was not held until almost one year after the filing of the motion).

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)(a). 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. It serves as a "last resort" when the reunification goals of the Children's Code cannot be met. *See People in the Interest of J.G.*, 370 P.3d 1151, 1160 (Colo. 2016). 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 and RPC, 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). The 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 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. §§ 19-1-126, 19-3-602(1.5)(a)(I).

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)(a)(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. *See M.M.*, 726 P.2d at 1116–17.

If the case is an ICWA case, more stringent notice requirements apply. *See* **ICWA fact sheet**. The termination hearing constitutes an independent child custody proceeding under ICWA, requiring compliance with all notice provisions applicable to the commencement of a child custody proceeding. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a). 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). The 2016 ICWA Regulations also require submission of return receipts or other proof of notice. 25 C.F.R. § 23.111(a)(2).

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 if not already represented by 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.*

TIP RPC must be diligent about informing clients and known family members about the requirement to file a request for guardianship and legal custody within 20 days of filing the motion for termination. Upon receiving the termination motion, many parents are

upset and may not recall this specific detail. RPC should follow up with parents shortly after the termination motion is filed and independently inform known relatives of this requirement as soon as possible after the termination motion is filed.

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); CJD 16-02. Counsel must be appointed in accordance with § 19-1-105. § 19-3-602(2). The statutory right to counsel must be invoked by a parent's request for an attorney upon proper advisement of that right. *See People in the Interest of V.W.*, 958 P.2d 1132, 1134–35 (Colo. App. 1998) (upholding default judgment terminating parental rights when father had not requested an attorney until after his parental rights had been terminated). 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.*, 226 P.3d at 1062. 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).

Erroneous denial of a respondent parent's right to counsel during a substantial part of a parental rights termination hearing will require application of an automatic reversible error standard. *See People ex rel. R.D.*, 277 P.3d 889, 896 (Colo. App. 2012). Effectively dismissing counsel by precluding counsel from participating in a termination hearing in a parent's absence is a violation of a parent's statutory right to counsel. *See id.* at 893.

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 such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *See A.R. v. D.R.*, 456 P.3d 1266, 1280 (Colo. 2020); *see also People ex rel. C.H.*, 166 P.3d 288, 290–91 (Colo. App. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). For example, in *People in the Interest of S.L.*, the Colorado Court of Appeals held that counsel's failure to timely endorse an expert witness did not require reversal, as on appeal father "failed to demonstrate a reasonable probability that, but for counsel's alleged deficiencies, the outcome of the termination proceeding would have been different." 2017 COA 160, ¶ 65. In *A.R. v. D.R.*, the Supreme Court found that Mother's counsel rendered deficient performance under the *Strickland* standard where counsel failed to present a less drastic alternative argument to the court where the record indicated that a relative of the child was available and willing to take placement of the child, and counsel failed to make any effort to secure placement of the child with the relative beyond filing a letter written by the mother with the court. 456 P.3d at 1283. Because the trial court indicated in orders subsequent to the termination order that it may not have terminated mother's rights had it been aware of the availability of the relative for placement, the the Court concluded that the record established prejudice and that no further record was necessary. *Id.*

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 behavioral or mental health disorder or an intellectual and 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 Hearing 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(1) provides that an indigent parent has a right to an appointed expert at the expense of the State. These requests must be made through the ORPC and follow all ORPC policies. 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 other parties may obtain discovery of the expert's report and introduce the expert's testimony as evidence. Where statements are made in circumstances that do not give rise to a reasonable expectation that the statements will be treated as confidential, the privilege may not apply. *D.A.S. v. People*, 863 P.2d 291, 294 (Colo. 1993); *People in Interest of A.N-B.*, 440 P.3d 1272, 1277 (Colo. App. 2019) (quoting *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992)). 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).

TIP ORPC will appoint experts at any time during a case. RPC should consult with ORPC staff about potential experts for termination. If necessary for a particular case, ORPC can appoint more than one expert for termination. RPC should request experts through the ORPC billing system.

TIP RPCs and GALs should carefully consider the engagement of an expert, particularly an expert evaluating the relationship between parents and children. RPCs and GALs should consider use of social workers, family advocates, or social service professionals on their team to help assess whether obtaining a PCI may be helpful. Practitioners should consider using expert engagement agreements to set forth the expectations for confidentiality and preparation of reports.

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). Parents, grandparents, relatives, or foster parents who have the child in their care for more than three months, who have information or knowledge concerning the care and custody of the child, and who have intervened as a matter of right pursuant to § 19-3-507(5)(a) may also participate in the hearing. *A.M. v. A.C.*, 296 P.3d 1026, 1038 (Colo. 2013). This ability to participate recognizes the important information foster parents may have to present at the hearing but does not give foster parent intervenors a legally protected interest in

the outcome of the hearing. *See People in the Interest of C.W.B. Jr.*, 2018 CO 8, ¶¶ 28, 34. *See generally* **Intervenors fact sheet**.

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 a 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).

TIP Responses to motions for summary judgment must comply with C.R.C.P. 56 and 121 § 1-15. RPC should prepare affidavits to support their position. RPC can find sample responses to motions for summary judgment in the ORPC Motions Bank. RPC can also consult with ORPC staff attorneys when faced with a motion for summary judgment.

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 procedures 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 should 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).

TIP Counsel requesting a sanction for a discovery violation should clearly articulate the prejudice incurred by the party as a result of the violation. *See, e.g., S.L.*, 2017 COA 160, ¶¶ 73–74 (holding that the trial court did not abuse its discretion by allowing department expert witnesses to testify when the department had failed to specify a particular area of expertise and disclose the prior cases on which the experts had testified but father did not articulate how he was prejudiced by the disclosure failures, did not request a continuance, and stipulated to experts' qualifications).

11. Default Judgment

The entry of a default judgment against a parent who has actively participated in the proceeding but has failed to appear at the termination hearing is not an appropriate remedy under C.R.C.P. 55. *See R.D.*, 277 P.3d at 893.

12. Relinquishment

As an alternative to contesting a motion to terminate parental rights, a respondent parent may decide to relinquish parental rights. In such circumstances the procedures and findings required by Article 5 apply. *See* **Relinquishment fact sheet**.

TIP In *People in Interest of L.M.*, 416 P.3d 875 (Colo. 2018), the Colorado Supreme Court held that when a dependency and neglect proceeding is pending, the Department can only terminate the parent-child legal relationship through the provisions of Article 3. While the Supreme Court did not question the juvenile court's acceptance of the mother's relinquishment of parental rights (an Article 5 procedure), the Court held that it was error for the juvenile court to then terminate father's parental rights under the provisions of Section 19-5-105(1).

13. Format of Hearing

As long as a parent is provided with adequate due process (which must at the minimum include adequate notice, court-appointed counsel, and a meaningful opportunity to defend against termination and to be heard), a termination hearing may occur via telecommunication and does not need to occur in-person. *See People in Interest of R.J.B.*, 482 P.3d 519, 524-25 (Colo. App. 2021). But, if a parent is attempting to appear virtually at a termination hearing and is having technical difficulties through no fault of their own, the denial of a continuance could violate the parent's due process rights and constitute an abuse of discretion. *See People in Interest of E.B.*, 2022 COA 8.

TIP Counsel should consider the unique needs of their client, including any disabilities that might require an in person hearing as a reasonable accommodation.

BURDEN OF PROOF/REQUIRED FINDINGS FOR TERMINATION OF PARENTAL RIGHTS

The sources of the required findings for termination are a combination of caselaw 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.
- Active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and have proven unsuccessful.

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).

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). This finding must be supported by testimony of a qualified expert witness. *Id. See* **ICWA fact sheet**. The Colorado Jury Instructions for Civil Proceedings define reasonable doubt as "a doubt based upon reason and common sense which arises from a fair and thoughtful consideration of all the evidence, or the lack of evidence, in the case. It is not a vague, speculative, or imaginary doubt, but one that would cause reasonable persons to hesitate to act in matters of importance to themselves." Colo. Jury Instr., Civil 3:3 (2017). ICWA does not establish a higher burden of proof for its required active efforts finding.

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)–(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. The question before the court at the termination hearing is not whether a factual basis supporting adjudication existed but rather whether an adjudication occurred. *See People in the Interest of L.K.*, 2016 COA 112, ¶¶ 44–47, *rev'd on other grounds*, *C.K. v. People*, 407 P.3d 566 (Colo. 2017).

TIP

In *People in Interest of J.W.*, 406 P.3d 853, 855 (Colo. 2017), the Colorado Supreme Court overturned a Court of Appeals decision that had held a trial court's failure to enter a written adjudication order deprived the court of jurisdiction to terminate the parent-child legal relationship. The court held that in that case, the trial court's acceptance of the parents' admission that the children were dependent or neglected met the purpose of the adjudicative process. *Id.* Under the circumstances of the case, in which the parties, including the mother, proceeded as if an adjudication had taken place, the trial court's failure to enter a written adjudicative order did not impair the fundamental fairness of the proceedings or deprive the mother of due process. *Id.* The *J.W.* court's reasoning was somewhat fact specific, *id.*, and counsel should confirm that written adjudication orders have been entered prior to termination. Moreover, in *J.W.*, the Colorado Supreme Court made clear the case before it did not involve a deferred adjudication. *Id.* at 856. In *People ex rel. N.G.*, 303 P.3d 1207, 1213 (Colo. 2012), a division of the Court of Appeals characterized deferred adjudications as involving the postponement of the determination of a child's status of dependent or neglected. In deferred adjudication cases, counsel should ensure that the court enters a written order sustaining the petition upon any revocation of the deferred judgment.

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 that is 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. *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 iden-

tify 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. *See* **Family Finding / Diligent Search fact sheet.**

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).

In *People in the Interest of C.Z.*, 360 P.3d 228, 235–36 (Colo. App. 2015), the Colorado Court of Appeals held that the Americans with Disabilities Act (ADA) did not preempt this specific statutory provision and that it did not deprive the father in the proceeding of equal protection of the law.

TIP Although the *C.Z.* court concluded that the determination that no appropriate treatment plan can be devised under § 19-3-604(1)(b)(I) implicitly includes a determination that no reasonable accommodations can be made to address the parent's mental impairment, the decision encourages trial courts addressing ADA issues to make express findings regarding reasonable accommodations. *See C.Z.*, 360 P.3d at 236. Counsel should advocate for specific findings consistent with the ADA direct threat body of law, keeping in mind that the child's health and safety must remain the court's paramount concern. *See* **Disabilities and Accommodations fact sheet**. HB 18-1104 requires the court to make explicit findings that the provision of reasonable accommodations and modifications pursuant to the ADA will not remediate the

impact of the parent's disability on the health or welfare of the child. *See* § 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., In the Interest of Z.P.S.*, 369 P.3d 814, 818–19 (Colo. App. 2016); *C.Z.*, 360 P.3d at 238; *People in the Interest of N.F.*, 820 P.2d at 1130.

TIP A division of the Court of Appeals held that terminating the parent-child legal relationship based on a determination that no appropriate treatment plan can be devised 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 "no reason to believe additional treatment would prevent the termination of parental rights"). However, the division based its reasoning, in part, on the premise that ICWA's active efforts requirement was equivalent to the reasonable efforts requirement applicable to all D&N proceedings. *K.D.*'s reasoning is inconsistent with the definition of active efforts provided by the 2016 ICWA Regulations, which distinguishes active efforts requirement from reasonable efforts and specifically states that "[a]ctive efforts must involve assisting the parent . . . through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." 25 C.F.R. § 23.2; *see also* **ICWA fact sheet**; *People ex rel. A.R.,* 310 P.3d 1007, 1014–15 (Colo. App. 2012) (declining to follow *K.D.* and holding that active efforts require more than reasonable efforts) *and People ex rel. A.V.*, 397 P.2d 1019, 1022 (Colo. App. 2012) (declining to follow *K.D.* and agreeing with *A.R.* that active efforts require more than reasonable efforts).

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, 322 (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; *see also People in the Interest of K.B.*, 369 P.3d 822, 826 (Colo. App. 2016) (the determination of appropriateness must include consideration of whether the plan's objectives adequately address the identified safety concerns). 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.*, 243 P.3d 244 (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. *K.B.*, 369 P.3d at 826; *A.H.*, 736 P.2d at 427–28; *L.G.*, 737 P.2d at 434; *M.M.*, 726 P.2d at 1121–22.

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,

1087 (Colo. App. 2005) (holding that the respondent parent waived the issue of the appropriateness of the treatment plan by stipulating to the treatment plan at the dispositional hearing) *with K.B.*, 369 P.3d at 827–28 (remanding the case to trial court for explicit findings regarding the appropriateness of the treatment plan and lack of success in making parent fit even though the parents stipulated to the treatment plan's appropriateness earlier in the proceeding) and *People ex rel. S.N.-V.*, 300 P.3d 911, 915–17 (Colo. App. 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, 537–38 (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 370–71 (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* **No appropriate treatment plan 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).
- 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).
- 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. § 19-3-604(2). The court may also consider other factors that point to the parent's unfitness. *Id.* For example, in *E.S.V. v. People*, 370 P.3d 1144, 1146–47 (Colo. 2016), the Colorado Supreme Court upheld termination based on a mother's repeated

failure to report ongoing contacts with the father, as required by the treatment plan. The court held that sufficient evidence supported the trial court's determination that these repeated failures, along with other conduct, prevented her from demonstrating the appropriate protective capacity that was the objective of her treatment plan and rendered the treatment plan unsuccessful. *Id.* at 1148–49.

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 D&N 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 1072; *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 249–50, 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. In *People in Interest of S.R.N.J-S.*, 2020 COA 12, the Court

reversed an order terminating the parent-child legal relationship; in this case, the juvenile court's oral findings that the parents were "semi-fit" contradicted its written finding of unfitness, the juvenile court's written order incorporated its oral findings by reference, and the Court of Appeals held that the court's findings regarding parents' visits, participation, and success in their treatment plans lacked record support and were clearly erroneous.

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 caselaw 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.*, 726 P.2d 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 People ex rel. Z.P.*, 167 P.3d 211, 214–15 (Colo. App. 2007); *T.D.*, 140 P.3d at 223–24; *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.

In *People in Interest of A.M.*, 480 P.3d 682, 689–90 (Colo. 2021), the Colorado Supreme Court held that the best interest standard, rather than an adequacy standard, applies to a juvenile court's finding as to whether no less drastic alternative to termination exist, and that the best interest standard satisfied due process. Additionally, the Court reaffirmed that, while it is best practice for a trial court to expressly consider and eliminate less drastic alternatives, it is not required to make such findings because such consideration is implicit in the statutory criteria for termination. *Id.* at 690.

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 and Active Efforts Have Proven Unsuccessful

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.* Additionally, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family but have proven unsuccessful. 25 U.S.C. § 1912(d). *See* **ICWA fact sheet**.

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. RPC should consider whether to subpoena other records from the report writers well before the hearing to have time to review those materials for impeachment purposes. RPC should also consider whether motions considering the reliability and admissibility of expert testimony should be filed. *See People v. Shreck*, 22 P.3d 68 (Colo. 2001).

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, if privilege holder, should be cognizant that the sharing of such information may result in a waiver of privileges protecting such information. In *L.A.N. v. L.M.B.*, 292 P.3d 942, 950 (Colo. 2013), the Colorado Supreme Court held that by disseminating a letter from the child's therapist, the GAL had at least partially waived the child's psychotherapist-patient privilege and remanded the case to the juvenile court to determine the scope of the waiver. 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 stipulations from parties and rulings from the court on limited waiver as appropriate. *See id.* at 950–52 (discussing procedure and considerations for determining the scope of waiver in D&N proceedings). *See also* **Children's Psychotherapist-Patient Privilege fact sheet**.

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).

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)(f), 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). Colorado may also lack jurisdiction to hear a termination hearing if Colorado does not have non-emergency ongoing jurisdiction at the time the termination order enters. See *People in Interest of S.A.G.*, 487 P.3d 677 (Colo. 2021), and *People in Interest of B.H.*, 488 P.3d 1026 (Colo. 2021). *See* **Jurisdictional Issues fact sheet**.

TIP Although the court in S.A.G. cited several cases which support the premise that "a Colorado court exercising temporary emergency jurisdiction may not enter a permanent custody disposition," the court was clear that it was not reaching that issue in the case. *Id.* Accordingly, this remains an open question that should be litigated when appropriate. *See also* §14-13-204(2) (providing a method by

which a court with temporary emergency jurisdiction can create a permanent order).

3. Americans with Disabilities Act

Because the focus of the proceedings is 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). A treatment plan for a parent with a known disability, however, is evaluated for appropriateness in light of both reasonable efforts made to rehabilitate the parent and the reasonable accommodations made for the parent's disability. *People in the Interest of C.Z.,* 360 P.3d at 234–36; *People in Interest of S.K.*, 2019 COA 36. *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(b)(1) requires that a notice of appeal be submitted to the Court of Appeals within 21 days of the signed 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 seven days after the parties received notice of the magistrate's ruling 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 D&N 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 motion requesting increased visitation or a placement motion requesting reunification is appropriate. RPC should also ensure the services provided under the treatment plan continue to be provided and evaluate whether motions to modify the treatment plan are indicated.

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 matters before the court.
  - ❍ Determine whether child wants position reported to court and whether child would like to attend court.
- ❑ If the child would like to attend court, advocate for elimination and mitigation of barriers to court participation.
- ❑ Check to see if the appeal deadlines have passed or if an appeal is filed.
- ❑ If the case is moving to a new caseworker, ensure the transition is occurring in a timely manner.
- ❑ 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.
- Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

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, transition to adulthood services, 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). The 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).

TIP In cases where parental rights have been terminated as to only one parent and the other parent has custody of the child, RPC must prepare these post-termination reports. RPC may want to consult with the GAL or caseworker when preparing these reports.

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 GAL's post-termination report should contain a strong emphasis on efforts to achieve permanency for the child. Specifically, the GAL should report 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. 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 that the 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. Information available through the OCR's online case management and billing system, including, but not limited to, the number of days in out-of-home placement, may assist the GAL in providing additional context for the child's permanency needs. The GAL's report should also identify any barriers to achieving permanency for the child and suggest strategies for overcoming/addressing those barriers. Any concerns about the department's lack of reasonable efforts should be raised in this report; however, if the GAL is seeking a no reasonable efforts finding, the GAL should file a separate motion. *See* **Reasonable Efforts fact sheet**.

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. *See* **Relative and Kinship Placement fact sheet**. In addition, the report should include the GAL's position regarding joint placement of siblings. § 19-3-605(2). *See* **Siblings fact sheet**. The GAL should also report on the child's current placement, the child's involvement in extracurricular and other activities, and whether the placement is exercising the reasonable and prudent parenting standard in a manner that provides as much normalcy as possible for the child.

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; transition to adulthood skills 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.

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 before the court, 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).

If privilege holder, the GAL should be careful not to effectuate any waivers of the privilege that do not serve the child's best interests and should seek rulings and stipulations on limited waivers as appropriate. *See* **Children's Psychotherapist-Patient Privilege fact sheet**.

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**. *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 family search and engagement at least every six months throughout the life of the case until permanency is achieved, unless specific circumstances exist. *See* 12 CCR 2509-4: 7.304.52(D); **Family Finding / Diligent Search fact sheet**. Such efforts must be documented in the family services plan and contact notes. 12 CCR 2509-4: 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 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** and **Relative and Kinship Placement fact sheets**.

TIP ICWA's placement preferences continue to apply after termination of the parent-child legal relationship. *See* 25 U.S.C. § 1915(b); 25 C.F.R. § 23.131; 2016 ICWA Regulation H.2; **ICWA 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 court must consider whether the child is in a permanent home at the permanency hearing occurring immediately prior to 12 months after the original placement out of the home. § 19-3-702(5)(c). *See* **Permanency Hearings** chapter, 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(1)(a), 19-3-702.5(1). These hearings must occur at least every six months. *See* §§ 19-3-702(1)(a), 19-3-702.5(1). 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 has concerns 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
FACT SHEET

In D&N proceedings, adoption provides an important permanency option for children whose parental rights have been terminated or whose parents have relinquished their rights.[1] Once adopted, the child is the child of the adoptive parents and entitled to all rights and privileges as a child born to the adoptive parents. § 19-5-211(1).

WHO MAY BE ADOPTED

Any child legally available for adoption pursuant to § 19-5-203, under 18 years of age, and either present in the state at the time the petition for adoption is filed or under the jurisdiction of a court in Colorado for at least six months may be adopted. § 19-5-201.

TIP In D&N proceedings, a child typically becomes legally available for adoption when parental rights have been legally terminated or relinquished. § 19-5-203. Section 19-5-203 also identifies certain circumstances in which written and verified consent may make a child available for adoption, such as stepparent adoptions or cases in which parents are deceased. *See* § 19-5-203.

In any adoption proceeding, the GAL should confirm the finality and validity of the termination and relinquishment orders to avoid issues with the subsequent adoption. *See, e.g., In re C.L.S.,* 252 P.3d

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.

556, 558 (Colo. App.2011) (voiding judgment terminating father's parental rights when mother's fraudulent failure to disclose father's identity deprived him of notice and the opportunity to be heard).

A person age 18 to 21 years of age may be adopted by approval of the court. § 19-5-201.

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 placing custodial care with the potential adoptive parent, 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). If the tribe has established by resolution a different order of preference, the tribe's placement preferences shall apply. 25 U.S.C. § 1915(c); 25 C.F.R. § 23.130(b). The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent. 25 U.S.C. § 1915(c); 25 C.F.R. § 23.130(b). The 2016 ICWA Regulations set forth a procedure and standards for a court's determination of whether good cause exists to depart from the placement preferences. *See* 25 C.F.R. § 23.132; **ICWA fact sheet**.

TIP If the child is an Indian child or there is reason to know or believe the child is an Indian child, counsel should ensure compliance with applicable notice requirements. *See* **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. *Id*. 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 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. § 19-5-104(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 not 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, 531–32 (Colo. App. 2004); *People ex rel. E.C.*, 47 P.3d 707, 709 (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)(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. Section 19-5-202 does allow a partner in a civil union to adopt a child in the same proceeding and be treated as a stepparent. § 19-5-202(4)–(5).

3. Closed 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 opening 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 contemplated 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). The petition to adopt should be filed no later than 35 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 5 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), and (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 ICPC. § 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)(a) (setting forth procedure for criminal background check); § 19-5-207(2.5)(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 adoption 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 specified convictions for the adoptive parent(s) and any adults residing in the home); § 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

Children and youth who have special needs that create a barrier to their adoption are eligible for adoption benefits in Colorado. Sections 26-7-102(8) and 26-7-105 outline criteria that qualify a child or youth for a subsidy. Children who meet the criterial for federal Supplemental Security Income or for whom it would be reasonable to conclude that they cannot be adopted without benefits are eligible. Factors supporting a child's eligibility include but are not limited to: a physical, mental, intellectual, or developmental disability; an education disability that qualifies the child for a Section 504 plan, being over seven years of age or part of a sibling group that should remain intact, and ethnic background or membership in a minority group. § 26-7-102(8). A subsidy must be supported by a determination that reasonable efforts have been made to place the child for adoption without benefits or a determination that such efforts would be against the best interest of the child. *See* § 26-7-105(2)(c) (including a significant bond with the prospective adoptive parents or the delay caused by a search for a nonsubsidized adoptive placement as factors supporting a best interest determination). Available benefits include monthly subsidized payments, medical assistance, reimbursement of nonrecurring expenses such as adoption and attorney fees. § 26-7-106(2).

Colorado's adoption assistance program is supervised by CDHS and administered by county departments. § 26-7-103. At the time that a family is matched for adoption of a child or youth potentially eligible for benefits, the department or child placement agency must provide written notice to the prospective adoptive family of the availability of monetary, mental health, and tax benefits and the family's rights in the adoption assistance process, including the right to involve the GAL and other individuals who have information about the child's history and needs, the right to request a negotiation meeting, and the right to appeal. *See* § 26-7-104(1). The subsidy determination must be reached through a discussion and good-faith negotiation process that takes into account the circumstances of the adoptive family and the needs of the child or youth; however, use of a means test is prohibited. § 26-7-107(1)–(3). Volume 7 outlines several important protections applicable to adoption subsidy negotiations, including but not limited to: the presentation interview must take place within 90 days of termination of the parent-child legal relationship; the GAL must be be invited to the interview; the department must provide an audio recording of the presentation interview and give the adoptive parents time to review the recording and written information. *See* 12CCR 2509-4: 7.306.16. An agreement must be signed prior to the adoption. § 26-7-107(1). An appeals process is provided by § 26-7-110.

TIP In 2019, the Subsidization of Adoption statute, C.R.S. §§26-7-101 to -110, was repealed and reenacted to address concerns with the program. SB19-178. The revision clarified that GALs may participate in subsidy negotiations, and GALs should advocate for subsidies that advance children's best interests through this permanency support.

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 and 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 pro-

spective 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 5 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 person or agency consenting to the adoption, 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 and address redacted. 12 CCR 2509-8: 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 as well as any affidavit signed by the parents asking that their identities remain confidential; and any agency having relevant information relating to the adoptive placement. 25 C.F.R. § 23.140.

OPEN ADOPTION

HB21-1101 authorized a procedure for open adoptions. §19-5-208(4.5)(a)-(h). Only the petitioner (the adoptive parent) in the adoption case may request a post-adoption contact agreement (unless the child is a member of an Indian tribe, in which case the tribe may request one). §19-5-208(4.5)(b). A post-adoption contract agreement may describe contact, visitation or the exchange of information between the child and/or adoptive family and the parent or biological relatives. *Id.* If the child is 12 years or older, the child must consent to the open adoption. §19-5-208(c). Regardless of the child's age, the court must find that the open adoption is in the child's best interest. §19-5-208(4.5)(d). If the child has a GAL through a D&N, then the GAL must also be appointed in the adoption case. §19-5-208(4.5)(h).

Although the parent or relative is a signatory on the post-adoption contact agreement, this does not make the parent or a relative a party in the adoption case. §19-5-208(4.5)(e). This legislation makes clear that an adoption cannot be set aside because of a failure of the adoptive family to comply with the post-adoption contact agreement or any subsequent modifications, and disagreement or litigation about the agreement do not affect the validity of the adoption. The agreement cannot limit an adoptive parent's ability to move out of state. §19-5-208(4.5)(f)(I).

The court in the adoption case retains jurisdiction to hear a motion to enforce the post-adoption contact agreement, enter stipulated modifications to the agreement, or terminate the agreement. §19-5-217(2). Only parties to the agreement can bring an action to enforce or terminate the agreement, and the parties must attempt alternative dispute resolution prior to filing. §19-5-217(3). In any subsequent litigation over the agreement, the court may appoint a GAL if the factors in §19-5-103(9)(a) are met, and the court may consider documentary evidence, offers of proof or it may conduct an evidentiary hearing. §19-5-217(2), (7). In order to terminate a post-adoption contact agreement, the moving party must establish a change in circumstance and that the agreement is no longer in the best interest of the child. §19-5-217(5).

TIP GALs appointed to represent children in an open adoption case should consider both the immediate and long-term implications of the proposed post-adoption contact agreement taking into consideration the possibility that circumstances will change in the lives of the child, the adoptive family and the biological family.

Allocation of Parental Responsibilities (APR)/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, 1390 (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).

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 of a minor 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 in writing, and they 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). If a minor does not consent to the appointment of a guardian, the Guardianship Act does provide for the appointment of a temporary or emergency guardian. *See* §§ 15-14-203(2), 15-14-204(4)–(5). However, these options do not provide permanency for the child, as they are time-limited.

TIP This fact sheet focuses on appointment of guardians for a minor pursuant to Part 2 of Article 14 of the Guardianship Act. For information about appointment of guardian for an incapacitated adult, counsel should refer to Part 3 of Article 14. *See* § 15-14-301 *et seq.*

3. Petition for Appointment of Guardian

The petition for the appointment of a guardian of a minor 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).

TIP Guardianship ordered through a D&N proceeding likely meets ICWA's definition of foster care placement. *See* 25 C.F.R. § 23.2. Counsel should ensure compliance with ICWA's notice provisions and required findings. *See* **ICWA fact sheet**.

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 the child, including, but not limited to, the following:

- The authority to consent to marriage, to enlistment in the armed forces, and to medical or surgical treatment.
- The authority to represent the child in legal actions and to make other decisions of substantial legal significance concerning the child.
- The authority to consent to the adoption of the 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 (describing the 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.

TIP An emergency guardian's authority is more limited in that the guardian may only exercise powers specified in the court order. § 15-14-204(5).

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 must at all times act in the child's best interests and exercise reasonable care, diligence, and prudence. *Id.*

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 insurance policy payments. § 15-14-208(2)(a).

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 or in the existing probate case.

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. Guardianship Assistance Program

Colorado, pursuant to the Fostering Connections to Success and Increasing Adoptions Act of 2008, has established a guardianship assistance program for children for whom the court has determined that adoption and reunification are not appropriate permanency options. § 26-5-110(2). Initially applicable to relatives and kin and generally referred to as RGAP (Relative Guardianship Assistance Program), the program was extended to include unrelated foster parents through HB 16-1448.

"Relatives, kin, and persons ascribed by the family as having a family-like relationship with the child" are eligible to receive assistance if they are committed to the child's permanency and have been the certified foster parents of the child for a minimum of six consecutive months at the time of the guardianship order. § 26-5-110 (2)(a)(I)–(II).

Additionally, certified foster parents who do not otherwise qualify for the program as relatives or persons ascribed as having a family-like relationship also qualify for the program if the following conditions are met:

- The child is at least 12 years of age and has consented to the guardianship or allocation of parental responsibilities, or the child (11 years or younger) is a sibling of an older child receiving assistance.

- The D&N court finds the child has a substantial psychological tie to the foster parent and that it would be seriously detrimental to the child's emotional well-being to remove the child from the foster parent's care.
- Adoption and reunification are not appropriate permanency options for the child and the D&N court finds, pursuant to § 19-3-702(4)(e)(III), that the foster parent is unable to adopt the child because of exceptional circumstances. The exceptional circumstances must not include an unwillingness of the foster parent to accept legal responsibility for the child, and the foster parent must be willing and capable of providing the child with a stable and permanent environment.
- The foster parent has cared for the child for a minimum of 12 months.
- The foster parent has assumed legal guardianship or allocation of parental responsibilities for the child.

§ 26-5-110(2)(b)(I)–(V).

CDHS rules for guardianship assistance are found at 12 CCR 2509-4: 7.311 *et seq*. The assistance determination must be based on the needs of the youth and the relative guardian's circumstances. 12 CCR 2509-4: 7.311.5(B)(5). The rules prohibit the use of an income eligibility test to determine assistance. *Id.* at 4. The types of assistance available include assistance payments that can be long-term, time-limited, "core" (a minimum monthly amount plus Medicaid), and dormant, to address anticipated future needs. *Id.* at (7). Additionally, assistance can be in the form of Medicaid or medical assistance for the child. *Id.* at (1). Monetary assistance can be provided up to the foster care payment rate. 12 CCR 2509-4: 7.311.6(H). The rules also provide for non-recurring relative guardianship assistance expenses. 12 CCR 2509-4: 7.311.5(9). RGAP is available to the child regardless of whether the child qualifies for federal IV-E reimbursement. *See* 12 CCR 2509-4: 7.311.62. The rules also provide for renegotiation of the assistance if the child's needs or family's circumstances change, *see* 12 CCR 2509-4: 7.311.6(H)(3), and set forth procedures for the transfer of the assistance to a successor guardian in the event of the death or incapacity of the guardian. *See* 12 CCR 2509-4: 7.311.64. The department also has a duty to inform the relative guardian of additional services and assistance that the youth will be eligible for and the procedures to apply for those services, as well as the potential eligibility for social / supplemental security benefits for the youth. 12 CCR 2509-4: 7.311.63(8) and 7.311.4(B).

TIP The GAL should advocate for guardianship assistance, consistent with the best interests of the child. Guardianship may be a good option for youth over 12 who will not consent to adoption but who would like to remain with a family who would like to provide permanency where the only barrier is financial. As with all permanency options, the GAL must evaluate, among other considerations, the stability of a guardianship placement versus other options (such as allocation of parental responsibilities or adoption) when evaluating whether guardianship meets the child's best interests. Due to the GAL's investigative responsibilities and ongoing involvement in the case, the GAL has information about the child's immediate and long-term needs and what forms of assistance are necessary to support the guardian in providing permanency for the child. Counties vary widely in their administration of this program, and the GAL should request a copy of the county department's written policy. *See* 12 CCR 2509-4: 7.311.63(A)(1). A thorough review of the applicable CCR (Volume 7) provisions will also support effective advocacy. As many counties continue to have little experience providing guardianship assistance, county staff may be confused about some of the procedures and requirements; CDHS staff may serve as a helpful resource for explaining the possible forms of assistance to a county department. GALs should contact the OCR for assistance in identifying CDHS staff who can be of assistance. Additionally, while the rules permit rather than require the department to provide guardianship assistance, a department's refusal to provide this assistance may provide the basis for a no reasonable efforts motion when such assistance will support the child's permanency goal. *See* **Reasonable Efforts fact sheet**.

9. Special Considerations

a. Letters of guardianship. The nominee guardian must accept the appointment by filing an acceptance with the court. § 15-14-110(1).

b. Guardian's report. Colorado Rule of Probate Procedure 31.2 requires an annual guardian's report be filed with the court, containing all significant information regarding the welfare and care of the minor for the preceding year.

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).

TIP Modification under the guardianship statute is very broad, allowing any person interested in the welfare of the child to petition for any order that is purportedly in the best interests of the child. There are no specific limits imposed on how frequently this can occur. If parental rights are still intact, it is important to understand the presumptions that may apply when a parent moves to modify or end the guardianship with a nonparent. The Supreme Court has held that a fit parent's position is presumed to be in the best interests of the child unless the guardianship order expressly limits the parent from asserting this presumption, and the guardian would bear the burden of proving by a preponderance of the evidence that termination or modification of the guardianship is not in the child's best interests. *See In re D.I.S.*, 249 P.3d 775, 787 (Colo. 2011). While Colorado courts have not considered the application of this decision to guardianships established through a D&N proceeding, the GAL should be aware of this potential limitation on the permanency established through a guardianship proceeding.

d. Termination. The guardianship terminates when the minor is adopted, emancipates, turns 18, or dies or as ordered by the court. § 15-14-210(1).

The Supreme Court has held that a court must give "special weight" to a parent's decision to terminate the guardianship "established by parental consent." *D.I.S.*, 249 P.3d at 787. 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.*

e. ICWA. ICWA applies to guardianship proceedings. *See* 25 U.S.C. 1903(1)(i); **ICWA fact sheet**.

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 S.T.*, 361 P.3d 1154, 1156–57 (Colo. App. 2015); *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. *C.M.*, 116 P.3d at 1283. While parental unfitness clearly constitutes a compelling reason, parental deficiencies less serious than unfitness may also give rise to a compelling reason. *Id.* at 1284. An award of APR to a nonparent does not require a finding that the parent is unfit. *Id.*; *see also In the Interest of M.D.*, 338 P.3d 1120, 1126–28 (Colo. App. 2014). However, if a parent has been determined to be a fit parent, the parent is entitled to the so-called *Troxel* presumption that he or she is acting in the children's best interest. *See People in Interest of J.G.*, 486 P.3d 504, 510, 512 (Colo. App. 2021). In which case, the party seeking APR to the non-parent must rebut the presumption by clear and convincing evidence. *See id.; see also* **Adjudicatory Hearing chapte**r.

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 UDMA'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 as they are governed by the Children's Code. *Id.* at 1388–90. 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).

TIP Because adjudication is a prerequisite for jurisdiction to enter an APR order, RPC should evaluate whether a deferred adjudication is appropriate in cases where an allocation of parental rights order is anticipated at the end of a case. *See* **Adjudicatory Hearing chapter**.

TIP If a parent or relative being allocated parental responsibilities desires to relocate, counsel should consider addressing relocation at the APR hearing and may look to the provisions of § 14-10-129 as

a guide. Counsel should not request a provision allowing a parent to relocate at some point in the future as doing so may result in a reversal of the APR order. *See, e.g., People in Interest of N.G.G.*, 459 P.3d 664, 669 (Colo. App. 2019).

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).

TIP RPC are required to advise clients about their right to appeal after an APR order is issued. *See* CJD 16-02(IV). If parents wish to appeal, RPC should immediately request appointment of appellate counsel from ORPC. *Id.* The APR is final when it is issued, rather than upon certification or dismissal of the D&N case. *See People in Interest of M.R.M.*, 2018 COA 10, ¶ 9 (Colo. App. 2018).

3. Certification of APR

The APR order must be certified in 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). When the juvenile court enters a custody order, a certified copy of the order shall be filed with the certifying court and becomes the order of that court. C.R.J.P. 4.4. At least one division of the Court of Appeals has applied the provisions of the Uniform Dissolution of Marriage Act (UDMA), or Title 14, in reviewing an APR order where the APR order was certified into a new domestic relations case. *See People in Interest of N.G.G.*, 459 P.3d 664, 669 (Colo. App. 2019).

4. Guardianship Assistance

HB 16-448 extended Colorado's RGAP to individuals allocated parental responsibilities of a child through D&N proceedings and it is now incorporated into § 26-5-110. The same categories of individuals eligible for RGAP as guardians are eligible for RGAP upon assuming allocation of parental responsibilities. *See* **Guardianship Assistance Program subsection**, *supra.*

TIP To ensure that less drastic alternatives to termination and adoption are not ruled out based on perceived financial barriers, RPC should independently ensure that kinship providers understand the ways in which RGAP can create permanency without terminating parental rights.

5. 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 an APR is governed by the UDMA, *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, as well as time requirements for bringing motions to modify, may make APR a more stable permanency option than guardianship. *See* §§ 14-10-129, 14-10-131(1).

TIP The statutory presumptions and corresponding burdens of proof differ depending on whether the court allocates parental rights to a nonparent and whether the parent is found to be unfit. Once a determination regarding an APR is made, relevant statutes generally restrict modifications sought within two years or modifications that substantially alter parenting time and change the person with whom the child primarily resides absent specific findings. *See* §§ 14-10-129, 14-10-131. While the party seeking the modification generally bears the burden of proof, when a fit parent moves to modify an APR with a nonparent, the burden switches to the nonparent to prove that the fit parent's request is not in the best interests of the child. *See In re B.R.D.*, 280 P.3d 78, 83 (Colo. App. 2012). The GAL should analyze these issues when determining what to request in an APR order.

c. ICWA. APR to a nonparent through a D&N proceeding is a child custody proceeding subject to ICWA. *See* **ICWA fact sheet**.

Appeals
FACT SHEET

Appeals and other forms of review are an important part of D&N 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. CJD 04-06(V)(D)(6) requires GALs to ensure that the best interests of children are represented on appeal by either filing a pleading or formally joining another party's pleading. 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. GALs do not need preapproval to obtain appellate litigation support at any stage of the proceeding.

TIP Respondent parent attorneys are required by CJD 16-02(IV) to advise their clients of their right to appeal after the entry of disposition and again after an order terminating parental rights. If the parent does not wish to appeal—or is not available to be advised of their right to appeal—the RPC must submit a written waiver of appeal or notice of diligent efforts to the ORPC. If a parent does wish to appeal, then the RPC must complete and submit the appellate transmittal form, located on the ORPC website. The ORPC can also appoint appellate attorneys to consult on record preservation and for C.A.R. 21 interlocutory appeals to the Supreme Court. For

these specialized appointments, the request must be made in writing directly to the ORPC appellate director.

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); *People ex rel. N.A.T.*, 134 P.3d 535, 537 (Colo. App. 2006) (regarding failure to object to allocation of permanent parental responsibilities). 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. *People ex rel. 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).

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 in the Interest of 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. If the court is entering an oral order that will only be reduced to writing in a minute order, counsel should review the minute order and file a motion to correct the minute order or must file a motion for reconsideration of the court's oral order. Counsel can also orally request clarification or correction of the court's oral order during a hearing.

If counsel intends to file a Notice of Appeal but lacks a written final order, counsel should make a written or verbal request at every opportunity that the court enter the written final order, or counsel will risk waiving the right to raise the issue at a later date. *See A.R. v. D.R.*, 456 P.3d 1266, 1277 (Colo. 2020). All parties should

be mindful that the written order includes the same findings and orders made in the oral order. Where the written order references findings made on the record without specific written findings, the oral orders may end up controlling. *See People in Interest of S.R.N.J-S.*, 2020 COA 12. To avoid ambiguity, parties should consider submitting detailed written proposed orders or requesting clarification of the court's written orders to accurately reflect the oral orders.

TIP

The Court of Appeals has rendered varying opinions regarding preservation of issues for appeal. *See People in the Interest of K.B.*, 369 P.3d 822, 827 (Colo. App. 2016) (noting that the standard for preserving a challenge to the adequacy of a parent's treatment plan for appellate review is not clear). *Compare id.* at 828 (considering mother's argument that the treatment plan failed to include domestic violence counseling and remanding the case for specific findings regarding the treatment plan and mother's unfitness even though mother had stipulated to the appropriateness of the treatment plan during the dispositional stage) *and People ex rel. S.N-V.*, 300 P.3d 911, 913–18 (Colo. App. 2011) (holding estoppel doctrines did not bar parent's lack of reasonable efforts argument on appeal although parent acquiesced to treatment plan at dispositional hearing, did not object to services supporting efforts to rehabilitate him, and raised issue for first time at termination hearing) *with People in the Interest of A.D.*, 2017 COA 61, ¶ 36 (Colo. App. May 4, 2017) (holding parent waived his right to challenge reasonable efforts based on department's objection to his motion to change venue because parent expressly agreed to hold motion in abeyance and failed to seek ruling on motion); *People ex rel. D.P.*, 160 P.3d 351, 354 (Colo. App. 2007) (holding estoppel doctrine of waiver barred parents' appellate arguments regarding their treatment plans when parents stipulated to plans, did not subsequently complain about plans or seek modification of plans, and raised issue for first time at termination hearing) *and People ex rel. M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005) (holding estoppel doctrine of invited error barred parent's argument based on his treatment plan when parent who was represented by counsel stipulated to plan, agreed plan was appropriate during subsequent review hearing, did not seek modification of plan, and raised issue for first time at termination hearing); *A.R. v. D.R.*, 456 P.3d 1266, 1277 (Colo. 2020) (barring parent from making claim of ineffective assistance of counsel at an adjudicatory hearing as part of an appeal of a termination order even where the adjudicatory order

had not been reduced to writing). While trial counsel should take care to lodge objections in a timely manner, appellate counsel should evaluate whether existing precedent supports raising an issue on appeal even if not fully preserved at the trial level.

TIP In *People in Interest of M.B.*, 459 P.3d 766 (Colo. App. 2020), a parent urged the Court of Appeals to apply a plain error standard of review to a his due process and equal protection claims, which had not been brought to the attention of the trial level court during the proceedings. The Court of Appeals declined to apply a plain error standard of review, noting that that standard arrives from Colorado Rule of Criminal Procedure 52(b) and that D&N proceedings are civil proceedings. Instead, the Court of Appeals determined that the proper standard of review for unpreserved constitutional claims in dependency and neglect cases is a miscarriage of justice standard, which the Court found the father had not met in this case. A trial court's factual findings and conclusions will be set aside only where they are so clearly erroneous as to find no support in the record. *See People in Interest of A.M.*, 480 P.3d 682, 686 (Colo. 2021)

TIP In lodging objections, it is important that trial counsel make a clear record of the specific prejudice incurred (including how the court's order affects the parent or child) and request appropriate relief. For example, a division of the Court of Appeals affirmed a trial court decision permitting expert testimony where the parent failed to make a record of prejudice, failed to request a continuance, and made a number of pretrial stipulations regarding the expert witnesses' expertise and reports. *People in the Interest of S.L.*, 2017 COA 160, ¶¶ 71–74. Counsel should also carefully consider pretrial stipulations and their potential implications for appellate review. RPC should remember to constitutionalize objections where appropriate.

TIP In *People in the Interest of J.W.*, 2017 CO 15, ¶ 20, the Colorado Supreme Court overruled a Court of Appeals holding that failure to enter an order of adjudication deprived the juvenile court of jurisdiction to terminate parental rights. The Court distinguished subject matter jurisdiction from personal jurisdiction and concluded that the lack of an adjudicatory order created an issue regarding personal, not subject matter, jurisdiction. *Id.* at ¶¶ 24–25. The distinction between subject matter jurisdiction and personal

jurisdiction has implications for the timing of when challenges to the court's jurisdiction must be made. Lack of subject matter jurisdiction may be raised at any point during the proceeding (*see, e.g., S.T.*, 361 P.3d at 1156), but challenges to personal jurisdiction are waived if not raised in a timely manner (*see* C.R.C.P. 12(h)).

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. §§ 19-1-109(1), 13-4-102(1); C.A.R. 1(a). The Colorado Supreme Court defines a final judgment as "one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings." *People in the Interest of E.A.*, 638 P.2d 278, 282 (Colo. 1981) (quotations omitted).

The General Assembly specifically designates orders terminating or refusing to terminate parental rights and orders adjudicating children dependent and neglected after the entry of the disposition final orders. § 19-1-109(2)(a)–(b). Section 19-1-109(1), with limited exceptions, authorizes appeals in D&N proceedings from any order that qualifies as a final judgment under § 13-4-102(1). *See People in the Interest of R.S.*, 416 P.3d 905, 907 (Colo. 2018). Divisions of the Colorado Court of Appeals have declared the following orders entered in D&N proceedings to be final.

- An order allocating parental responsibilities. *People in the Interest of M.R.M.*, 484 P.3d 807, 812 (Colo. App. 2021); *People ex rel. E.C.*, 259 P.3d 1272, 1276 (Colo. App. 2010); *see also* C.A.R. 3.4(a) (including orders allocating parental responsibilities pursuant to § 19-1-104(6) and final orders of permanent legal custody entered pursuant to §§ 19-3-702 and 19-3-605 in the list of orders subject to C.A.R. 3.4).
- A denial of a paternity order. *People in the Interest of N.S.*, 2017 COA 8, ¶ 10.
- An order denying intervention as a matter of right. *People ex rel. O.C.*, 312 P.3d 226, 228–29 (Colo. App. 2012), *aff'd* 308 P.3d 1218 (Colo. 2013).

TIP Counsel challenging an APR order must file a Notice of Appeal within 21 days of the written APR order being entered in the dependency and neglect case. Though it is common (and necessary) for an APR order to be certified into a new domestic relations

case so that parties may enforce or modify it in the future, it is the order entered in the dependency and neglect case that is the final, appealable order, not the order certifying it into the new case. *See M.R.M.*, 484 P.3d at 814-15. Counsel should also be aware that APR orders may be modified in the new trial court case even while an appeal of the APR order is pending. §§ 14-13.5-105 and 19-4-119.

The following orders entered in D&N proceedings have been held to not be final orders.

- Temporary custody order. *People ex rel. M.W.*, 140 P.3d 231, 233 (Colo. App. 2006).
- Order granting a voluntarily dismissal of a petition without requiring expungement of the administrative findings of child abuse. *People in the Interest of C.S.*, 405 P.3d 467, 469–70 (Colo. App. 2017).
- 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).
- Order modifying a treatment plan. *E.O. v. People*, 854 P.2d 797, 801 (Colo. 1993).
- Order determining a child is available for adoption. *People in the Interest of S.M.O.*, 931 P.2d 572, 573 (Colo. App. 1996).
- Order requiring 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).
- Order modifying child's out-of-home placement. *People in the Interest of P.L.B.*, 743 P.2d 980, 981 (Colo. App. 1987).
- Order entered during the temporary protective or shelter stage. *People ex rel. A.E.L.*, 181 P.3d 1186, 1191 (Colo. App. 2008).
- Order adjudicating a child dependent and neglected after a finding of no reasonable treatment plan where the proposed disposition was termination but termination of parental rights had not taken place. *People ex rel. M.S.*, 292 P.3d 1247, 1247 (Colo. App. 2012).
- The initial dispositional order, unless part of the appeal of the adjudication order. *See People in Interest of H.T.*, 2019 COA 72.

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. § 19-1-108(5.5). The petition for review must be filed within seven 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. *C.S. v. People*, 83 P.3d 627, 635–36 (Colo. 2004). Excusable neglect has been defined as a situation where the failure results from circumstances which would cause a reasonably careful person to neglect a duty, such as when counsel's medical condition is so physically or mentally disabling as to render counsel unable to file the requested relief or at least seek an extension of time. *People in Interest of L.B-H-P.*, 482 P.3d 527, 529–30 (Colo. App. 2021).

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. *People v. S.X.G.*, 269 P.3d 735, 739 (Colo. App. 2012). *See* **Magistrates fact sheet**.

TIP The Court of Appeals has held that when a district court has entered an adjudication order but the accompanying dispositional order has been entered by a magistrate, § 19-1-108(5.5) does not require the district court to review the magistrate's dispositional order before a parent may appeal the adjudicatory order. *People in Interest of R.J.* 2019 COA 109.

APPEALS TO THE COLORADO COURT OF APPEALS

To appeal a district or juvenile court order in a D&N proceeding, a notice of appeal and designation of transcripts 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). The designation must also be served on the trial court's managing court reporter. C.A.R. 3.4(d)(2).

TIP The applicability of C.A.R. 3.4 warrants brief consideration. C.A.R. 3.4(a) states that appeals from D&N orders permitted by § 19-1-109(2)(b) and (c)—including orders terminating or refusing to terminate parental rights, allocating parental responsibilities or permanent legal custody, and reinstating parental rights—must be in the manner and within the time frames outlined in C.A.R. 3.4. Colorado Appellate Rule 3.4 was initially promulgated in 2005 and amended in 2006, 2012, 2016, and 2017. Colorado courts have rendered varying opinions regarding the applicability of C.A.R. 3.4. *Compare People ex rel. A.H.*, 216 P.3d 581, 583–85 (Colo. 2009) (noting that C.A.R. 3.4 was created to expedite appeals in D&N cases, and rejecting parent's request for writ of prohibition pursuant to C.A.R. 21 for relief from trial court orders rejecting his request for custody and dismissing him after jury verdict in his favor because he had an available remedy pursuant to C.A.R. 3.4) *with People in the Interest of N.S.*, 2017 COA 8, ¶¶ 14–18 (Colo. App. 2017) (stating that C.A.R. 3.4 applies to orders specifically enumerated in C.A.R. 3.4 and applying C.A.R. 4 to paternity order because paternity orders are not specifically enumerated in C.A.R. 3.4). In light of this caselaw and to avoid potential dismissals due to untimeliness, counsel should follow the requirements and time frames outlined in C.A.R. 3.4, even if the order being appealed is not specifically enumerated in C.A.R. 3.4.

TIP A form Notice of Appeal (Cross Appeal) and Designation of Transcripts from an order in a D&N proceeding is available in Word and PDF formats at **https://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=21**. 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) (requiring record on appeal to contain initials of children and respondents); C.A.R. 32(f) (requiring appellate documents to refer to children in D&N proceedings and relatives whose names could be used to determine names of such children by initials or appropriate general descriptions).

TIP Appellate counsel may wish to file motions with the Court of Appeals requesting clarification or correction of orders, a timely mandate, etc. GALs can obtain assistance related to these motions from OCR's litigation support list.

TIP RPC may not act as appellate counsel on their own appeals and must, instead, request appointment of ORPC-approved appellate counsel to handle cases on appeal. This request may be made through the ORPC appellate request form, available on the ORPC website.

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

The notice of appeal or cross-appeal and designation of transcripts (notice/designation) must be filed with the clerk of the Court of Appeals and an advisory copy served on the clerk of the trial court within 21 days after entry (signing) of the order being appealed. C.A.R. 3.4(b)(1). The designation must also be served on the trial court's managing court reporter. C.A.R. 3.4(d)(2). 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. *Id.* 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.* Filing must be executed via hand delivery to the clerk's office, mail addressed to the clerk, or electronic filing through the electronic filing system approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(a). Service on the parties must be executed personally, via mail, or via electronic service through the electronic service system approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(d).

The notice/designation must identify the party initiating the appeal, the order from which the appeal is taken, the date the appealed order was signed by the trial court, and the dates of the proceedings for which transcripts are being requested and the names of the court reporters, if applicable, as well as include a certificate of service in compliance with C.A.R. 25 and a copy of the appealed order. C.A.R. 3.4(c)(1)–(5), (d)(3).

The record on appeal must include the district court file and all exhibits and may include any transcripts ordered by the parties. C.A.R. 3.4(d)(1).

The trial court clerk will prepare the record pursuant to the designation, and the record is due at the Court of Appeals within 42 days of filing the notice/designation. C.A.R. 3.4(e)(1). Appellant may request an extension of 14 days for good cause. C.A.R. 3.4(e)(2). If the request is based on a court reporter's or transcriber's inabil-

ity to prepare the transcripts in a timely manner, the request for extension must include an affidavit by the court reporter, transcriber, managing court reporter, or clerk of the trial court. *Id.*

TIP It is the appellant's responsibility to ensure that a sufficient record is designated 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. After a complete designation, the trial court must prepare the record and file motions for extension if the record cannot be completed in a timely manner. *See* C.A.R. 10.

TIP In light of the expedited guidelines, RPC should advise their clients about appeals as soon as possible after an oral ruling. RPC should then file an appellate transmittal form with the ORPC as soon as trial counsel knows a client wants to appeal—even if prior to the issuance of the written order. Appellate counsel can then prepare a transcript request prior to filing the notice of appeal.

Within seven days of serving the designation the appellant must arrange payment with the trial court's managing court reporter. C.A.R. 3.4(d)(5). Once a transcript has been ordered by a state agency, any state agency (including OCR / its contact attorneys and ORPC / its contract attorneys) may request a free copy. CJD 05-03(V)(B)(3)(a)–(b), Appendix A. The transcript may be in electronic form. CJD 05-03(V)(F)(5).

TIP If a party is indigent and has been appointed appellate counsel through the ORPC, the appellate RPC must complete a copy of the ORPC transcript request form and send that form to the managing court reporter in the district court. The transcript request form should be completed and sent as soon as possible—but no later than the filing of the notice/designation. The court reporters will then make payment arrangements with the ORPC directly. No additional payment approval is necessary. However, if expedited transcripts are needed, attorneys must seek pre-approval from the ORPC director.

If the parties wish to supplement the record on appeal before the record has been transmitted to the Court of Appeals, the parties can supplement or correct the error by stipulation, or the trial court may direct that the omission or misstatement be corrected. C.A.R. 10(f)(1).

If the record has already been transmitted to the appellate court, then the parties may file a motion to request an order to supplement the record by certification. C.A.R. 10(f)(2). If any difference arises as to whether the record accurately discloses what occurred in the trial court, the difference must be submitted to and settled by the trial court. C.A.R. 10(g)(1). The party moving to settle may file a motion to stay the appellate court proceedings in the appellate court while the trial court considers the motion to settle the record. *Id.* Any other questions regarding the form and content of the record must be made to the appellate court by motion. C.A.R. 10(g)(2).

Within seven days after filing a notice/designation, any appellee may file a supplemental designation of transcripts (JDF 547) with the Court of Appeals and the trial court clerks. C.A.R 3.4(d)(4). The supplemental designation must also be served on the trial court's managing court reporter. *Id.*

TIP Upon the agreement of the parties or where a transcript is unavailable, parties may file a statement of the evidence or proceedings in lieu of designating a transcript with the trial court, and the trial court must certify a statement of the evidence or proceedings in lieu of a transcript. C.A.R. 10(e)

TIP In *People in Interest of Z.M.*, 463 P.3d 330 (Colo. App. 2020), the Court of Appeals denied a parent's request for a new hearing based on two missing transcripts. The court held that the parent failed to establish materiality under C.A.R. 10(f)(2) and held that it did not violate father's due process rights when it required him to establish materiality.

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

2. Opening Brief

The opening brief on appeal (opening brief) must be filed within 21 days after the record is filed; a seven-day extension may be obtained. C.A.R. 3.4(f)(1)–(2). The petition must be no longer than 7,500 words. C.A.R. 3.4(f)(3). It must be in 14-point or larger typeface (captions may be in 12-point). C.A.R. 32(a)(1). The typeface must be plain, roman style, although italics and boldface can be used for emphasis. C.A.R. 32(a)(2).

C.A.R. 3.4(f)(1)(A)–(J) sets forth the content requirements for the opening brief, which include the following:

- Caption in compliance with C.A.R. 32 (d).
- Certificate of compliance as required by C.A.R. 32 (h).
- Table of contents, with page references.
- Table of authorities with cases arranged alphabetically, followed by statutes and other authorities, with page references.
- Statement of compliance with the Indian Child Welfare Act (ICWA).
- Statement of the issues presented for review.
- Concise statement identifying the nature of the case, relevant facts and procedural history, and the order presented for review, with appropriate references to the record.
- Summary of the arguments, which must include a succinct, clear, and accurate statement of the arguments in the brief; articulate the major points of reasoning employed as to each issue presented for review; and not merely repeat the argument headings or issues presented for review.
- Arguments, which must contain under a separate heading placed before the discussion of each issue, statements of the applicable standard of review with citation to authority, whether the issue was preserved and, if preserved, the precise location in the record where the issue was raised and where the court ruled; as well as the appellant's contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies.
- Short conclusion stating the precise relief sought.

TIP ICWA compliance is a common issue on appeal. Counsel should note that the statement of compliance with ICWA required by C.A.R. 3.4(f)(1)(E)(i)–(vi) must be filed in every appeal (regardless of whether the involved child was found to be an Indian child) and must include citation(s) to the record of the following:

- Each date the trial court made inquiries as to whether the child is or could be an Indian child and a statement of any identified or potential tribe(s).
- Copies of ICWA notices (including for foster care placement and termination of parental rights proceedings, if applicable), and other communications intended to provide such notice, sent to the child's parents, the child's Indian custodian(s), the BIA, or the child's tribe(s) or potential tribe(s).

- Postal return receipts for Indian child welfare notices sent to the child's parents, the child's Indian custodian(s), the BIA, or the child's tribe(s) or potential tribe(s).
- Responses from the parent(s) or Indian custodian(s) of the child, the BIA, and child's tribe(s) or potential tribe(s).
- Additional notices (including for a termination hearing) sent to non-responding tribe(s), or the BIA.
- Date(s) of any ruling as to whether the child is or is not an Indian child.

C.A.R. 3.4(f)(1)(E)(i)–(vi).

TIP Ineffective assistance of counsel claims may be raised on direct appeal in the Opening Brief. *A.R. v. D.R.*, 456 P.3d 1266, 1271 (Colo. 2020). Appellate RPCs must allege facts with sufficient specificity to establish a prima facie showing that, if true, the facts would meet both prongs of Strickland, as laid out in *A.R. See*, e.g., *People ex rel. C.H.*, 166 P.3d 288, 291 (Colo. App. 2007). "[W]hen either the record is sufficiently developed to allow the appellate court to decide the question of counsel's ineffectiveness or the record establishes presumptive prejudice", the appellate court may reverse the trial court's order without remanding for an evidentiary hearing. *Id.* at 1284. In most cases, the appellate court will need to issue a limited remand to the trial court to permit the trial court to hold an evidentiary hearing on the claim of ineffective assistance. *Id.* If the appellate court determines the claim of ineffective assistance of counsel must be remanded for further proceedings, appellate RPC should contact the ORPC to request new trial counsel be appointed for the parent.

The appellant must file the opening brief with the Court of Appeals via hand delivery to the clerk's office, mail addressed to the clerk, or electronic filing through the Electronic Filing System approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(a). The appellant must serve the opening brief on the parties personally, via mail, or via electronic service through the Electronic Service System approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(d).

3. Answer Brief and/or Cross-Appeal Opening/Answer Brief

Appellee has 21 days to file a response to the petition on appeal; a seven-day extension may be obtained. C.A.R. 3.4(g)(1), (4). The

response must be no longer than 7,500 words. C.A.R. 3.4(g)(5). The same rules regarding typeface and font that apply to the petition apply to the response. C.A.R. 3.4(g)(3). The response must contain the elements set forth in C.A.R. 3.4(f), *see* **Opening Brief section**, *supra*, except the following:

- Under a separate heading after the table of authorities, the response must contain a statement of whether the appellee agrees with the appellant's statement of compliance with ICWA, and if not, why not.
- Separate headings titled "statement of the issues" or "statement of the case" are unnecessary in the response unless the appellee is dissatisfied with the appellant's statements.
- Under a separate heading placed before the discussion of each issue, the response must contain a statement of whether the appellee agrees with the appellant's statements concerning the standard of review (with citations to authorities) and preservation of the issue for appeal, and if not, why not.

C.A.R. 3.4(g)(2)–(3).

The appellee must file the response with the Court of Appeals via hand delivery to the clerk's office, mail addressed to the clerk, or electronic filing through the Electronic Filing System approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(a). The appellant must serve the response on the parties personally, via mail, or via electronic service through the Electronic Service System approved by the Colorado Supreme Court pursuant to C.A.R. 30. C.A.R. 3.4(n); C.A.R. 25(d).

Where an appeal involves more than one appellant, the appellee must file a combined response addressing the legal issues raised by all appellants. C.A.R. 3.4(g)(6). The combined response must be filed within 28 days of service of the last opening brief and contain no more than 9,500 words. *Id.*

Where an appeal involves more than one appellee, the court encourages coordination to avoid repetition. C.A.R. 3.4(g)(7). A joint response may be filed. *Id.*

TIP Counsel who has not been identified as a GAL in the notice/designation or opening brief may be required to file an entry of appearance in order to e-file their response. GALs electing to use e-filing should confirm that they are able to file in the appellate case number in the court's e-filing system well before the deadline for filing their response. The OCR is able to assist GALs with the physical filing of this entry of appearance.

TIP The ORPC will appoint counsel for parents who wish to act as appellees (e.g., if another party files an appeal of an order favorable to that parent). In this circumstance, the trial attorney must fill out the appellate transmittal form on the ORPC website.

4. Reply Brief

Appellant may file a reply brief within 14 days after service of the response. C.A.R. 3.4(h). The reply brief must comply with C.A.R. 3.4(f)(1)(A)–(D) and contain no more than 5,700 words. *Id.*

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 seven days after briefs are closed. C.A.R. 3.4(i). The rule allows 15 minutes each for appellant(s) and appellee(s), unless otherwise ordered. *Id.* 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. *See* C.A.R. 34(i) (requiring references to sexual assault victims and minors in oral arguments to comply with C.A.R. 32(f)); C.A.R. 32(f) (requiring appellate documents to refer to children in D&N proceedings and relatives whose names could be used to determine names of such children by initials or appropriate general descriptions).

TIP Preparation is a key component of a successful oral argument. Appellate counsel should review the trial court order(s) and all appellate briefs, outline key points counsel must discuss during oral arguments, anticipate potential questions and prepare answers

to those questions, research recent opinions by the judges on the designated Court of Appeals panel, and listen to recent oral arguments on the Court of Appeals Colorado Judicial Branch website (**https://www.courts.state.co.us/Courts/Court_Of_Appeals/Oral_Arguments/Index.cfm**). OCR and ORPC staff are also available to arrange practice arguments for GALs and RPC as part of their preparation.

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). A petition for rehearing is not required before filing a petition for writ of *certiorari* to the Colorado Supreme Court. C.A.R. 52(b)(1). 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 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. 3.4(k); C.A.R. 40(a)(2), (b)(2). Oral argument will not be permitted on a petition for rehearing. C.A.R. 40(a).

7. Mandate

A mandate will issue from the Colorado Court of Appeals within 29 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(l). The original must be filed with the clerk of the Supreme Court. C.A.R. 34(f). Electronic filing through the Electronic Filing System approved by the Colorado Supreme Court is permissible. C.A.R. 30(b). Copies must be served on the parties in the same manner as the notice of appeal. C.A.R. 53(f). *See* **Notice of Appeal or Cross-Appeal and Designation of Transcripts section**, *supra*.

Counsel must also provide notice to parties of the Supreme Court case number. C.A.R. 51(c).

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. *Id.*

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*.

TIP RPC appellate attorneys remain appointed through the filing of the petition of the writ of *certiorari*, if the client wishes to continue to pursue the appeal. If the client cannot be found or does not wish to pursue a petition for writ of *certiorari*, then the appellate RPC is not required to file one.

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(l). The original must be filed with the clerk of the Supreme Court, and copies must be served on the parties in the same manner as the notice of appeal. C.A.R. 53(f). *See* **Notice of Appeal or Cross-Appeal and Designation of Transcripts section**, *supra*.

The cross-petition 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(l).

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). The original must be filed with the clerk of the Supreme Court, and copies must be served on the parties in the same manner as the notice of appeal. C.A.R. 53(f). *See* **Notice of Appeal or Cross-Appeal and Designation of Transcripts section**, *supra*.

The opposition brief must not exceed 12 pages or 3,800 words. C.A.R. 53(c). It must be formatted in compliance with C.A.R. 32. *Id.* 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). The original must be filed with the clerk of the Supreme Court, and copies must be served on the parties in the same manner as the notice of appeal. C.A.R. 53(f). *See* **Notice of Appeal or Cross-Appeal and Designation of Transcripts section**, *supra*.

The reply brief must not exceed ten pages or 3,150 words. *Id.* It must be formatted in compliance with C.A.R. 32. *Id.*

TIP A reply brief is not specifically authorized by C.A.R. 3.4(l), nor does C.A.R. 3.4(l) 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.

TIP If the petition is granted, the RPC appellate attorney handling the appeal must be reappointed through the ORPC or can request another appellate attorney to handle the case.

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. *A.H.*, 216 P.3d at 584–85. In *Madrone v. Madrone*, 290 P.3d 478, 479 (Colo. 2012), the Colorado Supreme Court held that its exercise of original jurisdiction under C.A.R. 21 to review a trial court's determination of its jurisdiction under the UCCJEA was appropriate; because the UCCJEA jurisdictional determination question constitutes the necessary first step in the allocation of parental responsibilities and because of the impact on the short- and long-term stability of the child's life and relationships, appeal of the court's UCCJEA determination would be an inadequate remedy.

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, 2017 ed. (Hon. Alan M. Loeb, ed., CLE in Colo., Inc.).

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 at court hearings. In the 2016 *Colorado Youth Engagement Study*, the overwhelming majority of participants indicated that a youth's presence at court hearings is helpful to the decision-making process. National Council of Juvenile and Family Court Judges (NCJFCJ), *Colorado Youth Engagement Study* at 15 (March 2016), *available at* **http://www.coloradochildrep.org/ocr-cases/engaging-youth/**.

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* Jaclyn Jean Jenkins, *"Listen to Me!" Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings*, 46 Fam. Ct. Rev. 163 (2008) (citing Miriam Aroni 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); Elizabeth Whitney Barnes, Andrea Khoury, and Kristin Kelly, National Council of Juvenile and Family Court Judges, *Seen, Heard, and Engaged: Children in Dependency Court Hearings* (August 2012), *available at* **http://www.ncjfcj.org/sites/default/files/CIC_FINAL.pdf**;

Colorado Judicial Institute, *A Voice of Their Own* (November 2007), *available at* **http://www.coloradojudicialinstitute.org/download/CJI+Youth+Voices+Study+2007.pdf** (hereafter "CJI Study"). According to a study conducted by the Center on Children and the Law, "many foster youth want to participate in decisions affecting their lives. Judges learn more about the youth coming before them, and report having a better understanding of what youth need and want and why." ABA Center on Children and the Law, *Engaging Youth in Court: A National Analysis* 1 (2015), **https://www.americanbar.org/content/dam/aba/administrative/child_law/youthengagement/NationalAnalysisFinal.authcheckdam.pdf**. Colorado youth surveyed wanted "judges to hear their voices" and "to provide direct input about their situations and placements." *Id.* at 3.

TIP The GAL must promote a child's voice in court. A determination of a child's best interests must include consulting with the child in a developmentally appropriate manner and considering the child's position. CJD 04-06(V)(B). When ascertaining the child's position regarding issues before the court, the GAL must endeavor to maximize the child's involvement in court proceedings, when the child's participation is consistent with the child's best interests, by discussing the court process, ascertaining whether the child wishes to appear in court, and identifying and advocating for eliminating barriers to the child's court attendance. CJD 04-06(V)(D)(1), Commentary.

FEDERAL LAW REGARDING CHILDREN IN COURT

Congress has recognized the importance of youth participation in court proceedings and the case review process. Enacted in 2006, the Child and Family Services Improvement Act requires procedural safeguards "to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to a successful adulthood, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." *See* Pub. L. No. 120 Stat 1233 (adding 42 U.S.C. § 675(5)(C)(iii)).

Additionally, the Preventing Sex Trafficking and Strengthening Families Act specifically requires the court to ask any child with a permanency goal of OPPLA about his or her desired permanency outcome. Pub. L. No. 113-183, § 112(b) (adding 42 U.S.C. § 675a(a)(2)(A)).

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 prior notice to children of all court hearings and reviews, and it 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(1)(a). When appropriate, children must be given an opportunity to participate in hearings. *See* § 19-1-106(2) (stating that although hearings may be closed when in the best interests of the child or the community, persons who have an interest in the case, including persons whom the child wishes to be present, shall be admitted). Additionally, during a permanency hearing, the court must consult with the child in a developmentally appropriate manner. § 19-3-702(1)(a).

NATIONAL SUPPORT FOR YOUTH INVOLVEMENT IN COURT

Guidelines published by the NCJFCJ specifically provide that children of all ages should be present in court and attend each hearing, mediation, pretrial conference, and settlement conference, unless the judge decides that it is neither safe nor appropriate. Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline III(C) at 109–10 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016). When safe and appropriate, judges should expect children to be present in court. *Id.* If a child is not present, the court should require an explanation for the child's absence from the child welfare agency that directly relates to the child's safety and well-being. *Id.* To promote children's presence in court, the resource guidelines recommend that courts develop policies and protocols for ensuring children's attendance, schedule cases in a manner that is least likely to disrupt the child's school schedule, provide children with meaningful notice of and preparation for hearings, expect caregivers and child welfare agencies to work collaboratively to ensure children's attendance, and participate in training to learn how to best engage children during hearings. *Id.*; *see also NCJFCJ Children in Court Policy Statement* (2012), *available at* **https://www.ncjfcj.org/about/resolutions-and-policy-statements**.

Similarly, section 9 of the ABA's *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* out-

lines a child's right to notice and the child's right to attend and fully participate in all hearings related to the child's case. ABA, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* at 14 (August 2011), *available at* **https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf**. If a child is absent from a hearing, the act requires the court to determine whether the child was properly notified of his or her right to attend the hearing, the child's wishes regarding attendance, whether the child had transportation, and the reasons for the child's absence. *Id.* If the child wished to attend and was not transported to court, the act requires the court to continue the matter. *Id.* Finally, a child's presence is excused only after the child consulted with his or her attorney and, with informed consent, waived his or her right to attend. *Id.*

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 early in the 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. *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* at 5 (2001), *available at* **http://www.naccchildlaw.org/?page=StandardsOfPractice**.

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), (5)(b) (regarding GAL's duty to personally interview child and maintain contact with child); CJD 04-06(V)(B) (regarding GAL's obligation to ascertain child's position); C.R.C.P. 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 or explore whether the child can join by telephone or video technology. 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 routines, school schedule, or extracurricular activities and whether any accommodations can be made to minimize the disruption. Moreover, GALs should advocate for date- and time-certain hearings. In the 2007 Colorado Judicial Institute study *A Voice of Their Own*, youth expressed disappointment in the unpredictability and unreliability of court dates. CJI Study at 13. They discussed planning ahead to miss school or work to attend a court date that eventually was postponed or moved to another date. *Id.*

d. Who will transport the child? Transportation of the child to and from court may require advanced planning and collaboration. However, there are generally many individuals involved in D&N cases who are capable of providing transportation, including caseworkers, foster parents, facility staff, and placement agency staff. Moreover, 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. The NCJFCJ recommends that courts work with the agency and the caregivers to ensure the child has transportation to court. *See NCJFCJ Children in Court Policy Statement*.

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 their roles are, what may be asked of the youth at the hearing, and courtroom etiquette. 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 court-

room 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 Court

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 study *A Voice of Their Own*, 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.* Similarly, in the 2016 Voice for Adoption survey, youth reported that they did not fully understand permanency goals. Voice for Adoption, *Youth Voices for Permanency* at 5 (May 2016), **https://voice-for-adoption.org/youth-voices-permanency-%E2%80%93-four-steps-judges-and-court-professionals-can-take-promote-permanency**.

TIP The GAL should 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 conduct a post-hearing follow up with the child regarding the

outcome of the hearing and the child's experience at the hearing. CJD 04-06(V)(D)(1), Commentary. The GAL should allow the child to ask questions and ensure that the child understands the outcome of the hearing, what will happen next, and when the next court hearing will be. *See Seen, Heard, and Engaged: Children in Dependency Court Hearings* at 18.

4. *In Camera* Interviews of Children

Although the Children's Code does not contain a specific provision allowing a court to conduct an *in camera* interview with a child, § 19-1-106(5) provides that a child may be heard separately when deemed necessary by the court, and § 19-3-702(1)(a) requires that the court consult with the child in an age-appropriate manner regarding the child's permanency plan.

The Court of Appeals has held that the Children's Code permits a trial court to conduct an *in camera* interview with a child to determine the child's best interests and how to allocate parental responsibilities in a D&N proceeding. *In the Interest of H.K.W.*, 2017 COA 70, ¶ 3. Due process requires a record of the interview to be created, unless waived by the parties. *Id.* at ¶ 22. The record must be made available to parents upon their request when the court relied on information from the interview and the parents need to determine whether the court's findings are supported by the record or contest the information. *Id.* at ¶¶ 19–29; *see also* § 19-1-106(3) (requiring a verbatim record to be taken of all proceedings).

In *People in the Interest of S.L.*, the Court of Appeals considered whether a parent is entitled to have counsel during a D&N court's *in camera* interview of children in D&N proceedings. 2017 COA 160, ¶¶ 46–53. The court concluded that the determination of whether counsel should be permitted to be present during *in camera* interviews of a children in D&N proceedings is best left to trial court discretion on a case-by-case basis and provided a number of factors for the court's consideration, including, but not limited to, the following: (a) the age and maturity of the child; (b) the nature of the information to be obtained from the child; (c) the relationship between the parents; (d) the child's relationship with the parents; (e) any potential harm to the child; and (f) any impact on the court's ability to obtain information from the child. *Id.* at 49. In the interest of fairness and the record, trial courts should permit parents or counsel to submit questions, which courts may ask children in their discretion. *Id.* The interview must be on the record. *Id.* A transcript of the interview must be made available to the

parties in advance of a termination hearing if timely requested and the trial court anticipates relying on information from the interview in ruling on the termination motion. *Id.* In considering the weight to accord the information obtained during the interview, trial courts should be mindful that the information provided by the child was not subject to cross-examination. *Id.*

During *in camera* interviews "a judge must maintain impartiality to avoid the appearance of favoring a particular outcome." *Id.*

TIP Both GALs and RPC have an interest in ensuring that the procedures used during D&N proceedings 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.C.P. 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.

TIP The GAL should advocate for strong factual findings supporting the trial court's exercise of its discretion to conduct the interview and whether to permit counsel to attend the interview. Doing so will ensure quality decision-making and preserve the record for appeal. 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 A GAL advocating for an *in camera* interview should obtain the position from the other parties prior to the interview and state on the record the other parties' positions regarding the interview.

Children's Psychotherapist-Patient Privilege
FACT SHEET

In its 2013 decision *L.A.N. v. L.M.B.*, the Colorado Supreme Court ruled that children in D&N proceedings are entitled to the protections of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The Court set forth special considerations for deciding who can exercise the privilege on behalf of a child in a D&N proceeding and for determining the scope of any waiver of the privilege. Despite the guidance provided by the Court in the *L.A.N.* decision, the application of privilege principles to children in D&N proceedings presents unique challenges for the D&N practitioner.

DEFINITION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

While commonly referred to as the psychotherapist-patient privilege, the privilege defined by § 13-90-107(1)(g) references a number of mental health professionals, including, but not limited to, licensed psychologists, professional counselors, marriage and family therapists, social workers, addiction counselors, registered psychotherapists, and certified addiction counselors. *Id.* Registered candidates for some of these professions and some employees or agents of these professionals are also covered by the privilege. *Id.*

The privilege prevents these professionals from testifying as to any communication made by the patient or any advice given. *Id.* The privilege also prevents participants in therapy such as group therapy from testifying about the knowledge gained about another participant during the course of the therapy without that other patient's consent. *Id.*

The privilege applies not only to testimony during proceedings but also to pretrial discovery and disclosure. *See L.A.N.*, 292 P.3d at 947 (citing *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002)).

PURPOSE OF THE PRIVILEGE

In enacting Colorado's privilege statute, the General Assembly recognized the psychotherapist-patient privilege as among those "particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." § 13-90-107(1). This privilege's purpose "is to preserve the 'atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears' necessary for effective psychotherapy." *L.A.N.*, 292 P.3d at 947 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)).

In the *L.A.N.* decision, the Court recognized that "[j]uvenile patients in particular require the privacy protection provided by the psychotherapist-patient privilege due to the sensitive nature of children's mental health care." *Id.* (citing *Dill v. People*, 927 P.2d 1315, 1321 (Colo. 1996)).

WHEN THE PRIVILEGE APPLIES TO CHILDREN IN D&N PROCEEDINGS

The protections of the psychotherapist-patient privilege apply unless waived or statutorily abrogated. *See L.A.N.*, 292 P.3d at 947. In D&N proceedings, § 19-3-311 specifically abrogates the privilege with respect to communications that form the basis of a report for child abuse or neglect. Other than for such communications, the privilege applies unless waived.

DETERMINATION OF PRIVILEGE HOLDER

The *L.A.N.* decision provides a framework for identification of the privilege holder on behalf of a child in a D&N proceeding.

TIP Whenever a child receives treatment covered by the psychotherapist-patient privilege, the GAL should ensure that the court makes a ruling regarding the privilege holder. Clarity regarding the holder of the privilege advances the important pur-

pose the privilege serves. *See* **Purpose of the Privilege section**, *supra.* Lack of clarity regarding the holder of the privilege prevents any one person from assuming the responsibility of asserting the privilege when necessary. It can also lead to inadvertent waivers. *See, e.g., L.A.N.*, 292 P.3d at 950–51 (holding that the GAL had waived the privilege through her actions even though her status as privilege holder was unclear at the time of the actions). Sample motions and stipulations can be accessed through OCR's Litigation Toolkit, available at **www.coloradochildrep.org**.

It is also important for counsel to keep in mind that regardless of the individual determined to be the "holder" of the privilege, the privilege remains that of the child.

1. The Child

First, as the patient generally holds the privilege, a determination must be made as to whether the child is too young or otherwise incompetent to hold the privilege. *See L.A.N.*, 292 P.3d at 948. If the child is determined to be of sufficient age or competence, the child holds his or her own privilege.

TIP The Supreme Court in *L.A.N.* did not address the criteria to be employed in determining sufficient age or competence to exercise one's privilege. With regard to age, counsel may wish to consider the following legally significant ages: children as young as ten can be charged in delinquency proceedings, *see* § 19-2.5-702 *et seq.*; written consent of a child age 12 or older is required for adoption, *see* § 19-5-203(2); at the age of 15, a child can consent to his or her own mental health treatment, *see* § 27-65-103(2).

TIP As the child is not the client of the GAL, and the GAL's representation of the best interests may put the GAL in conflict with the objectives of a child who holds his or her own privilege, the GAL cannot advise a child who is or who may be the privilege holder regarding the privilege. *See* C.R.P.C. 1.7, 1.8 (describing conflict of interest rules); C.R.P.C. 4.4 (prohibiting lawyer from using methods of obtaining evidence that violate the rights of a third person). To avoid conflicts and role confusion, the GAL should consider moving for counsel to be appointed for the child. *See* § 19-1-105(2) (allowing for the appointment of both counsel and GAL if the court finds it is in the best interests and welfare of the child); CJD 04-06(I)(B)(3) (assigning to OCR responsibility for the provision of counsel services for children in D&N proceedings).

2. The Parent

If the child is too young or otherwise incompetent to hold the privilege, the parent typically holds the privilege on behalf of the child. *See L.A.N.*, 292 P.3d at 948. *See, e.g., People v. Pressley*, 804 P.2d 226, 228 (Colo. App. 1990) (parents may waive child's privilege related to medical records); *Lindsey v. People*, 181 P. 531, 536 (Colo. 1919) ("the proper person to claim or waive the privilege as to a minor is the natural guardian of such minor—in this case his mother"). However, the parent cannot hold the child's privilege "when the parent's interest as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship." *L.A.N.*, 292 P.3d at 948.

TIP In assessing whether the parent is available to exercise the privilege, the GAL should not only consider the level of adversity between the child and parent as parties in the litigation but also whether other pressures the parent faces, such as treatment plan provisions requiring the parent to sign all releases, will prevent the parent from being able to assert the privilege when necessary to protect the atmosphere of confidence and trust essential to effective treatment. As a result, RPC must also be mindful of the effect of treatment plan components as they relate to the rights of children at the dispositional hearing.

3. The GAL

When neither the child nor the parent has the authority to hold the child's privilege, the GAL should hold the privilege. *See L.A.N.*, 292 P.3d at 950. As a result of the GAL's fiduciary and statutory responsibilities, "the GAL is in an optimal position to assert or waive the child's privilege in order to serve the child's best interests." *Id.* Additionally, as the appointment of a GAL is mandatory in D&N proceedings, the GAL will be "consistently available" to exercise the privilege consistent with the child's best interests. *Id.*

TIP The *L.A.N.* Court specifically excluded the juvenile court and the department as potential holders of the child's privilege. *See L.A.N.*, 292 P.3d at 948–50. While the Supreme Court did not address other parties to the litigation in the *L.A.N.* decision, its reasoning regarding foster parents in *C.W.B.* provides a strong rationale for why

foster parents should not hold a child's privilege in D&N proceedings. *See C.W.B. v. A.S.*, 410 P.3d 438, 446–47 (Colo. 2018) (explaining limitations on foster parent intervention and reasons why foster parents should not have representative capacity for a child's interests).

WAIVER

1. Determination of Whether Waiver Has Occurred

Waiver of the privilege may be expressed or implied. *See L.A.N.*, 292 P.3d at 947. "Waiver occurs if the evidence shows that the privilege holder 'by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.'" *Id.* at 947 (quoting *Sisneros*, 55 P.3d at 801). The court will apply a totality of the circumstances analysis to determine whether waiver has occurred. *See, e.g., Sisneros*, 55 P3.d at 801 (holding that the victim's testimony that her therapist had helped her recall some details of the assault did not amount to a waiver of the privilege); *People v. Silva*, 782 P.2d 846, 850 (Colo. App. 1989) (holding that victim's testimony that she had sought counseling as a result of an assault did not constitute a waiver of the privilege).

TIP A GAL determined to be the child's privilege holder should ensure that any waiver of the privilege is consistent with the best interests of the child. Given the numerous parties, professionals, and caregivers involved in D&N proceedings, it is possible that the therapist may share information with individuals other than the privilege holder—during staffings, meetings, or individual conversations. While a violation of the privilege does not amount to a waiver of the privilege, *see Pressley*, 804 P.2d at 228–29, a GAL's failure to object to the sharing of privileged information when such sharing is known to the GAL may be construed as an implied waiver of the privilege. GALs who are privilege holders should be proactive in asserting the privilege and in seeking stipulations and orders regarding limited waiver, as such orders may promote the sharing of the limited information necessary for the ongoing care of the child while preventing the possibility of a broadly construed waiver that is contrary to the best interests of the child. *See* **Scope of Waiver subsection**, *infra.*

Notably, "relevance alone cannot be the test" regarding waiver "because such a test would ignore the fundamental purpose of evi-

dentiary privileges, which is to preclude discovery and admission of relevant information under prescribed circumstances." *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (internal quotations omitted).

2. Scope of Waiver

The *L.A.N.* decision provides a process and framework for determining the scope of a waiver of a child's psychotherapist-patient privilege once the waiver has occurred.

First, after the court determines a waiver has occurred, the court should consider whether the scope of the waiver is readily apparent by considering the words or conduct that constituted the waiver. *L.A.N.*, 292 P.3d at 951. If the scope is readily apparent, the court may exercise its discretion to order disclosure of evidence subject to the waiver. *Id.*

If the scope of the waiver is not readily apparent, the court will instruct the privilege holder to compile a privilege log identifying the documents the holder believes should remain privileged. *Id.* The log should identify the reason why the holder believes the document should remain privileged and provide enough detail about the document for the court and parties to assess the privilege claim. *Id.* If the court or other parties believe the privilege should not apply to any given document, the court may conduct an *in camera* review of the document.

TIP The privilege log contemplated by the *L.A.N.* decision is based on traditional privilege logs used in other proceedings. *See id.* (citing *Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005)). GALs who must compile a privilege log can access examples on the OCR's Litigation Toolkit, available at **www.coloradochildrep.org**.

After reviewing the log and conducting any *in camera* review, the court must determine the scope of the waiver. The *L.A.N.* court identified the following "competing interests surrounding disclosure":

- The damage to the patient's trust in the therapist and the therapeutic process that could result from disclosure, a concern "particularly pronounced in cases involving children."
- The "compelling policy considerations" that encourage disclosure during discovery, such as a parent's need to obtain information essential to a claim or defense; the potential for disclosure to eliminate surprise at trial, bring forth relevant evidence, simplify the issues, and promote expeditious resolution of the case; and the benefit to the court's decision-making.

L.A.N., 292 P.3d at 951.

In balancing these competing interests, the court must keep in mind its "overarching duty to further the best interests of the child." *Id.* at 952. The following discretionary factors, along with any considerations unique to the case, may guide the court's balancing analysis:

- the best interests of the child and the impact of the waiver on the child;
- the parents' due process rights and ability to adequately respond;
- the impact of disclosure on any applicable permanency plan;
- the significance of the information and its impact on the case;
- whether the information is available from any other source;
- the procedural posture of the case; and
- the impact the disclosure may have on other parties beyond the litigation.

Id. at 952.

SEEKING REVIEW OF A COURT'S PRIVILEGE RULINGS

While the *L.A.N.* case dealt with privilege rulings on appeal of an order terminating the parent-child legal relationship and pretrial discovery orders are generally viewed as interlocutory in nature, the Supreme Court has exercised its original jurisdiction under C.A.R. 21 to review claims of abuse of discretion in pretrial privilege rulings. *See, e.g., Sisneros*, 55 P.3d at 798; *People v. District Court*, 719 P.2d 722, 723 (Colo. 1986); *Clark v. District Court*, 668 P.2d 3, 7 (Colo. 1983). In doing so, the Supreme Court has reasoned that the damage caused by a wrongful requirement to disclose confidential records will occur upon disclosure of the records, regardless of any ruling on appeal. *See, e.g., Sisneros*, 55 P.3d at 978. *See* **Appeals fact sheet**.

TIP GALs may consult with appellate attorneys on OCR's appellate litigation support list at any point during a proceeding. RPC likewise may consult with the ORPC appellate director or seek appointment of appellate counsel for an interlocutory appeal.

SPECIAL CONSIDERATIONS FOR D&N PROCEEDINGS

1. Privilege vs. Confidentiality

The *L.A.N.* decision raised many questions about what may have previously been the standard exchange of mental health information

in D&N proceedings in some districts. Due to the minor status of the child and impact of any out-of-home custody orders, the holder of the privilege may not always be the same person as the person with authority to consent to release of information under applicable confidentiality/privacy laws.

TIP This subsection does not provide a comprehensive legal analysis of federal privacy law but rather a brief overview of some of the statutory provisions that present challenges to the practitioner dealing with disclosure and waiver issues in D&N proceedings.

For example, under the federal Health Insurance Portability and Accountability Act (HIPAA), a minor who has legal authority to consent to his or her own treatment has the authority to obtain and/or to consent to the release of protected information. 42 C.F.R. § 164.502(g)(3)(i). For unemancipated minors who cannot consent to their own treatment, a parent, guardian, or "other person acting in loco parentis" who has authority to act on behalf of a minor in making decisions related to the treatment must be treated as a personal representative with the authority to obtain and/or to consent to release of information. *Id.* An entity covered by HIPAA, however, may elect not to treat a person as a personal representative if the covered entity (1) has a reasonable belief that the minor has been subject to domestic violence, abuse, or neglect by the person or could be endangered by the treatment of the person as a personal representative, and (2) the covered entity, in the exercise of professional judgment, decides it is not in the best interests of the individual to treat the person as the individual's personal representative. 45 C.F.R. § 164.502(g)(5).

Because the Children's Code's definition of legal custody, *see* § 19-1-103(73)(a), does not clearly address the responsibility to provide or ability to authorize mental health treatment, determining the personal representative of a child in any given case may be difficult. Additionally, this decision is made by individual providers rather than the court. *See, e.g.,* 45 C.F.R. § 164.514(h); 45 C.F.R. § 164.510(b)(3). Regardless, the GAL's responsibilities do not include authorizing mental health treatment for a child. *See* § 19-3-203; CJD 04-06(V). Even when the GAL is the privilege holder for a child, the person with legal authority to sign releases under HIPAA will be different.

TIP GALs may be asked, as privilege holder, to sign releases. GALs who elect to sign releases should always clarify they are doing so as the privilege holder rather than as the personal representative under HIPAA.

Regardless of releases, HIPAA allows the sharing of the "minimum necessary" information between covered entities for some payment purposes, *see* 45 C.F.R. § 164.506(c)(2), and with family members and close personal friends (or other persons) when the information is directly relevant to the person's involvement with the individual's health care or payment, *see* 45 C.F.R. § 164.510(b)(1), (3). Psychotherapy notes are specifically excluded from the information that can be shared without authorization. *See* 45 C.F.R. § 164.508(2).

TIP GALs who are privilege holders should advocate for strict application of HIPPA's minimum necessary standard. Sharing of any additional information undermines the atmosphere of confidence and trust the privilege is designed to protect. Additionally, GALs who are privilege holders should consider entering into agreements and seeking advance court rulings establishing that the sharing of minimal information necessary for the care of the child does not amount to a waiver of the privilege that would allow the therapist to be called as a witness in the proceeding or subjected to pretrial discovery.

TIP Other confidentiality laws, such as 42 C.F.R. Part 2, also provide unique protections for substance abuse treatment records. As the providers of such services are often professionals covered by the psychotherapist-patient privilege, a GAL privilege holder should employ similar strategies to ensure that the disclosure of information subject to those laws does not violate the privilege or constitute a waiver of the privilege.

2. Crossover Cases

While the *L.A.N.* decision specifically focused on D&N proceedings, its analysis may apply to other proceedings, such as high-conflict domestic relations proceedings. *See, e.g., Liberatore v. Liberatore,* 37 Misc.3d 1034 (N.Y. Sup. 2012); *In re Berg,* 152 N.H. 658 (N.H. 2005). However, in delinquency proceedings, the child is presumed competent. *See* § 19-2-1301 *et seq*.

TIP The appointment of anyone other than the juvenile to exercise the juvenile's privilege in a delinquency proceeding would create serious due process concerns. In such proceedings, GALs should object to being appointed as the privilege holder.

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.

RIGHTS OF CHILDREN IN D&N PROCEEDINGS

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.* Notice of permanency hearings must contain the substance of the motion, as well as the constitutional and legal rights of the child. § 19-3-702(2)(a).

3. Court Participation

The Children's Code requires prior notice to children of all court hearings and reviews, and it specifically provides that a child may be heard separately when deemed necessary by the court. §§ 19-3-502(7), 19-1-106(5); *see also People in the Interest of H.K.W.*, 2017 COA 70, ¶ 3; *People in the Interest of S.L.*, 2017 COA 160, ¶¶ 35–53. *See generally* **Children in Court fact sheet**.

If appropriate, a child may participate in a permanency hearing or action. § 19-3-702(1)(a). The court conducting a permanency hearing is directed to consult with the child in an age-appropriate manner regarding the child's permanency plan. *Id.* Additionally, the court conducting a permanency hearing must ask any child with a permanency goal of OPPLA about his or her desired permanency outcome. 42 U.S.C. § 675a(a)(2)(A); § 19-3-702(4)(a)(VI)(D).

4. Consent to Informal Adjustments and Continued Adjudications

Informal adjustments require the child to be informed of his or her constitutional and legal rights, as well as the child's written consent, when the child is of sufficient age and understanding. § 19-3-501(1)(c)(I)(A)–(C).

Deferred adjudications require the child's consent after being fully informed by the court of his or her rights in the proceeding, including the right to have an adjudication made either dismissing or sustaining the petition. § 19-3-505(5).

5. 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 of age 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(4)(e)(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).

6. 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 mental, physical, and social history. § 19-1-107(4).

7. 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. § 19-3-209. Counties must ensure that the child participates in the development of the Family Services Plan. 12 CCR 2509-4: 7.301.22(A)(3).

Youth who meet Colorado's Foster Youth in Transition Program (FYTP) eligibility criteria have the right to receive services through this program at least until the age of 21. §19-7-304 (eligibility and enrollment). Youth may access this program by entering into a Voluntary Services Agreement (VSA), §19-7-306, at which point, a new case is created by the filing of a petition with the court in an Article 7 case, §19-7-307. For additional information on the FYTP program, *see* **Transition to Adulthood fact sheet**.

8. Reasonable Efforts and Active Efforts

Children in D&N proceedings are entitled to have the department make reasonable efforts to prevent out-of-home placement, to make a safe return home possible, and/or to finalize their permanency

plan. *See* **Reasonable Efforts fact sheet**. Indian children are also entitled to active efforts to prevent the breakup of their Indian family. *See* **ICWA fact sheet**. Children with disabilities have the right to have their disabilities accommodated during reasonable efforts. *See* **Disabilities and Accommodations fact sheet**.

9. Confidentiality of Department Records

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)(b).

10. Visits with Parents

When children are placed outside their homes, county departments are required to provide visiting services for children and parents as deemed necessary and appropriate by their individual case plan. *See* **Visits fact sheet**.

11. Placement and Visits with Siblings

Siblings in foster care have a right to placements with their siblings when possible and in the best interests of each sibling and, when they cannot be placed together, to be placed in close geographical distance to each other. § 19-7-203(1)(a)–(c). They also have a right to maintain frequent and meaningful contact with their siblings and to be actively involved in each other's lives, unless such contact/involvement is not in the best interests of one of the siblings. § 19-7-203(1) (g)–(h). *See* **Siblings fact sheet**.

12. Participate in the Foster Youth in Transition Program until Age 21

Youth who meet Colorado's Foster Youth in Transition Program (FYTP) eligibility criteria have the right to receive services through this program at least until the age of 21. §19-7-304 (eligibility and enrollment). Youth may access this program by entering into a Voluntary Services Agreement (VSA), §19-7-306, at which point, a new case is created by the filing of a petition with the court in an Article 7 case, §19-7-307. For additional information on the FYTP program, *see* **Transition to Adulthood fact sheet**.

13. Psychotherapist-Patient Privilege

Like other civil litigants, children in D&N proceedings are entitled to the protections of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947–48 (Colo. 2013). When the child is too young or otherwise incompetent to hold the privilege and the child's interests are adverse to those of his or her parents, the GAL is in the best position to exercise the privilege on behalf of the child. *Id.* at 948–50. *See* **Children's Psychotherapist-Patient Privilege fact sheet**.

14. Medicaid

Subject to the availability of federal funding, Colorado must provide Medicaid to children who are under age 26 and who were in state/tribal foster care and enrolled in Medicaid under a state plan when they turned 18. § 25.5-5-101(1)(e). Before closing a case prior to a child's 18th birthday, the court or the child's GAL must notify the child that the child will lose the right to receive Medicaid until the child's 21st birthday if the case closes before the child's 18th birthday. § 19-3-702(4)(c). *See* **Medical and Dental Needs of Children in Care fact sheet**.

15. Protections against Identity Theft

Children in the legal custody of the department are entitled to free annual credit reports. § 19-7-102(1). The county must report any inaccuracies in the report to the court. *Id.* If the report shows evidence of identity theft, the county must refer the matter to an agency on the state department's referral list for assistance interpreting and resolving any inaccuracies. § 19-7-102(2)(a). If the report shows evidence of possible identity theft, the GAL must advise the child of possible consequences and options, including the child's right to report the matter to law enforcement and seek possible prosecution of the offender. *Id.*

16. Vital Life Documents

Children who are in foster care who have reached the age of 18 and who have been in foster care for at least six months are entitled to the following documents no more than 90 days prior to their emancipation date:

- a certified birth certificate or, when applicable, an alien registration card;

- any tribal affiliation, if applicable;
- a social security card;
- a state identification card or a state driver's license;
- a health passport and pertinent health-related records and health insurance information;
- official documentation to prove the youth was in out-of-home placement; and
- educational records.

12 CCR 2509-4: 7.305.5; *see also* 42 U.S.C. § 675(5)(D); 12 CCR 2509-4: 7.305.5.

17. Participation in Extracurricular and Social Activities

The reasonable and prudent parent standard is "characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining to allow a child in foster care under the responsibility of the State to particulate in extracurricular, enrichment, cultural, and social activities." 42 U.S.C. § 675(10)(A). Colorado foster parents, group home parents, and group center administrators must make a reasonable effort to allow children in their care to participate in extracurricular, cultural, educational, work-related, and personal enrichment activities. § 19-7-103(1); *see also* 12 CCR 2509-8: 7.701.200(A)–(E) (requiring foster care providers to apply the reasonable and prudent parent standard, listing the elements of activities that satisfy the standard, and requiring training for its application.)

STATUTORY AND REGULATORY PROTECTIONS FOR YOUTH IN FOSTER CARE

In 2011, the General Assembly set forth a legislative declaration enumerating a number of protections for children in foster care. *See* SB 11-120. These protections are codified in § 19-7-101, which provides that youth in foster care should enjoy the following:

a. Receipt of appropriate and reasonable adult guidance, support, and supervision in a safe, healthy, and comfortable environment where they are treated with respect and dignity.

b. Freedom from physical, sexual, emotional, or other abuse or corporal punishment.

c. Receipt of adequate and healthy food, adequate clothing, and an adequate allowance, as appropriate.

d. Receipt of medical, dental, vision, and mental health services as needed. *See* **Medical and Dental Needs of Children in Care fact sheet**.

e. Freedom from the administration of prescription medication or other chemical substances, unless authorized by a physician. *See* **Medical and Dental Needs of Children in Care fact sheet**.

f. Freedom to contact those persons working on their behalf, including, but not limited to, case workers, attorneys, foster youth advocates and supporters, court-appointed special advocates, and probation officers.

g. Freedom to contact the child protection ombudsman, county department, or the state department 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, freedom to make and receive confidential telephone calls and to send and receive unopened mail in accordance with their permanency goals.

i. Freedom to attend religious services and activities.

j. Permission to maintain an emancipation bank account and manage personal income, consistent with their age and developmental level, unless prohibited by their case plan. *See* **Transition to Adulthood fact sheet**.

k. Freedom from being abandoned or locked in a room.

l. Receipt of an appropriate education, access to transportation, and participation in extracurricular, cultural, and personal enrichment activities consistent with their ages and developmental levels.

m. As appropriate, freedom to work and develop job skills that are in accordance with their permanency goals. *See* **Transition to Adulthood fact sheet**.

n. As appropriate, freedom 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.

o. Freedom to attend transition to adulthood classes if they meet program and age requirements. *See* **Transition to Adulthood fact sheet**.

p. Consultation with the court conducting their permanency hearing, in an age-appropriate manner, regarding their permanency plan, pursuant to § 19-3-702(1). *See* **Permanency Hearing chapter**, **Children in Court fact sheet**, **Transition to Adulthood fact sheet**.

q. A safe place to store personal belongings.

r. As appropriate to their age and developmental level, permission to participate in, and review, their case plan, if they are age 12 year or older, and to receive information about their out-of-home placement and case plan, including being informed of any changes to the case plan. *See* **Dispositional Hearing chapter**, **Transition to Adulthood fact sheet**.

s. Confidentiality of all juvenile court records, consistent with existing law.

t. Fair and equal access to available services, placement, care, treatment, and benefits based on their treatment plan and to not be subjected to discrimination or harassment based on actual or perceived race, ethnic group, national origin, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. *See* **Dispositional Hearing chapter**.

u. At 16 years of age or older, access to existing information regarding the educational options available to them, including, but not limited to, the course work necessary for vocational and postsecondary educational programs and information regarding financial aid available for postsecondary education. *See* **Transition to Adulthood fact sheet**.

v. School stability that presumes they will remain in the school in which they are enrolled at the time of placement, unless remaining in that school is not in their best interests. *See* **Education Law fact sheet**.

w. Ability to remain in the custody of their parent or legal guardian unless their 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 their best interests pursuant to § 19-1-102. *See* **Preliminary Protective Hearing chapter**.

x. Placement in a home where the foster caregiver is aware of and understands their unique history as it relates to their care.

y. Receipt of effective case management and planning that will prioritize their safe return to their family or move them on to other

forms of permanent placement. *See* **Reasonable Efforts fact sheet**.

z. As appropriate to their developmental level, and if they are age 12 or older, involvement in meetings at which decisions are made about their future and having the department bring together their family group and other supporters to decision-making meetings at which the group creates a plan for their future.

aa. Placement in the least restrictive setting appropriate to their needs.

bb. GAL appointed to represent their best interests.

cc. Placement with or visitation with their siblings.

The application of these protections "may be limited to reasonable periods during the day or restricted according to the routine of foster homes to ensure the protection of children and foster homes." § 19-7-101(2).

TIP Although § 19-7-101(2) states that the above protections (a)–(cc) may be limited, 12 CCR 2509-8: 7.708.33(A) defines many of those protections as rights which may not be restricted or denied by foster homes or certifying authorities.

TIP Counsel should familiarize themselves with the following regulations, which provide additional rights and/or protections to children in foster care:

Regulation	Content
12 CCR 2509-8: 7.708.31	Care of foster children, including orientation (B), substitute care (C), respite care (D), health care (E), home environment and family activity (F), nighttime care (G), and infant children (H)
12 CCR 2509-8: 7.708.34	Prohibition of cruel and aversive therapy in foster homes
12 CCR 2509-8: 7.708.35	Discipline in foster care homes, including prohibited discipline (F)
12 CCR 2509-8: 7.708.36	Physical management and seclusion in foster homes
12 CCR 2509-8: 7.708.37	Religion of children in foster care
12 CCR 2509-8: 7.708.38	Education of children in foster care
12 CCR 2509-8: 7.708.39	Community participation of children in foster care
12 CCR 2509-8: 7.708.41	Medical and health services for children in foster care, including medical examination (A), dental examination (D), corrective devices (E), and medication administration (J)

12 CCR 2509-8: 7.708.42	Food and nutrition in foster homes, including three nourishing, wholesome, well-balanced meals a day (B)
12 CCR 2509-8: 7.708.43	Personal hygiene of children in foster homes and daily routines in foster homes
12 CCR 2509-8: 7.708.44	Clothing and personal belongings of children in foster care
12 CCR 2509-8: 7.708.61	Admission requirements for children in foster care, including written admissions policies (B)
12 CCR 2509-8: 7.708.62	Grievance procedure for children in foster care
12 CCR 2509-8: 7.708.63	Comprehensive program for medical care of foster children
12 CCR 2509-8: 7.708.68	Personal allowance and work opportunities for foster children
12 CCR 2509-8: 7.708.69	Confidentiality of records and reports

Civil Protection Orders
FACT SHEET

In 2017, the General Assembly amended § 19-1-104 to provide courts hearing D&N proceedings jurisdiction to enter civil protection orders pursuant to Article 14 of Title 13. H.B. 17-1111 (adding § 19-1-104(7)). Such civil protection orders have the same force and effect as other civil protection orders entered pursuant to Article 14 of Title 13. § 19-1-104(7).

TIP Counsel may wish to seek civil protection orders pursuant to § 19-1-104(7) rather than, or in addition to, other protective orders traditionally available in D&N proceedings, as Article 14 civil protection orders (a) have a broader array of enforcement mechanisms (*see, e.g.,* § 13-14-702(1) (explaining that a person who fails to comply with a civil protection order is in contempt or may be prosecuted for violation of a civil protection order) *and* § 13-14-702(2) (explaining the duties of peace officers enforcing a civil protection order)) and (b) remain in effect after a D&N closes (*see* § 19-1-104(7)).

TIP Counsel should consider whether a protection order would alleviate safety concerns leading to removal and, if so, seek protection orders to allow children to be returned home more quickly.

TIP This fact sheet provides only a general overview of the protections and processes applicable to civil protection orders pursuant to Article 14. Before seeking a civil protection order in a D&N proceeding, counsel must carefully read the applicable statutes.

TYPES OF CIVIL PROTECTION ORDERS AVAILABLE IN ARTICLE 14 OF TITLE 13

Article 14 of Title 13 provides for three types of civil protection orders: emergency, temporary, and permanent. *See* §§ 13-14-103, 13-14-104.5, 13-14-106. While emergency orders typically expire upon the close of the next day of judicial business and temporary orders typically expire within 14 days, permanent orders expire only upon order of a court. *See* §§ 13-14-103(1)(f), 13-14-104.5(10), 13-14-108.

TIP Although the civil protection order process outlined in Article 14 may commence with a verbal request or petition for an emergency protection order pursuant to § 13-14-103, this fact sheet focuses on the process for obtaining a temporary protection order and making a temporary order permanent, as counsel is most likely to employ this process in D&N proceedings. It remains to be seen whether courts hearing D&N proceedings will issue emergency civil protection orders pursuant to Article 14 or whether such courts will view the emergency protection orders pursuant to § 19-3-405(2)(b) as the sole method for obtaining emergency orders in D&N proceedings.

PROTECTIONS AVAILABLE THROUGH A CIVIL PROTECTION ORDER

Section 13-14-104.5(1)(a) provides for the issuance of a temporary or permanent civil protection order against an adult or a juvenile who is ten years of age or older to prevent assault and threatened bodily harm, domestic abuse, sexual assault or abuse, and/or stalking. This statute gives the court discretion to enter "other relief it deems appropriate" as part of the protection order. § 13-14-104.5(8).

TIP While specifically applicable to municipal and county courts, the potential orders outlined in § 13-14-105 may provide counsel with some ideas of what they may wish to request in a motion for a civil protection order.

TIP A civil protection order against an individual who is not a party to a D&N proceeding may advance the safety and welfare of the child and/or other parties. It remains to be seen whether courts hearing D&N proceedings will issue civil protection orders protecting or

restraining individuals who are not parties. To promote the court's authority to enter orders concerning an individual who is not a party, counsel should consider asking to court to name the individual as a special respondent to the D&N proceeding (*see* **Special Respondents fact sheet**) and ensure all notice requirements applicable to the civil protection order are satisfied.

PROCESS

D&N courts issuing civil protection orders must use the standardized forms developed by the judicial department and follow the standards and procedures for the issuance of civil protection orders in Article 14 of Title 13. § 19-1-104(7).

TIP The Colorado Judicial Branch website houses many forms and instructions related to filing, modifying, and registering civil protection orders. **https://www.courts.state.co.us/Self_Help/protectionorders/.**

TIP Counsel in support of a civil protection order should ensure that all procedural and substantive requirements are followed, regardless of whether counsel is the moving party.

1. Motion for Civil Protection Order

In D&N proceedings, a motion for a civil protection order may be filed by city or county attorneys, GALs, and RPC. § 19-1-104(7).

The motion must be verified and allege that the responding party committed acts constituting grounds for a civil protection order. § 13-14-104.5(8). The moving party is not required to demonstrate that he or she reported the act forming the basis of the complaint/motion to law enforcement, charges have been filed, or that he or she is participating in the prosecution of the responding party. § 13-14-104.5(1)(b).

TIP The court may require the moving party to pay a filing fee, except where the court determines that the moving party is a victim of domestic abuse, domestic violence, stalking, sexual assault, or sexual abuse. § 13-14-109(1). GALs requesting civil protection orders on behalf of children should ask the court to exercise its discretion to waive the filing fee. RPC seeking protection orders should ask

the trial court to waive filing fees based on the indigency finding that allowed appointment of counsel or also file a motion to proceed without payment of filing fees. *See* JDF 205.

2. Hearing on Motion for Temporary Order

Motions must be set for hearing as soon as possible and take precedence over all other matters, except matters of the same kind that have been on the docket for a longer time. § 13-14-104.5(4). The hearing may be *ex parte*. *Id.*

A court may issue a temporary order where it finds imminent danger to the person(s) seeking protection. § 13-14-104.5(7)(a). "In determining whether an imminent danger exists to the life or health of one or more persons, the court shall consider all relevant evidence concerning the safety and protection of the person or persons seeking the protection order." *Id.* However, courts may not deny requested relief based on the time that passed between the abuse/threatened harm and the filing of the complaint/motion. *Id.*

3. Temporary Order and Citation (JDF 398)

A temporary order must be on the standard form created by the state court administrator, and court clerks must enter temporary civil protection orders into a computerized central registry of protection orders. § 19-1-104(7).

TIP Protected parties should always carry complete copies of civil protection orders and certificates of service to aid the enforcement of such orders.

The court must issue a citation (a) directing the restrained party to appear at a return date no later than 14 days after the issuance of the temporary order and citation to show cause why the temporary order should not be made permanent and (b) informing the restrained party that failure to appear on the return date may cause a bench warrant to be issued for him/her and the temporary order to be made permanent without further notice or service. § 13-14-104.5(8)–(10).

4. Notice of Permanent Orders Hearing

The restrained party must be served with copies of the complaint, temporary order, and citation. § 13-14-104.5(9). If the restrained party is unable to be served before the return date, the court must extend

the temporary order, continue the show cause hearing, and issue an alias citation stating the return date for the continued hearing. § 13-14-104(10). The moving party may request, and the court may grant, additional continuances necessary to complete service. *Id.*

5. Permanent Orders Hearing

The permanent orders hearing must occur on the return date outlined in the citation or the continuance date outlined in the alias citation. § 13-14-106(1)(a).

If the responding party fails to appear at the hearing and the court finds that the responding party was properly served with the temporary order and citation, it is not necessary to reserve the responding party to make the protection order permanent. § 13-14-106(1)(a).

After examining the record and the evidence, the court may continue the temporary order and show cause hearing to a date not to exceed (a) one year for good cause shown if both parties are present at the hearing and agree to the continuance and the continuance is in their best interests or (b) 14 days for good cause shown by a party. § 13-14-106(1)(b). The court must inform the restrained party that a violation of the temporary order constitutes a criminal offense or contempt and subjects the restrained party to punishment in accordance with the law. *Id.*

After examining the record and the evidence, the court shall make the temporary order permanent or issue a permanent order with different language if the court makes the following findings by a preponderance of the evidence:

- the responding party committed acts constituting grounds for a civil protection order; and
- the responding party will continue to commit such acts or acts designed to intimidate or retaliate against the moving party if not restrained. § 13-14-106(1)(a).

The court need not find imminent danger. *Id.*

A court may enter a mutual permanent order to prevent mutual domestic violence only if both parties meet their burden and the court enters separate and sufficient findings supporting the mutual order; parties may not waive these requirements. § 13-14-106(3).

The court/court clerk must enter permanent civil protection orders into the computerized central registry of protection orders. § 13-14-106(2).

TIP RPC representing restrained parties must be mindful of collateral consequences of protection orders. Civil protection orders may negatively impact employment, firearm access, professional licensure, immigration, higher education, and access to public housing. RPC may wish to agree to a continued temporary protection order rather than a permanent order to allow time for rehabilitation and eliminate the need for a permanent order, thus avoiding long-term collateral consequences. *See* Joann Sahl, *Can We Forgive Those Who Batter? Proposing an End to the Collateral Consequences of Civil Domestic Violence Cases*, 100 Marq. L. Rev. 527 (2016), *available at* **http://scholarship.law.marquette.edu/mulr/vol100/iss2/7**.

HB 21-1255 introduced new requirements for proving that firearms have been properly relinquished. If a restrained party fails to comply, they may be held in contempt of court or be deemed to have violated the conditions of their bond. Counsel must familiarize themselves with these requirements and ensure compliance.

Counsel representing protected parties must also be mindful of the impact of protection orders on employment and the subsequent effect on child support.

6. Notice

The restrained person must be personally served with a copy of the permanent order if it is different than the temporary order. § 13-14-106(1)(a). Additionally, if the restrained person has not been personally served, a peace officer responding to a call for assistance must serve a copy upon the person. *See* §§ 13-14-107(3), 19-1-104(7).

TIP Protected parties should always carry complete copies of civil protection orders and certificates of service to aid the enforcement of such orders.

CERTIFICATION OF CIVIL PROTECTION ORDERS IN DISTRICT AND COUNTY COURT PROCEEDINGS

A civil protection order that has been made permanent by a D&N court pursuant to the provisions of § 13-14-106 remains in effect upon termination of the D&N proceeding. § 19-1-104(7). The clerk of the court issuing the order must file a certified copy of the permanent civil protection order into one of the following:

- ❑ An existing case in the district court, if applicable.

- With the county court in the county where the protected party resides.

TIP GALs who deem the ongoing protection of a permanent protection order to be in the best interests of a child and RPC in support of the protection order should ensure that these certification procedures are properly followed.

ENFORCEMENT

Civil protection orders entered by juvenile courts in conformity Article 14 must be enforced the same as civil protection orders entered by other courts with jurisdiction. § 19-1-104(7).

Any person who fails to comply with a civil protection order is in contempt of court or subject to prosecution pursuant to § 18-6-803.5. § 13-14-107(1); *see also* **Contempt fact sheet**. The duties of peace officers enforcing civil protection orders are set forth in § 18-6-803.5 and in the rules adopted by the Colorado Supreme Court pursuant to that section. § 13-14-107(2).

MODIFICATION AND DISMISSAL

A protected party may request modification or dismissal of a civil protection order at any time. § 13-14-108(2)(a). A restrained person may request modification or dismissal two years after the issuance of the order or disposition of any motion. § 13-14-108(2)(b). A court may not consider a motion to modify filed by the restrained person unless the court has received the results of a fingerprint-based criminal history record check conducted within 90 days of filing the motion. § 13-14-108(3)(b).

The moving party must personally serve the other parties with the motion, all attachments, and notice of the hearing. § 13-14-108(5).

The motion must be heard by a court. *Id.* The moving party has the burden of proving by a preponderance of the evidence that the modification or dismissal is appropriate. *Id.* The court must consider all relevant factors, including those outlined in § 13-14-110(6)(a)–(j). A court cannot modify or dismiss a protection order if the restrained person has been convicted of, or pled guilty to, a misdemeanor or felony against the protected person (other than the original offense that formed the basis of the permanent order). § 13-14-108(3)(a)(I).

Contempt
FACT SHEET

In D&N proceedings, contempt is a legal tool available under some circumstances to promote compliance with court orders.

TIP In determining whether to employ contempt procedures against parents, GALs should keep in mind the family preservation purposes of the Children's Code. *See* § 19-1-102. GALs should attempt to employ positive and proactive engagement with parents prior to initiating contempt proceedings whenever possible.

TIP When contempt is filed in a D&N proceeding, defending a parent is within the scope of an ORPC contract with RPC.

DEFINITION OF CONTEMPT

Contempt is:

- disorderly or disruptive behavior, a breach of peace, boisterous conduct or violent disturbance toward a court, or conduct that unreasonably interrupts judicial proceedings;
- behavior that obstructs the administration of justice;
- disobedience of or resistance to any lawful writ, process, or order of the court;
- interference with any lawful writ, process, or order of the court; or
- any other act or omission designated as contempt by statute or the Colorado Rules of Civil Procedure.

C.R.C.P. 107(a)(1).

CONTEMPT POWER AND PROCEDURES

Courts have the inherent and indispensable power to impose contempt. *People v. Razatos*, 699 P.2d 970, 974 (Colo. 1985). The Children's Code references this inherent and indispensable power in many contexts, including, but not limited to:

- compliance with protection orders, including orders requiring active participation in the rehabilitation process, *see, e.g.,* §§ 19-1-114(3)(a), 19-1-114(5);
- orders as conditions for release to a child's parent or grandparent, *see* § 19-3-402(2)(a);
- completion of the relative affidavit, *see* §§ 19-3-403(3.6)(a)(I)(A), 19-3-403(3.6)(a)(III);
- court appearances, *see* § 19-3-504(1) (providing that contempt proceedings may be initiated against someone who is summoned or required to appear in court pursuant to § 19-3-503 who acknowledged service but failed to appear in court without reasonable cause);
- compliance with court-ordered interview, examination, and investigation of a child, *see* § 19-3-308(3)(b);
- court-ordered grandparent visitation, *see* § 19-1-117.5(2)(e) (authorizing contempt for failure to abide by orders concerning grandparent visitation).

As a general rule, D&N courts must conduct contempt proceedings pursuant to C.R.C.P. 107. C.R.J.P. 4.5. The one exception to that general rule is for service—in D&N proceedings, the contempt citation, motion, affidavit, and order must be personally served on the respondent at least 14 days before the time designated for the respondent to appear in court, instead of the 21 days set forth in C.R.C.P. 107. *Id.*

TYPES OF CONTEMPT

1. Direct Contempt

Direct contempt is heard or seen by the court and either so extreme that a warning is unnecessary or repeated despite a court's warning to stop. C.R.C.P. 107(a)(2).

Direct contempt may be punished summarily so long as the court makes an order on the record or in writing reciting the facts

constituting the contempt, including (a) a description of the contemnor's conduct; (b) a finding that the contemnor's conduct was so extreme that a warning was unnecessary or the conduct was repeated after the court warned him/her to stop; and (c) a finding that the contemnor's conduct was offensive to the authority and dignity of the court. C.R.C.P. 107(b). The contemnor has a right to make a statement in mitigation before the court imposes a sanction. *Id.*

2. Indirect Contempt

Indirect contempt occurs outside a court's direct sight or hearing. C.R.C.P. 107(a)(3).

Proceedings commence with the filing of a motion supported by an affidavit alleging that the alleged contemnor committed indirect contempt. C.R.C.P. 107(c). A court may order a citation on an *ex parte* basis requiring the respondent to appear at a specified date, time, and place to show cause why the alleged contemnor should not be punished. *Id.* The citation, motion, affidavit, and order must be personally served on the alleged contemnor at least 14 days before the show cause hearing. C.R.J.P. 4.5. If the alleged contemnor fails to appear at the show cause hearing and was properly served, the court may issue a warrant and require bond. C.R.C.P. 107(c).

TIP RPC and GALs may wish to consider filing contempt motions concerning the department's failure to obey court orders regarding treatment and services, as such efforts are essential to reunification and timely permanency for children.

CONTEMPT SANCTIONS

C.R.C.P. 107 provides for two types of contempt sanctions—punitive and remedial. The sanctions sought determine the requisite procedure and findings. A court may order both punitive and remedial sanctions where it follows the appropriate procedures for, and makes findings supporting the adjudication of, both types. C.R.C.P. 107(e).

TIP Thorough preparation for the contempt hearing is key to effective representation. A trial notebook is a useful preparation tool. Suggested components of a trial notebook include opening statements, direct and/or cross-examination questions of all anticipated witnesses with specific references to impeachment and refreshing recollection materials, a skeletal outline for anticipated closing

argument, evidentiary aids such as a list of common objections and a hearsay "cheat sheet," and copies of statutes and cases supportive of the legal arguments counsel intends to make.

1. Punitive Sanctions

Punitive sanctions are criminal in nature and include punishments by unconditional fines, fixed sentences, or both. C.R.C.P. 107(a)(4). Punitive sanctions and are reserved for conduct found offensive to the authority and dignity of the court. *Id. See, e.g., In re Marriage of Nussbeck*, 974 P.2d 493, 498 (Colo. 1999) (holding that the trial court could enforce temporary orders in a domestic relations proceeding through punitive contempt).

Punitive sanctions must be supported by findings of fact establishing beyond a reasonable doubt that (a) a lawful court order existed and the contemnor (b) knew of the order, (c) had the ability to comply with the order, and (d) willfully refused to comply with the order. *Id.* A willful act is done "voluntarily, knowingly, and with conscious regard for the consequences of [one's] conduct." *Nussbeck*, 974 P.2d 493 at 499.

The following procedural considerations apply to punitive sanctions.

- In indirect contempt proceedings where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt.
- Where a judge initiated the contempt proceedings, the alleged contemnor must be advised of the right to have the matter heard by a different judge.
- During the first appearance, the alleged contemnor must be advised of the presumption of innocence as well as the rights to be represented by an attorney (the court will appoint counsel if the respondent is indigent and a jail sentence is contemplated), plead guilty or not guilty, require proof beyond a reasonable doubt, present witnesses and evidence, cross-examine adverse witnesses, have subpoenas issued to compel witnesses to appear at trial, remain silent, testify at trial, and appeal.
- A court may impose punitive sanctions only where it expressly finds the contemnor's conduct offensive to the authority and dignity of the court.
- The contemnor has the right to make a statement in mitigation before the court imposes the sanction.

See C.R.C.P. 107(d)(1).

Punitive sanctions are subject to the following limitations.

- Courts cannot permit probation as a condition of a punitive sanction. C.R.C.P. 107(e).
- The maximum jail sentence may not exceed six months unless the respondent was advised of the right to a jury trial. C.R.C.P. 107(d).
- Although courts cannot suspend any part of a putative sanction based upon the performance/non-performance of a future act, courts may reconsider punitive sanctions. C.R.C.P. 107(e).

3. Remedial Sanctions

Remedial sanctions are civil in nature and aim to force the contemnor to comply with a lawful order or compel the contemnor to perform an act within the contemnor's power or present ability to perform. C.R.C.P. 107(a)(5); *Nussbeck*, 974 P.2d at 498.

In indirect proceedings in which remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed must be described in the motion or citation. C.R.C.P. 107(d)(2).

A court may issue remedial sanctions when it enters findings of fact establishing that the contemnor (a) did not comply with a lawful court order, (b) knew of the order, and (c) has the present ability to comply with the order. *In re the Marriage of Cyr and Kay*, 186 P.3d 88, 92 (Colo. App. 2008). The contemnor has the burden of proving the inability to comply. *Id.* The court must enter an order on the record or in writing describing how the contemnor may purge the contempt and sanctions. *Id.* The court may assess related costs and reasonable attorney's fees. C.R.C.P. 107(d)(2). If the contempt is due to the contemnor's failure to perform an act in the contemnor's power to perform and the court finds the contemnor has the present ability to perform the act, the court may fine or imprison the contemnor until the contemnor performs the act. *Id.*

APPEAL

Orders adjudicating contempt and imposing sanctions for contempt are final appealable orders. C.R.C.P. 107(f).

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 D&N system. § 19-3-100.5(1). The juvenile justice system holds public safety paramount 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. § 19-2.5-101(1)(b).

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 is to "represent the juvenile's best interests throughout the appointment in a manner that promotes and protects the juvenile's rights." CJD 04-06(V)(E).

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 the following: (1) the failure to appear by a parent or legal guardian of the child; (2) a

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 and the specific findings are included in the court's order of appointment. *Id.* In order to appoint a GAL, the court must find that one of these factors exists. *See Ybanez v. People*, 2018 CO 16 ¶¶ 39–41.

The GAL's appointment in a delinquency ends when one of the following occurs: the court terminates the appointment because it is no longer necessary; the sentence is imposed, unless the court continues the appointment because the child is sentenced to a residential or community out-of-home placement as a condition of probation; or the child reaches 18 years of age, unless the child has a developmental disability. *See* § 19-1-111(4)(b)–(c).

TIP

Whether the delinquency court will appoint the D&N GAL to the delinquency matter varies throughout the state. A GAL appointed in a D&N proceeding should provide current information and input to the delinquency court as appropriate. Additionally, the D&N GAL should make the court aware of the GAL's availability for appointment on the delinquency case. The OCR's policies allow a GAL for a child in a D&N proceeding to be appointed as the child's GAL for the child's delinquency cases, regardless of whether the GAL's name appears on the delinquency appointment list in the district where the child is charged. Regardless of whether he or she is appointed in the delinquency case, the D&N GAL should stay informed of the delinquency proceedings.

As in the D&N proceeding, a GAL appointed in a delinquency proceeding does not have a traditional attorney-client relationship with the juvenile. CJD 04-06(V)(B). The GAL's duty of confidentiality to the best interests of the juvenile does not prevent a GAL from sharing information essential to representation of the child's best interests. *See id.*; *People v. Gabriesheski*, 262 P.3d 653, 660 (Colo. 2011). The GAL must explain these limitations on confidentiality to the juvenile and ensure the juvenile understands the distinctions between the GAL's role and the role of defense counsel. *Id.*; CJD 04-06(V)(B), (E)(1).

CJD 04-06(V)(E) details practice standards for GALs, which include, but are not limited to, conducting a timely in-person meeting with the juvenile, attending all court hearings, and interviewing parents, kin, placement providers, and other professionals and individuals necessary to assess and advocate for the juvenile's best interests. The GAL's investigation must assess the following:

the juvenile's functioning, the juvenile's needs and circumstances; the appointment and availability of defense counsel; placement; services and treatment; any issues regarding lack of competency; the juvenile's understanding of the proceeding and its consequences; the consequences of proposed orders; family issues that could be addressed through court orders; and other pending cases. CJD 04-06(V)(E)(3).

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). The GAL must present independent information relevant to the juvenile's best interests through oral or written communications, motions, or other acceptable means consistent with the GAL's appointment orders and the GAL's statutory authority and ethical obligations. CJD 04-06(V)(E)(1).

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. Unless the juvenile has waived his or her psychotherapist-patient privilege in the juvenile delinquency proceeding, the GAL should not disclose information from the therapist in pleadings or recommendations. While the Supreme Court's ruling in *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013), pertains to D&N proceedings, its reasoning underscores the importance of the psychotherapist-patient privilege. The GAL should always keep in mind that advocating for the child's best interests includes ensuring the protection of his or her legal interests and constitutional rights.

CONFESSION, 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.

TIP Litigating suppression issues is the responsibility of defense counsel rather than the GAL. The GAL, however, must be aware of how his or her actions may implicate the constitutional and statutory rights of juveniles.

Pursuant to § 19-2.5-203(1), 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. HB 19-1315 sets forth a process by which a juvenile can seek suppression of any statements made during custodial interrogation if the juvenile alleges that the responsible adult had an interest adverse to the juvenile. *See* § 19-2.5-203(7).

Caselaw establishes that another adult whose interests are consistent with those of the child may "act in the representative capacity contemplated by the statute." *People v. S.M.D.*, 864 P.2d 1103, 1104 (Colo. 1994). If not a parent, guardian, or legal custodian as enumerated by the statute, the person with the juvenile during the § 19-2.5-203 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). A GAL has been deemed to act in this representative capacity. *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.* held that the GAL could act in the place of a parent as contemplated by § 19-2.5-203, 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. §§ 19-2.5-209. Once the juvenile is taken into temporary custody, a parent, guardian, or legal custodian must be notified. § 19-2.5-303(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. § 19-2.5-305(1), (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 poses a substantial risk of serious harm to others or a substantial risk of flight from prosecution and community-based alternatives to detention are insufficient to reasonably mitigate the risk. The statute distinguishes flight from prosecution from simple failure to appear. *See id*. Pursuant to § 19-2.5-305(3)(a)(V), there is a rebuttable presumption that the juvenile poses a substantial risk of serious harm to others 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 § 19-2.5-306. Juveniles who are under 13 may not be detained unless arrested or adjudicated for a felony or weapons charge pursuant to §§ 18-12-102, 18-12-105, 18-12-106, or 18-12-108.5. § 19-2.5-305(3)(a)(V). Section 19-2.5-304(3) lists a number of bases that alone cannot justify the detention of a juvenile, including but not limited to: lack of supervision alternatives, service options, or more appropriate facilities; the community's inability to provide treatment or services; lack of supervision in the home or community; and risk of self-harm.

A court may not impose a secured money or property conditions on a bond for juveniles charged with or accused of committing a delinquent act. §19-2-508(3)(a)(VII)(C).

TIP The delinquency GAL must conduct a timely in-person meeting with the juvenile. *See* CJD 04-06(V)(E)(1). For detained juveniles, the GAL must make diligent efforts to meet the juvenile in the detention facility as soon as possible but no later than 7 days

after the detention commences or the GAL is appointed. *Id.* at Commentary. The GAL's investigation must include an assessment of whether the placement is in the juvenile's best interests and consistent with the juvenile's due process rights, whether reasonable efforts have been made to prevent out-of-home placement, and whether it is the least restrictive placement for the juvenile. CJD 04-06(V)(E)(3). Placement with kin or a court-ordered placement evaluation for placement with the county department of social services may provide a least restrictive placement option for juveniles who cannot remain home. *See* § 19-2.5-305(3)(a)(VIII)(A)–(B).

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), (E). The GAL also must be careful not to effectuate a waiver of the psychotherapist-patient privilege or any other privileges. *See L.A.N.*, 292 P.3d at 948.

Each juvenile is entitled to representation from the Office of the State Public Defender or, if there is a case conflict, by the Office of Alternate Defense Counsel at the detention hearing. § 19-2.5-305(2). The Court of Appeals has held that because juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," a juvenile court has an expanded duty of careful inquiry into a juvenile's understanding of his or her right to counsel before the court can find that a waiver of that right is is voluntary, knowing, and intelligent. *See People in the Interest of J.V.D.*, 2019 COA 70 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

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. § 19-2.5-502(1); 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 seven 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. § 19-2.5-306(4)(b); *see also People in Interest of G.S.S.* 2019 COA 4.

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 advise the juvenile whether to consent to such evaluations in the first instance. Given the significant limitations of § 19-3-207, 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 § 19-2.5-605. At this hearing, the juvenile is asked if he or she wants the assistance of counsel. Counsel from the Office of the State Public Defender—or the Office of Alternate Defense Counsel, when there is a case conflict—shall be appointed if the juvenile and his or her parents, guardian, or other custodian are indigent, the child is in the custody of a state or county department of human services, counsel is needed to protect the juvenile's interests, or the parents refuse to hire counsel. § 19-2.5-605(1)(b)–(e). The court is not required to appoint counsel if the child has retained private counsel or has made a knowing, intelligent, and voluntary waiver of counsel. *Id.* The parents may be responsible for reimbursement of costs if they refuse to hire counsel. *Id.*

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 § 19-2.5-609; 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. 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. *See* CJD 04-06(V)(E)(1), Commentary. However, consideration of whether an apparent factual basis exists for the plea is part of the GAL's assessment of whether the plea bargain is

in a juvenile's best interests, and the GAL does have the ability to review the discovery to make this determination. 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 or concerns about the immediate or long-term consequences of the plea agreement to the court's attention. *See* CJD 04-06(V)(E)(3)(b)–(g). 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. The Colorado Office of the Public Defender's website contains helpful resources regarding the collateral consequences of juvenile adjudications. *See* **http://www.coloradodefenders.us/juvenile/consequences-of-juvenile-adjudication/**.

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. § 19-2.5-907(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 persons if the juvenile is charged with a crime of violence as defined in § 18-1.3-406, *see* § 19-2.5-610(1), or a jury of 12 persons if the juvenile is charged as an aggravated juvenile offender pursuant to § 19-2.5-1125(4), *see* § 19-2.5-503(3)(a). The court also has discretion to order a jury trial for any felony charges in a juvenile delinquency proceeding. § 19-2.5-610(1)–(2). A jury trial must be demanded, or else it is deemed waived. § 19-2.5-610(3).

TIP The GAL does not participate in the adjudicatory hearing. However, the GAL is expected to attend all court hearings, including the trial, unless exceptional circumstances lead the GAL to conclude that the GAL's presence at trial is not necessary and the court approves the GAL's absence in advance of the trial. *See* CJD 04-06(V)(E)(2). 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. § 19-2.5-905(3)(a). 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. § 19-2.5-907(3). Pursuant to § 19-2.5-1101, 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 19-2.5-1103 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 Services (DYS) 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, § 19-2.5-1113; restitution, § 19-2.5-1104; community service, § 19-2.5-1111; anger management or therapy, § 19-2.5-1122; placement with a relative, § 19-2.5-1112; placement in the custody of the department or a child placement agency, § 19-2.5-1115; or placement in a hospital or other suitable facility, § 19-2.5-1114, §§ 19-2.5-1103, 19-2.5-1106. However, juveniles under the age of 13 may not be sentenced to detention unless adjudicated for statutorily-specified felony or weapons charges. *See* § 19-2.5-1123(2). Pursuant to HB 21-1315, the court cannot impose fines, fees or costs of prosecution on any juvenile engaged in the criminal justice system. §18-1.3-701(1)(a), (2), (2)(m).

Juveniles adjudicated for the commission of an offense described in § 19-2.5-305(3)(a)(V) must receive a minimum mandatory period of detention of not less than five days. § 19-2.5-1123(1). If the court places the juvenile in a community placement for a period of 12 months or longer, a permanency hearing must be held within 12 months and at least every 12 months thereafter. *See* § 19-2.5-1518(1)(b) (also listing factors the court must consider at the permanency hearing). If the court sentences a juvenile to DYS, the court must make a finding as to whether the lack of available and appropriate congre-

gate care placements is a contributing factor to the commitment to DYS. *See* § 19-2.5-1117(4)(a)(III).

The following special offender sentencing categories may enhance the juvenile's sentence: (1) mandatory sentence offender or three adjudications, § 19-2.5-1125(1); (2) repeat juvenile offender for at least one prior adjudication and a subsequent adjudication for a felony, § 19-2.5-1125(2); and (3) violent juvenile offender or an adjudication for a crime of violence, § 19-2.5-1125(3). *See* § 19-2.5-1126. For juveniles subject to these sentencing categories, 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). Additionally, juveniles adjudicated as aggravated juvenile offenders may be sentenced to DYS for up to five or seven years, depending on the offense; the petition must allege by a separate count that the juvenile is an aggravated juvenile offender and that increased commitment is authorized. § §19-2.5-503, 19-2.5-1127.

For juveniles committed to DYS, DYS may petition the committing court to extend the commitment for an additional period not to exceed two years. § 19-2.5-1117(9).

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 DYS. Further reviews are conducted administratively in the delinquency case by DYS, which must provide the court with information concerning the committed youth. *See* § §19-2.5-1117(3)(b), (8), 19-2.5-1518(1)(a). The GAL may request that DYS 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. § 19-2.5-702 *et seq*. A juvenile who is not competent to proceed may not be tried or sentenced. § 19-2.5-702(2).

For juveniles charged with acts occurring before July 1, 2018, "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). H.B. 18-1050, applicable to acts committed on or after July 1, 2018, establishes a juvenile-specific definition of incompetent to proceed. Codified at § 19-2.5-102(25), this definition identifies lack of mental capacity, in addition to developmental disability or mental disability, as a reason why a juvenile may be incompetent to proceed.

TIP The General Assembly's enactment of lack of mental capacity, defined at § 19-2.5-102(32), as a basis for a juvenile's incompetence to proceed serves as a recognition of the unique developmental issues that may implicate a juvenile's incompetence to proceed. *See* § 19-2.5-701; Kimberly Larson and Thomas Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers* (Models for Change 2012), *available at* **http://www.modelsforchange.net/publications/330**. Age alone is not a basis for finding a juvenile incompetent to proceed; the court must make findings that the juvenile lacks the relevant capacities for competence. § 19-2.5-702(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. § 19-2.5-702(3). The court may also initiate competency proceedings upon its own motion. § 19-2.5-702(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. § 19-2.5-703(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. § 19-2.5-703(2). If the request for the hearing is timely (i.e., filed within fourteen 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. § 19-2.5-703(4)(a). Specific requirements govern which psychiatrists and psychologists are eligible to perform competency evaluations. § 19-2.5-703(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. § 19-2.5-703(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. § 19-2.5-704(2)(a). The Office of Behavioral Health is the entity responsible for providing competency restoration. *See* § 19-2.5-704(2)(b). If the court finally determines that the juvenile is incompetent to proceed and cannot be restored to competency, the court must determine whether a management plan is necessary, taking into account the public safety and the best interests of the juvenile. § 19-2.5-704(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 unless the court makes specific findings of good cause to retain jurisdiction. § 19-2.5-704(3)(c). In no case shall the juvenile court's jurisdiction extend beyond the juvenile's twenty-first birthday. *Id.* As with the competency examination, the management plan involving placement of the juvenile must be in the least restrictive environment. *Id.* The entry of an order for a psychosexual evaluation after a juvenile is found incompetent and that his or her competency cannot be restored implicates neither the juvenile's privilege against self-incrimination nor the presumption of innocence. *See In Interest of C.Y.*, 275 P.3d 762, 769–71 (Colo. App. 2012).

If the court finds that the juvenile's competency is restorable, progress toward competency must be reviewed every 91 days for juveniles not in custody. § 19-2.5-704(2)(a). The court must conduct a review every 35 days for juveniles who are in custody to ensure the prompt provision of restoration services in the least restrictive environment. *Id.* 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 § 19-2.5-705(1). At the restoration hearing, the burden of proof is on the party asserting that the juvenile is competent. § 19-2.5-705(2). The juvenile court does not have jurisdiction to order a second competency evaluation in lieu of holding a restoration hearing or a competency review. *People in Interest of B.B.A.M.*, 453 P.3d 1161 (Colo. 2019). If the juvenile is deemed incompetent, the court may continue restoration efforts, if appropriate, or order a management plan. § 19-2.5-706(2). If the juvenile is deemed restored to competency, the court shall resume the proceedings. § 19-2.5-706(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. § 19-2.5-704(1).

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. *See* CJD 04-06(V)(E)(3)(e). 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 have an intellectual or developmental disability must be referred to the nearest community-centered board for an eligibility determination. § 19-2.5-305(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 making a 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. § 19-2.5-305(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. § 19-2.5-305(3)(b)(II).

A juvenile also can be referred for mental health services pursuant to § 19-2.5-612.

4. Sex Offenses

If the juvenile is adjudicated for an act that constitutes unlawful sexual behavior, the juvenile may be required to register as a sex offender and participate in treatment and follow probationary conditions applicable to sex offenders. *See generally* § 16-22-101 *et seq*. (regarding Colorado Sex Offender Registration Act); *see also* § 16-22-103(5) (providing a procedure by which a court may exempt certain juveniles charged with specified offenses from the registration requirements).

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.,* § 19-2.5-901 (regarding informal adjustment); §19-2.5-401 *et seq.* (regarding diversion). 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* §§ 16-22-113(1)(d)–(e), (1.3); 19-2.5-903(6). However, in *People in Interest of J.M.M.* 496 P.3d 833, 838 (Colo. App. 2021), the Court of Appeals clarified that a person who had to register for an offense committed as a juvenile is eligible to seek to deregister as a sex offender even if the individual failed to satisfy the terms and conditions of earlier sentences or dispositions, so long as the individual successfully completed their subsequently imposed sentence or disposition.

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**.

TIP If a D&N case remains open when the juvenile becomes eligible for deregistration, the GAL should identify whether the deregistration is automatic pursuant to the completion of a deferred judgment and sentence or deferred adjudication, *see* § 16-22-113(1.3)(a), and ensure that the court completes the deregistration process. For non-automatic deregistration, the GAL may assist in the filing of the deregistration by connecting the juvenile with resources, including counsel, and providing relevant information and assistance to counsel or the self-petitioning juvenile. § 16-22-113(1)(e). The GAL must be clear about his or her role in the process and should not obtain confidential information that may harm the juvenile if disclosed.

TIP In 2021, the Colorado legislature implemented the recommendations from the legislative oversight committee which modified provisions of the Colorado Sex Offender Registration Act to provide additional protections and leniency to those who committed qualifying acts as juveniles. §16-22-103(3)(b), (4), (5)(a).

5. Prosecution of the Juvenile in Adult Court

a. Direct file. Section 19-2.5-801 sets forth the district attorney's authority to file directly into adult court. This ability is limited to youth who are over the age of 16 and who meet specified criteria. If the juvenile has been charged by a direct filing of information or by an indictment in district court, the juvenile may file a motion to transfer the case to juvenile court, known as a "reverse-transfer" hearing, in which the court must review and make findings as to a number of factors similar to those reviewed in a transfer hearing. § 19-2.5-801(4)(a)-(b). The direct file statute also has specific sentencing options, including adult sentencing, sentencing to the youthful offender system, or sentencing as a juvenile. § 19-2.5-801(5), (6).

TIP Section 19-1-111(2) factors apply to the appointment of a GAL in a direct file proceeding. *See Ybanez*, 2018 CO 16 at ¶ 39. The practice standards of CJD 04-06(V)(E) apply to such appointments. The GAL's investigation and advocacy should advance the best interests of the juvenile in a manner consistent with the juvenile's rights at all stages of the proceeding, including the reverse transfer hearing. The GAL can also be of valuable assistance 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 information about residential treatment facilities or other treatment options in the juvenile system that may address the juvenile's needs and interests while protecting the community.

TIP In *People v. Brown*, 2019 CO 50, the Colorado Supreme Court held that a juvenile charged in an adult proceeding could limit his waiver of testimonial privileges to the transfer hearing alone. GALs with relevant treatment and mental health information should work with defense counsel prior to engaging in any actions that would constitute a waiver of the psychotherapist-patient privilege at this stage, as waiving that privilege might allow the prosecution to use the information against the juvenile at a later stage in the proceeding.

b. Pretrial detention of juveniles tried as adults. Section 19-2.5-305(3)(c)(II) 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, includ-

ing the juvenile's age, emotional state, intelligence, developmental stage, and treatment and educational needs. § 19-2.5-305(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. § 19-2.5-305(3)(c)(III)(C).

c. Transfer proceedings. A juvenile also may be prosecuted as an adult in district court through a transfer proceeding. § 19-2.5-802. Juveniles as young as 12 may be subject to a transfer petition, depending on the alleged offense. *Id.* HB21-1091 provides that juveniles transferred to adult court are not subject to the mandatory minimum sentencing provisions for crimes of violence, so that these juveniles are subject to the same sentencing provisions as juveniles in adult court based upon direct file.

TIP As with direct-file proceedings or any juvenile case, the GAL representing the best interests of a juvenile in a transfer proceeding must strike a careful balance between sharing information that would serve the juvenile'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.

6. Expungement of Juvenile Records

Section 19-1-306 provides that the court, the juvenile probation or the juvenile parole department, the juvenile, a respondent parent or guardian, or a court-appointed GAL may initiate expungement proceedings. If the juvenile has any felony, drug felony, misdemeanor, drug misdemeanor, petty offense, or delinquency action pending, the court will stay the petition for expungement until resolution of the pending case. § 19-1-306(2)(i). Adjudications of certain offenses, including domestic violence and unlawful sexual behavior, may preclude eligibility for this process. *See* § 19-1-306. Juveniles adjudicated as a repeat or mandatory offender, violent juvenile offender, or aggravated juvenile offender will not be eligible for expungement. § 19-1-306(8). HB17-1204 made changes to § 19-1-306, effective November 1, 2017, and included automatic expungement of certain records. *See* § 19-1-306(4). Eligibility requirements and waiting periods for other types of expungement are found in § 19-1-306.

TIP As expungement of records usually serves the best interests of juveniles and GALs now have authority to petition for expungement, GALs should ensure the expungement of all eligible records

by petitioning to expunge records if the juvenile becomes eligible during the GAL's appointment. When the GAL's appointment will end prior to expungement eligibility, the GAL should confirm that the juvenile and his or her parent or guardian understand expungement eligibility and how to initiate the process.

7. Allocation of Parental Responsibilities in Delinquency Proceedings

H.B. 17-1110 amended § 19-1-104(5) to clarify that in limited circumstances a juvenile court may enter orders allocating parental responsibilities in delinquency proceedings. Specifically, allocation of parental responsibilities is allowed only upon agreement of all parties, parents, guardians, and other legal custodians (or lack of objection upon proper notice), and the court must have jurisdiction over the juvenile through an adjudication, through deferred adjudication, or pursuant to a management plan. § 19-1-104(8). The court must provide at least seven days' written notice that complies with the Colorado Rules of Juvenile Procedure. § 19-1-104(5). The court must also ensure that a child custody action, a D&N action, or an APR action is not pending in a district court of this state and that the proceeding complies with the Uniform Child Custody Jurisdiction and Enforcement Act. § 19-1-104(5). *See* **Jurisdictional Issues fact sheet**.

8. The Court's Authority to Order the Filing of a D&N Petition

Section 19-3-501 gives the juvenile court the authority to order a D&N investigation and filing under certain circumstances.

TIP While not necessarily a useful advocacy tool for juveniles who currently have an open D&N proceeding, § 19-3-501 is an important advocacy tool for GALs appointed in delinquency proceedings who have determined that the best interests of the juvenile would be better served in a D&N proceeding.

9. Qualified Residential Treatment Program (QRTP)

Once Colorado has implemented FFPSA, special procedures and findings will apply to any placement in a Qualified Residential Treatment Program (QRTP). *See* **Qualified Residential Treatment Program** section in **Placement Review Hearings** chapter.

Disabilities and Accommodations

FACT SHEET

Effective advocacy in D&N cases requires an understanding of the legal protections afforded to parents and children with disabilities.

RELEVANT LEGISLATION

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, provides protection against discrimination by public entities and many private agencies and also protects against employment discrimination. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (hereafter Section 504), prohibits discrimination by any agency receiving any stream of federal funding. The ADA and Section 504 protect qualified individuals with disabilities, who may include children, parents, legal guardians, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents.

Title II of the ADA covers all of the programs, services, and activities of state and local governments, their agencies, and departments. *See Pa. Dep't. of Corrs. v. Yeskey*, 524 U.S. 206, 209–12 (1998) (discussing the breadth of Title II's coverage). Similarly, Section 504 applies to all of the activities of agencies that receive federal financial assistance. *See* 29 U.S.C. § 794(b)(1)(A)–(B). Accordingly, all child welfare–related activities and programs of county departments and courts are covered, including, but not limited to, investigations, witness interviews, assessments, removal of children from their homes, case planning, service planning and treatment plans,

visitation, guardianship, adoption, foster care, reunification services, and dependency court proceedings, including termination of parental rights. US Department of Justice, Civil Rights Division, Disability Rights Section, and US Department of Health and Human Services, Office for Civil Rights, Administration for Children and Families, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (Washington, DC, *available at* **http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf**) (hereafter *DOJ Technical Assistance*).

TIP The Department of Justice and the Children's Bureau in the Health and Human Services Administration for Children and Families enforce Title II of the ADA against public entities, including child welfare agencies and state courts. *See* 28 C.F.R. § 35.190 (b)(3) and (6); *DOJ Technical Assistance* at 3.

TIP HB 18-1104 provides safeguards for parents and prospective parents with disabilities in D&N, paternity, adoption, and domestic relations cases. The bill adds a new statute, § 24-34-805, that requires adherence to procedural safeguards set forth in the ADA, provides that in D&N proceedings a parent's disability alone cannot be used as the basis for denial of parenting time unless the disability impacts the health or welfare of a child, and requires the court, prior to non-emergency removals on the basis of a parent's disability, to find whether reasonable accommodations and modifications required by the ADA were provided. The bill also amends provisions of Title 19 to define disability consistent with the ADA, *see* § 19-1-103(42.5), incorporates consideration of reasonable modifications and accommodations into the determination of reasonable efforts, *see* § 19-3-100.5, and requires services to comply with the requirements of the ADA, *see* § 19-3-208. The bill also requires, at the dispositional hearing, a consideration of reasonable accommodations and modifications to ensure that the treatment plan components are accessible; identified accommodations and modifications must be listed in the report prepared for the hearing. *See* § 19-3-507(1)(c). Additionally, for a court to order termination of parental rights under the no appropriate treatment plan provision of the termination statute based on an emotional illness, behavioral or mental health disorder, or intellectual and developmental disability of the parent, the court must make findings that the provisions of reasonable accommodations

and modifications pursuant to the ADA will not remediate the impact of the parent's disability on the health or welfare of the child. *See* § 19-3-604(1)(b)(I).

DEFINITION OF DISABILITY AND QUALIFIED INDIVIDUAL WITH 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); 29 U.S.C. § 705(9)(B). Major life activities also include the operation of major bodily functions, including, but not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(B). While not specifically listed in the statute, parenting is recognized as a major life activity covered by the ADA.

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); 29 U.S.C. § 705(9)(B); *see also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, #12 and 13, at **www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm**.

The ADA and Section 504 also apply to people who have a record of having a substantial impairment (e.g., medical, military, or employment records denoting such an impairment) or are regarded as having such an impairment, regardless of whether they actually have an impairment. 42 U.S.C. § 12102(1)(B)–(C); 29 U.S.C. § 705(9)(B). The ADA Amendments Act of 2008 amended the definition of disability for Titles I, II, and III of the ADA as well as Section 504 to broaden the scope of the definition. PL 110-325, 122 Stat. 3553 (2008).

TIP The determination of whether a parent is a qualified individual with a disability under the ADA requires a case-by-case determination. *See People in Interest of S.K.*, 2019 COA 36. While the department must provide appropriate screenings and assessments, the parent is responsible for disclosing information regarding his or

her disability and should also identify modifications believed necessary to accommodate the disability.

An individual with a disability under the ADA and Section 504 does not include an individual who is currently engaged in the illegal use of drugs, when the county department acts on the basis of the illegal drug use. 42 U.S.C. § 12210(a); 29 U.S.C. § 794(d). However, an individual is not excluded from the definition of disability on the basis of the illegal use of drugs if he or she (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in drug use or has otherwise been successfully rehabilitated and is no longer engaging in drug use, or (2) is participating in a supervised rehabilitation program and is no longer engaging in drug use. 42 U.S.C. § 12210(b)(1)–(2); 29 U.S.C. § 794(d).

TIP Illegal use of drugs under the ADA is defined as the use of drugs that are unlawful under schedules I–V of the federal Controlled Substances Act, which includes marijuana, notwithstanding state legalization. *See* 42 U.S.C. § 12210(d) and 21 U.S.C. § 801 *et seq*. From a disability perspective, the ADA does not protect current marijuana users in child welfare cases.

In some cases, a parent with a disability may not be a qualified individual with a disability because he or she poses a significant risk to the health or safety of the child that cannot be eliminated by a reasonable modification. *See* 28 C.F.R. § 35.139(a)–(b); *People ex rel. C.Z.*, 360 P.3d 228, 235 (Colo. App. 2015). This exception is consistent with the obligations of child welfare agencies and courts to ensure the safety of children. A decision whether an individual poses a direct threat to the health or safety of others must be based on an individualized assessment and objective facts, to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications or the provision of auxiliary aids or services will mitigate the risk. 28 C.F.R. § 35.139(b); *see also DOJ Technical Assistance* at 5 (citations omitted).

PROTECTIONS AGAINST DISCRIMINATION

Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by such entity. 42 U.S.C. § 12132. Title II of the ADA applies to the services, programs,

and activities of all state and local governments throughout the United States, including child welfare agencies and court systems. 42 U.S.C. § 12131(1)(A)–(B); *see also, e.g.,* 28 C.F.R. § 35.130(b)(1) (prohibiting disability discrimination directly or through contractual, licensing, or other arrangements), § 35.130(b)(3) (prohibiting methods of administration that have a discriminatory effect). Private entities involved in the child welfare system may also be independently covered by Title III of the ADA. 42 U.S.C. § 12181, § 12182 (private entities providing public accommodations), § 12183 (commercial facilities), § 12184 (private entities providing public transportation), § 12187 (exemptions for private clubs and religious organizations), and § 12189 (covering examinations and courses). 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, and advantages or the accommodation. 42 U.S.C. § 12182(a).

TIP Law offices of RPC and GALs are public accommodations under the ADA. 42 U.S.C. § 12181(7)(F). Accordingly, attorneys must also ensure their practices comply with the ADA as well. *See* 42 U.S.C. § 12182.

Section 504 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any entity that receives federal financial assistance or be subjected to discrimination by such entity. 29 U.S.C. § 794(a). An entity can be a recipient of federal financial assistance either directly or as a sub-recipient. *See Grove City College v. Bell*, 465 U.S. 555, 564 (1984). Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if federal financial assistance is directed to one component of the agency or for one purpose of the agency. 29 U.S.C. § 794(b).

A county department or court may not, directly or through contract or other arrangements, engage in practices or methods of administration that have the effect of discriminating on the basis of disability. *See* 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4); *DOJ Technical Assistance* at 4; *see also* 28 C.F.R. § 42.503(b)(3).

TIP The *DOJ Technical Assistance* document articulates several considerations relevant to counsel's advocacy on behalf of parents and children.

- County departments and the court, to the extent that they contract with private agencies and providers to conduct child

welfare activities, are responsible for ensuring that the providers do not discriminate or engage in practices or methods of administration that have the effect of discriminating on the basis of disability.

- ❑ The ADA and Rehabilitation Act require individualized treatment and full and equal opportunity in the administration of child welfare programs.
- ❑ Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence. Persons with disabilities may not be treated on the basis of generalizations or stereotypes. Assessments of and decisions regarding individuals with disabilities must be made "on actual facts that pertain to the individual person, and not on assumptions, generalizations, fears, or stereotypes about disabilities and how they might manifest."
- ❑ Individuals with disabilities must be provided an opportunity to benefit from or participate in child welfare programs, services, and activities that is equal to the opportunity offered to individuals without disabilities. This principle can require the provision of aids, benefits, and services different from those provided to other parents who do not have disabilities when necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification.
- ❑ A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities, but these requirements may not be based on stereotypes or generalizations about persons with disabilities.

See DOJ Technical Assistance at 4, 10, 12 (citations omitted).

REASONABLE ACCOMMODATIONS AND MODIFICATIONS

County departments and courts must make modifications in policies, practices, and procedures when necessary to ensure equal access unless taking such steps would fundamentally alter the nature of the service, program, or activity. *See* 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.22(a). To provide assistance to parents with disabilities that is equal to that offered to parents without disabilities, county departments may be required to provide enhanced or supplemental training, increase the frequency of training opportunities, or provide such training in familiar environments

conducive to learning in order for a parent to complete objectives in his or her treatment plan. *See DOJ Technical Assistance* at 10. Such changes are not required if the entity can demonstrate that making such modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. *Id.* 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 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.

TIP

The following are some examples illustrating government obligations to ensure equal access and reasonable accommodations. (1) 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. (2) 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. (3) A county department that provides only classroom-based parenting education may be required to accommodate a parent with an intellectual disability by providing one-on-one parenting education in the parent's home. In *People in Interest of S.K.*, 2019 COA 36, the Court of Appeals considered parents' arguments regarding reasonable accommodations; its analysis may serve as a helpful examples for GALs and RPC.

A fundamental alteration is necessarily highly fact-specific. Courts and county departments have the burden of establishing that a proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, and the determination that a proposed action would constitute a fundamental alteration does not relieve the entity from taking other actions that would ensure participation to the maximum extent possible. *See DOJ Technical Assistance* at 10. For example, a county department may offer a parenting skills class once per week. For a parent with a disability who requires individualized assistance in learning new skills because of her or his disability, the department may need to modify this training to allow more frequent, longer, or more meaningful training. *See id.* If a county department provides transportation assistance to parents, for example, the department must also ensure they provide transportation assistance that accommodates a parent's particular disabil-

ity, even if the department has to use a different provider. *See DOJ Technical Assistance* at 13.

TIP Counsel should ensure accommodation and modification requests are made in writing. Counsel should also file motions to modify treatment plans to add accommodations and modifications to the treatment plan and ask the court to order accommodations and modifications if the parties do not agree to add them to the treatment plan.

The ADA applies to the provision of assessments, treatment, and other services that a department provides to parents through a D&N proceeding prior to the termination hearing. *C.Z.*, 360 P.3d 228, 235 (Colo. App. 2015). While the ADA does not preclude termination of a disabled person's parental rights for a disabled parent, *see id.*; *People ex rel. T.B.*, 12 P.3d 1221 (Colo. App. 2000), a court should consider whether reasonable accommodations were made for the parent's disability in determining whether a parent's treatment plan was appropriate and reasonable efforts were made to rehabilitate the parent. *S.K.*, 2019 COA 36.

TIP Counsel should advocate for reasonable accommodations and modifications in treatment and services throughout the proceeding. In fact, counsel should ensure that every parent with a disability is accommodated by the county department and the court throughout a proceeding. Counsel should identify appropriate accommodations and modifications throughout a case and ask that treatment plans be modified to include provision of specific accommodations and modifications whenever new accommodations and modifications are identified.

AUXILIARY AIDS AND SERVICES

County departments and courts are required to provide auxiliary aids and services when necessary to ensure effective communication unless an undue burden or a fundamental alteration would result. *DOJ Technical Assistance* at 9 (citing 28 C.F.R. § 35.160–164; 45 C.F.R. § 84.52(d)). 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 and other print disabilities. 42 U.S.C. § 12103(1)(A)–(B). Auxiliary aids and services also include acquisition or modification of equip-

ment or devices, as well as other similar services and actions. 42 U.S.C. § 12103(1)(C)–(D).

TIP

The obligation to provide such services applies not only to courts but also to individuals providing public accommodations, including attorneys. Attorneys and clients may request sign language interpreters, CART (real-time reporting), and other auxiliary aids and services for court hearings by clicking on the "ADA Information" tab on the Colorado Judicial Branch website: **http://www.courts.state.co.us/**.

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/**. RPC who need interpreters for clients should contact the ORPC for assistance with obtaining interpreters.

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 a child 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 care, education. § 19-1-103(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), 300.233(1); 1 CCR 301-8: 2220-R-2.33(1). If the child is a ward of the State, the State is specifically excluded from this definition of parent. *See* 34 C.F.R. § 300.30(a)(3); 1 CCR 301-8: 2220-R-2.33(1)(c). If the biological or adoptive parent is attempting to act as the parent when more than one party is qualified to act as a parent, the biological parent is presumed to be the parent unless a court has limited his or her rights. 34 C.F.R. § 300.30(b)(1)–(2); 1 CCR 301-8: 2220-R-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. 1 CCR 301-8: 2220-R-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. The GAL's decision whether to advocate for limitations on a parent's educational decision-making authority 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 who need to be assessed for, special education services. Different people may serve in this capacity, and the juvenile court may play a role in determining who should do so.

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 (FAPE). 1 CCR 301-8: 2220-R-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 (McKinney-Vento Act). 34 C.F.R. § 300.519(a); 1 CCR 301-8: 2220-6.02(8). For children placed in the legal custody of the department, the ESP may be appointed by the court overseeing the child's case. 34 C.F.R. § 300.519(c); 1 CCR 301-8: 2220-6.02(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. 1 CCR 301-8: 2220-6.02(8)(e)(iii). A caseworker or social worker employed by the department may not be an ESP. 1 CCR 301-8: 220-6.02(8)(e)(iii)(A).

The state educational agency is required to make reasonable efforts to ensure the assignment of an ESP within 30 days of a determination that a child needs an ESP. 1 CCR 301-8: 2220-6.02(8)(j). Because school districts are controlled locally, the specific rules for appointing an ESP may vary from district to district. Theresa Lynn Sidebotham, *Serving Children with Disabilities under the Jurisdiction of the Juvenile Court*, *available at* **https://telioslaw.com/**.

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. Regardless of who has been identified as the ESP, the GAL will often have valuable information regarding the child's history and educational needs that will help in the development and implementation of effective education programming.

Typically, local school districts provide training for ESPs on understanding their responsibilities, the relevant laws, the special education process, and how to communicate with schools.

ADVOCATING FOR SCHOOL STABILITY

Children and youth in foster care experience much higher levels of school instability than their peers. US Department of Education and US Department of Health and Human Services, *Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care* 3 (June 2016) (hereafter *Ensuring Educational Stability*), *available at* **https://www2.ed.gov/policy/elsec/leg/essa/index.html**. 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 (The Institute for Higher Education Policy, Washington, DC, 2005), *available at* **http://www.ihep.org/sites/default/files/uploads/docs/pubs/opportunitiesfosteryouth.pdf**. Research suggests that each time a child changes schools, the child loses four to six months of educational attainment. *Id.* Consequently, children in foster care experience "lower standardized test scores in reading and math, high levels of grade retention and drop-out, and far lower high school and college graduation rates" compared with their peers not in foster care. American Bar Association Center on Children and the Law, Education Law Center, and Juvenile Law Center, *How Will the Every Student Succeeds Act (ESSA) Support Students in Foster Care?* 1 (2015) (hereafter *ESSA Q&A Sheet*), *available at* **http://www.childrensdefense.org/library/data/how-will-the-every-student.pdf**. Moreover, school instability makes it difficult for children to form supportive relationships with teachers or peers. *Id.* Accordingly, the US Department of Education and US Department of Health and Human Services have found that "children in foster care are much more likely than their peers to struggle academically and fall behind in school" and are less likely than their peers to graduate from high school. *Ensuring Educational Stability* at 3.

The on-time graduation rate for youth in foster care in Colorado is only 23.6 percent. Colorado Department of Education, 2017 State Policy Report: Dropout Prevention and Student Engagement (March 5, 2018), *available at* **http://www.cde.state.co.us/dropoutprevention**. In contrast, 79 percent of all Colorado youth graduated on time in 2016. *Id.* These poor educational outcomes are undoubtedly related to the high frequency of school moves. In 2016, 55.4 percent of youth in out-of-home placement changed schools during the school year. Colorado Department of Education, *Foster Care Fact Sheet* at 1 (June 2017), **https://www.cde.state.co.us/communications/fostercarefactsheet**. Youth in foster care have, by far, the highest mobility rates of any other special population in Colorado (e.g., gifted and talented, disabled, English language learners, Title I, migrant, and homeless students). *See Foster Care Fact Sheet* at 1; *District Mobility Rates by Instruction Program/Service Type*, Colorado Department of Education (last visited April 2018).

TIP The GAL should be vigilant in ensuring that school stability is a primary consideration in placement decisions. Changes in school settings should occur only when they serve the child's best inter-

ests. Relevant considerations may include time and distance required to travel to school of origin, academic progress in school, peer support, involvement in extracurricular activities, as well as other child-centered factors. GALs can access robust, current, and local data and research relevant to educational advocacy at **http://www.unco.edu/cebs/foster-care-research/reports.aspx**.

Each school district and the state charter school institute must designated a staff as its child welfare education liaison. *See* § 22-32-138(2). These liaisons are responsible for working with the department and child placement agencies to successfully maintain students in out of home placement in their schools of origin and, when it is not in the students' best interests to remain in their school of origin, to facilitate prompt and appropriate placement, transfer, and enrollment in schools within their district.

1. The Presumption against Changes in Educational Placement

Federal law recognizes the importance of limiting educational disruption and maintaining school stability for children and youth in foster care. 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* 42 U.S.C. § 675(1)(G)(ii). Child welfare agencies must include in the child's case plan a plan for ensuring the educational stability of the child while in foster care. 42 U.S.C. § 675(1)(G). The Elementary and Secondary Education Act, as reauthorized by the ESSA, reiterates these requirements, emphasizing collaboration between educational agencies and child welfare agencies to ensure school stability for children in foster care, including assurances that these children will remain in their schools of origin if it is in their best interests. *See* 20 U.S.C. § 6311(g)(1)(E)(i).

The Children's Code contains legislative findings that children and youth in foster care should enjoy school stability that presumes they will remain in the schools in which they are enrolled at the time of placement, if it is in their best interests. § 19-7-101(1)(v). Accordingly, any out-of-home placement in a D&N proceeding must take into consideration any special needs of the child, the ability of the school district of the proposed placement to provide the necessary services 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). Additionally, the court must consider any information the county department may have concerning whether the child's educational needs can be adequately met if the proposed placement is located in a school district other than the district of the child's parent's home. § 19-1-115.5(2)(d). Prior to a change in placement, the Children's Code requires all parties to promote educational stability for the child by taking into account the child's existing educational situation and, in accordance with the child's best interests, selecting a placement that enables the child to remain in the existing educational situation. § 19-3-213(1)(d). Each placement must take 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. 12 CCR 2509-4: 7.301.241(C); *see also* 42 U.S.C. § 675(1)(G)(i); 20 U.S.C. § 6311(g)(1)(E)(i).

Pursuant to these federal and state mandates, 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 must document its efforts to do so. 12 CCR 2509-4: 7.301.241(A)–(B). Because it is presumed to be in the child's best interests to remain in the school of origin, the department, in collaboration with the local education agency, must make a best interest determination prior to any school move resulting from a change in placement, unless remaining in the school of origin poses a specific, documented threat to the child's safety. *Id.* at (D). The best interest determination must consider the child's wishes, the child's safety, how the school of origin can meet the child's academic and non-academic needs (including special education, extracurricular activities, and social, emotional, and other needs), whether the child has a meaningful and appropriate relationship with an adult at the school of origin, how the potential new school could meet the child's academic and non-academic needs, how the decision impacts the child's permanency goals, and the length of travel to the school, and impact of that travel time on the child. *Id.* at (D)(5).

Determining Whether Maintaining a Child in the Same School Is in His or Her Best Interests

Federal guidance emphasizes the need for a holistic, well-informed, and student-centered determination, suggesting the following factors:

- Preferences of the child.
- Preferences of the child's parent(s) or education decision-maker(s).
- The child's attachment to the school, including meaningful relationships with staff and peers.
- Placement of the child's siblings.
- Influence of the school climate on the child, including safety.
- The availability and quality of the services in the school to meet the child's educational and socioemotional needs.
- History of school transfers and how they have impacted the child.
- How the length of the commute would impact the child, based on the child's developmental stage.
- Whether the child is a student with a disability under the IDEA who is receiving special education and related services or a student with a disability under Section 504 of the Rehabilitation Act of 1973 (Section 504) who is receiving special education or related aids and services and, if so, the availability of those required services in a school other than the school of origin.
- Whether the child is an English-language learner and is receiving language services and, if so, the availability of those required services in a school other than the school of origin, consistent with Title VI and the Equal Educational Opportunities Act of 1974 (EEOA).

Transportation costs must not be considered when determining a child's best interests.

Ensuring Educational Stability at 11–12.

The department must invite the parents, the GAL, a representative from the school of origin, and the educational surrogate parent, if any, to participate in the best interest determination. 12 CCR 2509-4: 7.301.241(D)(2)(a)–(f). The department must also include the child in the best interest determination meeting to the extent possible and appropriate for the child's individual needs. *Id.* at (D)(2)(a). The department must notify the parents, GAL, and educational surrogate parent of the best interest determination within one business day of making the determination. *Id.* at (D)(7).

TIP The GAL should actively participate in the best interest determination meeting and advocate for the child's participation to the maximum extent possible consistent with the child's best interests. As a significant portion of a child's day is spent in school, it is important to make sure that the best interest determination is based on a thoughtful consideration of the child's perspective. The child will have a unique and important perspective about his or her day-to-day experience at the school, relationships with teachers and peers, and academic success and needs.

If it is determined to be in the child's best interests to attend a new school, it is presumed to be in the child's "best interest to be in the least restrictive environment and to transfer at natural transitions such as the beginning of the school year or academic term." *Id.* at (D)(4)(b). Pursuant to the Fostering Connections Act, the school district must enroll the child in the new school on the date designated in the best interest determination, even without records normally required for enrollment. 12 CCR 2509-4: 7.301.241(D)(6); *see also* 42 U.S.C. § 675(1)(G)(ii)(II).

TIP Colorado regulations define "immediate" as the date designated in the best interest determination. For example, if a team decides on December 1 that it is best for a child to change schools after the semester break, on January 6, then "immediate" is on January 6. 12 CCR 2509-4: 7.301.241(D)(6).

Colorado regulations set forth a process for resolving disputes regarding best interest determinations. *See* 12 CCR 2509-4: 7.301(D)(8). Disputes must be handled in a manner that promotes the child's safety and stability. *Id.* The rules provide that if a parent, GAL, or educational surrogate parent disagrees with the department's best interest determination and files a motion with the juvenile court within three days of the notice of the department's determination, the child must remain in the school of origin pending resolution of

the dispute unless remaining in the school poses a specific, documented threat to the child's safety. *Id.*

ESSA creates a reciprocal obligation for education agencies to collaborate with child welfare agencies to ensure that children in foster care remain in their schools of origin. *ESSA Q&A Sheet* at 1.

Colorado law also has protections in place for all students who change residences during the school year. If a student moves out of the school district in the middle of a school year, the school district must allow the student to remain enrolled in his or her school until at least the end of the semester or term. § 22-32-116(1). Elementary school students and high school seniors must be permitted to remain enrolled until the end of the academic year. § 22-32-116(1)–(2). Note that although this statute also permits elementary school students to re-enroll in their schools in some circumstances, this was restricted by the decision in *Bradshaw v. Cherry Creek School District No. 5*, 98 P.3d 886 (Colo. App. 2003).

TIP Additional protections will apply to children with disabilities, English learners, and homeless students. *See* **relevant subsections**, *infra.*

2. Transportation to School of Origin

If transportation is necessary to maintain a child in his or her school of origin, ESSA requires county departments to "ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner." 20 U.S.C. § 6312(c)(5)(B)(i); *see also* 12 CCR 2509-4: 7.301.241(E). This must be in accordance with the Fostering Connections Act, which allows 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). The cost of transportation is not a permissible consideration in determining the child's best interests. 12 CCR 2509-4: 7.301.241(D)(5)(g). Additionally, county departments and local education agencies must collaborate to develop systems-level transportation plans that include how transportation will be provided, arranged, and funded for the duration of time the child is in foster care. §22-32-138(10)(a); 12 CCR 2509-4: 7.301.241(E); *see also* 20 U.S.C. § 6312(c)(5)(B). County departments must document their compliance with these requirements, including designation of responsibilities. 12 CCR 2509-4: 7.301.241(A). Child maintenance payments include reimbursement to cover the cost of "reasonable

travel to the school where the child is enrolled prior to out-of-home placement." *See* 12 CCR 2509-5: 7.418.1(A), (C).

TIP HB 18-1306 identifies transportation necessary to allow a student in out-of-home placement to attend his or her school of origin as a service required by § 19-3-208(2)(b). *See* **Reasonable Efforts fact sheet**.

TIP Children with an individualized education program (IEP) or who meet the federal definition of homelessness may be eligible for additional transportation reimbursement. *See* **relevant subsections**, *infra*.

TIP As appropriate, counsel should advocate for transportation reimbursement to include bus passes, reimbursement to caregivers for mileage, supplements for school districts to re-route or add bus routes, or payments to a private transportation provider. Additionally, some foster children may be able to remain in their schools 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.

3. Special Considerations for Students with Disabilities

Children in foster care are 2.5 to 3.5 times more likely to receive special education services than children not in foster care. *Ensuring Educational Stability* at 8. Additionally, children in foster care who receive special education services change schools more frequently than children receiving special education services who are not in foster care. *Id.* at 8–9.

TIP Because students with disabilities have a right to receive a FAPE that provides special education services according to an IEP under the IDEA, 34 C.F.R. §§ 300.101, 300.17, 300.020, the GAL should ensure that the school of origin or proposed new school provides all required special education services as described in the child's IEP. *See Ensuring Educational Stability* at 13. Contacting the special education coordinator or director at the new school will provide this information. Additionally, the GAL should consider whether the student is undergoing an evaluation or reevaluation for special education services and the impact of any change in educational placement on that evaluation. Similarly, if the child receives ser-

vices under Section 504, the GAL should ensure that the school of origin or proposed new school provides all required special education services according to the child's Section 504 plan. *See* 34 C.F.R. § 104.33; *Ensuring Educational Stability* at 9, 13.

If the child is a student with a disability under the IDEA, IDEA funds may be used to pay for transportation services if the child's IEP requires transportation as a related service necessary for the child to receive a FAPE. *See* 34 C.F.R. §§ 300.101, 300.17; *Ensuring Educational Stability* at 17.

4. Special Considerations for English Learners

The Equal Educational Opportunities Act of 1974 (EEOA) requires local education agencies "to take appropriate action to overcome language barriers that impede equal participation by [their] students in its instructional programs." 20 U.S.C. § 1703(f). To meet its obligations under the EEOA, local education agencies must provide English learners (ELs), or students with limited English proficiency in reading, writing, speaking, and listening, with a language assistance program that is educationally sound and proven successful. US Department of Justice and US Department of Education, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 8 (January 2015), **https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf**; *see also Ensuring Educational Stability* at 10. If the child is an English learner, the GAL should ensure when making the best interest determination that the school of origin or proposed new school complies with its obligations under the EEOA and provides appropriate language services. *Ensuring Educational Stability* at 10, 13.

5. Protections for Homeless Students

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) for the remainder of the school year and for the duration of their homelessness. 42 U.S.C. § 11432(g)(3)(A)(i). Additionally, the act requires local education agencies to presume that keeping the child in the school of origin is in the child's best interests, except when doing so is contrary to the request of a parent or guardian or, in the case of an unaccompanied youth, the youth. *Id.* at (g)(3)(B)(i). In making a best interest determination, local education agencies must consider

the impact of mobility on achievement, education, health, and safety of the child, giving priority to the request of the child's parent or guardian or, in the case of an unaccompanied youth, the youth. *Id.* at (g)(3)(B)(ii).

In recognition of the need for additional resources for homeless students, ESSA removed "awaiting foster care placement" from the definition of "homeless children and youths" in the McKinney-Vento Act. *ESSA Q&A Sheet* at 2. However, the McKinney-Vento Act includes children and youth "living in emergency or transitional shelters" and "migratory children" in the definition of "homeless children and youths." 42 U.S.C. § 11434a(2)(B).

The McKinney-Vento Act can be an alternate source of transportation funding; children who meet the definition of "homeless children and youth" under the act are entitled to transportation to and from their schools of origin at the request of a parent or guardian or, in the case of an unaccompanied youth, the liaison. 42 U.S.C. § 11432(g)(1)(J)(iii).

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).

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). Determining residence is fact-specific and requires examination of multiple statutes. C.R.S. § 22-1-102 is the generally applicable statute for determining residence. This statute lists many ways a child may establish residence in a given school district. *Id.* The overall effect of the residency statute is that a child is usually a resident of the district where they actually live most of the time. *See id.* One way a student can be a resident of a district is if the legally appointed guardian of his person resides in that district. § 22-1-102(2)(b). The Children's Code clarifies that this is the person to whom legal custody has been granted by

the court. § 19-1-103(73)(b). In some circumstances, residency for special education students is determined differently than for general education students. § 22-20-107.5. Once a child's residence is in the district, the district can deny enrollment only for specifically enumerated reasons. *See* § 22-33-106.

TIP A school district must enroll a student who becomes a resident of that district. There is no exception for reasons such as it being the end of the school year, the students are taking exams, etc.

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. *See* 42 U.S.C. § 675(1)(G)(ii)(II). The ESSA requires states to ensure the immediate enrollment of a child in a new school, even if the child is unable to produce records normally required for enrollment. *See* 20 U.S.C. § 6311(g)(I)(E). Colorado law sets forth the following process for enrollment for children in out-of-home placement: if a change in school is required for a child in out-of-home placement, the sending school must transfer records as soon as possible but no later than five days, and the new school must enroll the child immediately. § 22-32-138(3)–(4); *see also* 12 CCR 2509-4: 7.301.241(D)(6) (clarifying that immediate enrollment is defined by the date designated in the best interest determination and is not necessarily the date the best interest determination is made).

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 the child within five days. § 22-32-138(4)(a); *see also* § 22-32-110(1)(jj) (prohibiting a school from withholding a

diploma, a transcript, or grades of any student for failure to pay library or textbook fines or replacement fees or for failure to return or replace school property). When a special education student transfers schools, the new school must provide "comparable services" as those listed in the student's most recently implemented IEP. 34 C.F.R. § 300.323(e).

TIP The Uninterrupted Scholars Act allows caseworkers to access educational records, enabling them to facilitate timely transfer of records. *See* **Confidentiality of Educational Records subsection**, *infra*.

3. Credits Transfer, Coursework Recognition, and Graduation Requirements

For students in out of home placement, the new school must accept the student's coursework certification as if had been completed at the school. § 22-32-138(5)(a). For students who have experienced an out of home placement at any point during high school, education providers may waive course or program prerequisites for enrolling in courses or programs. § 22-32-138(5)(b). Schools may also waive specific courses required for graduation if the student has completed similar coursework demonstrated competency; for students who cannot meet this requirement, schools are encouraged to provide alternative means of completing coursework or demonstrating competency. § 22-32-138(5)(c). For students in out of home placement transferring schools at the beginning of or during twelfth grade and who do not meet the new school's diploma requirements, the new school may request a diploma from the student's previous school. § 22-32-138(d).

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. 12 CCR 2509-4: 7.301.24(H). 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. 12 CCR 2509-4: 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. 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.* While FERPA requires the education provider to notify parents and students of subpoenas or court orders prior to complying with such orders, the law specifically provides an exception to the notification requirement when the parent is the party to a D&N proceeding and the order is issued in the context of that proceeding. 20 U.S.C. § 1232g(b)(2)(B). The Uninterrupted Scholars Act amended FERPA to allow educational agencies to release education records to child welfare caseworkers without consent or a court order when the child welfare agency is legally responsible for the student. *See* 20 U.S.C. § 1232g(b)(1)(L). The caseworker may re-disclose educational records to individuals or agencies "engaged in addressing the student's education needs." *Id.*

TIP HB 18-1348 will require schools to provide foster parents with access to education records, including online records. *See* § 22-32-138.

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* **https://youthlaw.org/publication/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.* Compliance with the reasonable and prudent parenting standard will also help promote foster youth participation in extracurricular activities. *See* **Placement Review Hearing chapter**.

Both the IDEA and Section 504 provide additional protections for students with disabilities, requiring districts to provide an equal opportunity to participate in extracurricular activities and nonacademic services. *See* 34 C.F.R. §§ 104.37, 300.107(a). Additionally, a student's IEP must include any supplementary aids and services that the student will need to participate in an activity. 34 C.F.R. § 300.17.

EDUCATION SERVICES FOR CHILDREN WITH SPECIAL NEEDS

1. Individuals with Disabilities Education Act

a. Child Find. The 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 an intellectual disability, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment,

autism, traumatic brain injury, other health impairment, specific learning disability, multiple disabilities, or deaf-blindness 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 subsection**, *infra*. All children with disabilities are entitled to receive a FAPE. 20 U.S.C. § 1412(a)(1)(A); 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. 1 CCR 301-8: 220-R-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. 1 CCR 301-8: 220-R-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 and consent has been given by an individual appointed by the judge to represent the child (ESP). 20 U.S.C. § 1414 (a)(1)(D)(iii)(II).

42 C.F.R. § 300.502 provides the right to request an independent educational evaluation.

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 written document describing a student's educational needs and goals and how the school district will provide the student a FAPE. The IEP "must be reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017). The IEP should also describe the placement where the child will receive services in his or her least restrictive environment. 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).

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. Whenever appropriate, the child must also be included. *Id.* "Other individuals who have knowledge or special expertise regarding the child" may also be included at the discretion of the parent or the agency. *Id.*

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) (regarding transfer within the state), (f) (regarding transfer from another state).

TIP The district's complete offer and description of a FAPE should be included in the written IEP document or a separate prior written notice. GALs attending the IEP meetings should request a copy of the draft IEP (schools almost always prepare a draft) a few days before the meeting. GALs should also request that the final version

be sent for review before the IEP is "locked" (i.e., finalized in the school district's computer system, making it difficult to revise).

d. Least restrictive environment. A student's IEP must indicate the maximum extent appropriate 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 children who do not have disabilities. 34 C.F.R. § 300.320(a)(4). Students should remain in their classrooms except when separation is necessary to achieve individual education goals.

e. Postsecondary goals and transition services for children. IEPs in effect when the child turns 16, or younger if determined appropriate by the IEP team, must include appropriate measurable postsecondary goals relating to training, education, employment, and, where appropriate, independent living skills, as well as the transition services needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b). Transition services, defined at 34 C.F.R. § 300.43(a), are a coordinated set of activities designed within a results-oriented process focused on facilitating the child's transition to post-school activities and based on an individual child's needs, taking into account the child's strengths, preferences, and interests. These services include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, daily living skills and a functional vocational evaluation. *Id.* The transition plan must be updated annually. 34 C.F.R. § 300.320(b).

f. School discipline. Under the IDEA, students with disabilities who face a school decision to change their placement because of a violation of a code of student conduct are entitled to a manifestation determination within ten days of the decision. 42 C.F.R. § 300.530(e). This determination must be made by the parent, the local education agency, and relevant members of the child's IEP team and must assess whether the conduct was caused by or had a direct and substantial relationship to the child's disability or was the direct result of the school's failure to implement the IEP. *See id.* A change of placement is defined to include the removal of the child for more than ten consecutive school days or a series of removals that constitute a pattern, as defined by the regulations. *See* 34 C.F.R. § 300.536.

TIP Disruptions in school placement may lead to disruptions in the child's placement through the D&N case. GALs may consult with attorneys on OCR's litigation support list to respond effectively to school discipline issues.

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 FAPE 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 non-academic 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. § 12101 *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 FAPE, it has been interpreted as having the same requirements for school districts as Section 504, that is, to provide students with a FAPE. 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.*

The ADA and Section 504 have distinct requirements to protect students with disabilities from discrimination. *See* 42 U.S.C. § 12132; 29 U.S.C. § 794. Compliance with the IDEA does not necessarily ensure compliance with the ADA. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013). In some cases, the ADA's requirement to provide equal access may require a school district to provide additional services under Title II of the ADA that they

would not have to provide under the IDEA. Department of Justice, Office of Civil Rights, *FAQs on Effective Communication for Students with Hearing, Vision, or Speech Disabilities*, 64 IDELR 180 (November 12, 2014), *available at* **http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf**.

4. Gifted and Talented Student Services

1 CCR 301-8: 2220-R-1201 *et seq.* set forth schools' obligations with regard to identifying and meeting the educational needs of "gifted children" as defined by the rules.

TIP GALs should remember to consider the possibility that the child may qualify for gifted and talented services and that low grades, not attending school, or non-engagement may be related to these learning needs.

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* 12 CCR 2509-4: 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 an 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* 12 CCR 2509-10: 7.900; **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. Community-centered boards throughout Colorado coordinate 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 of Children in Care 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. 12 CCR 2509-4: 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 childcare 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 the 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).
- 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); *see also, e.g., People in the Interest of A.W.*, 363 P.3d 784, 787–88 (Colo. App. 2015) (holding that, under a manifest injustice standard, the trial court did not abuse its discretion in denying a motion for continuance

based on the absence of a witness when the moving party failed to exercise due diligence to procure the presence of the witness). However, RPC must also ensure parents' due process rights are protected, even when the need to ensure due process does not rise to the manifest injustice standard.

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

For children and youth placed out of home and in EPP proceedings, the court must make additional permanent home findings. § 19-3-702(5). A permanent home is defined as the place in which the child or youth may reside if the child or youth is unable to return home to a parent or guardian. § 19-3-702(5)(a). The purpose of permanent home findings is to ensure that a child or youth who has been removed from his or her home has been placed in a permanent home as expeditiously as possible. § 19-3-702(5)(c). *See* **Permanency Hearings** chapter.

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) and 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 (versus six years for non-EPP cases) and the court has found by clear and convincing evidence that no appropriate treatment plan can be devised. § 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 (also referred to as family search and engagement) 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 / FAMILY SEARCH AND ENGAGEMENT

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 *et al., Finding Family Connections for Foster Youth*, 27 ABA Child Law Practice 117 (October 2008); Rose Mary Wentz *et al., Maintaining Family Relationships for Children in the Child Welfare System*, 31 ABA Child Law Practice 97 (July 2012).

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 family search and engagement can vary. Family search and engagement 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 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 FAMILY SEARCH AND ENGAGEMENT

Family search and engagement is the diligent and timely good-faith effort to locate and contact any noncustodial parent, all grandparents, other adult relatives, and the parent of a sibling of a child who has been removed from the home of their legal custodian. 12 CCR 2509-1: 7.000.2(A). Family search and engagement shall extend beyond the United States, its territories, and Puerto Rico as appropriate. *Id.*

TIP Although the definition of family search and engagement 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 family search that includes individuals who are not relatives but who may be eligible kinship caregivers. *See id.* (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 FAMILY SEARCH AND ENGAGEMENT

1. Department Obligations

The department must begin family search and engagement for noncustodial parents within three working days. 12 CCR 2509-4: 7.304.52(A)(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 permanency. In Fiscal Year 2016, CDHS only engaged 82.9 percent of fathers to participate in case planning and only secured 67.9 percent actual participation. Colorado Office of Children, Youth & Families, Division of Child Welfare, *2018 Annual Progress and Services Report* at 12, *available at* **https://drive.google.com/drive/folders/0B32vshZrERKsd0JRZTdSQ0k0QzQ** (hereafter "2018 APSR"). Inconsistent engagement of parents, particularly fathers, in case planning, visits, assessment of needs and services, and reunification efforts was also a key finding of both the 2009 and 2017 Child and Family Services Reviews (CFSRs). *See* Child and Family Services Review Final Report: Colorado, Executive Summary, at 3–4 (2009); Child and Family Services Review Final Report: Colorado, at 3–4, 8–10 (2017) (*both reports available at* **https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews**).

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**; Fathers & Families Coalition of America (an organization providing training and policy updates related to engaging fathers in the child welfare process); National Responsible Fatherhood Clearinghouse (Office of Family Assistance–funded national resource for fathers, practitioners, programs/federal grantees, states, and the public who are serving or interested in supporting strong fathers and families), *available at* **https://www.fatherhood.gov/about-us**.

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. *See* CJD 04-06(V)(D)(4)(f). This includes asking the mother and child about the identity and location of the father and any of the father's relatives, contacting the father's relatives, using family-finding technology, and checking with jail, prison and law enforcement, and probation and parole authorities. *See* Enhanced Resource Guidelines:

Improving Court Practice in Child Abuse and Neglect Cases, at 120 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016) (outlining questions to be asked of case workers).

Family search and engagement 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); 12 CCR 2509-4: 7.304.52(A)(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); 12 CCR 2509-4: 7.304.52(A)(2).

The Preventing Sex Trafficking and Strengthening Families Act provides for more expansive search of siblings by requiring the department to notify all parents of a sibling of the child, where such parent has legal custody of such sibling, in addition to other relatives. *See* P.L. 113-183 § 209(a)(1), 128 Stat 1919 (2014) *amending* 42 U.S.C. § 671(a)(29). For the purpose of these provisions, "sibling" is defined to include siblings as defined by state law as well as individuals who would have been considered a sibling of the child under state law but for a termination or other disruption of parental rights. *See id., adding* 42 U.S.C. § 675; *see also* **Siblings fact sheet**. The Colorado Department of Human Services has promulgated conforming rules. *See, e.g.,* 12 CCR 2509-1: 7.000.2(A) (including diligent and timely good faith efforts to locate and contact the parent of a sibling of a child who has been removed from the home of their legal custodian in the definition of family search and engagement).

Family search and engagement 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 is 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 the court finds that it is the appropriate permanency plan and that it is in the best interests of the child to discontinue family search and engagement. 12 CCR 2509-4: 7.304.52(C). The department may also discontinue diligent search efforts when a non-relative/kin placement for a youth 12 years of age or older and his/her siblings residing in the same placement commits to their permanency, the court has adopted

a permanency plan of guardianship or allocation of parental responsibilities (APR), the youth/siblings consent to the guardianship or APR, the court finds the youth/siblings have a substantial psychological tie to the foster parent and removal from the placement would be seriously detrimental to the emotional well-being of the youth/siblings, and the court finds that the foster parent is unable to adopt the youth/siblings because of exceptional circumstances that do not include unwillingness to accept legal responsibility for the youth/siblings. 12 CCR 2509-4: 7.304.52(C)(4). Finally, the department may discontinue family search and engagement efforts related to specific relatives when a court orders a delay in contacting those specific relatives for good cause, including domestic or other family violence, until the court authorizes otherwise. 12 CCR 2509-4: 7.304.52(B)(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.

In addition to the ongoing family search and engagement requirements, the department must hold family engagement meetings under certain circumstances. A family engagement meeting must occur within 30 days if (1) the child is in a family-like permanent setting without the provider expressing formal intent to provide legal permanence and (a) the child has been in out-of-home placement during 15 of the last 22 months, (b) the child has had two or more unplanned moves within 12 months, or (c) the child has an OPPLA permanency goal; or (2) the child is in out-of-home placement in a non-family-like setting without an approved permanency plan and any of the conditions outlined in a–c exist. 12 CCR 2509-4: 7.304.52(D).

Parents and, when appropriate, children must be consulted regarding suggested relative caretakers. § 19-3-403(3.6)(a)(III); 12 CCR 2509-4: 7.304.52(B).

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. 12 CCR 2509-4: 7.304.52(E).

TIP Counsel should regularly review the department's file, including diligent search efforts, to remain updated on search results and to enlist court involvement when necessary to enable children to be with family or kin.

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 hearing / temporary custody hearing or before the next hearing in the case, whichever comes sooner. § 19-3-403(3.6)(a)(I), (III). If necessary, parents may be advised by the court of potential penalties of perjury and contempt for failing to accurately complete the form. *Id.* Parents must be advised by the court 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 may be advised in court of the implications of submitting an inaccurate and incomplete 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. RPC should assist parents in updating and supplementing the relative affidavit whenever new information is found or if additional relatives or kin become available to care for the children. RPC should file the relative affidavit with the court and provide copies to all parties to ensure a complete record.

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. *See* CJD 04-06 (V)(B); § 19-3-403(3.6)(a)(III); 12 CCR 2509-4: 7.304.52(B)(2).

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 communicating 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), *available at* **https://www.childwelfare.gov/topics/permanency/planning/engaging-families**; National Institute for Permanent Family Connectedness, Seneca Family of Agencies, and Family Finding website (presenting a family-finding model and numerous resources), *available at* **http://familyfinding.org/moreaboutfamilyfinding.html**. 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® and Intelius®. In Fiscal Year 2017, Colorado Department of Human Services renewed its contract with Thomson Reuters® for use of its CLEAR investigation software, which is provided at no cost to small- and medium-sized county departments to support family findings and background checks. *2018 APSR* at 72, Appendix A at 11. 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, 122 Stat. 3957 *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 (e.g., 411.com®, Facebook.com®, and/or zabasearch.com®). Further, other agencies and nonprofits may host helpful websites geared toward family finding for children in D&N proceedings. *See, e.g.,* **http://www.familyfinding.org** (an online search tool provided by the National Institute for Permanent Family Connectedness, Seneca Family of Agencies, and Family Finding). 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 caseload 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, historic 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.

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, 237–38 (Donald N. Duquette, Ann M. Haralambie, and Vivek Sankaran, eds., Bradford Publishing Company, 3d ed., 2016) (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 historically had 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, the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110-351, and the Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub. L. 113-183. *See* NACC Red Book at 237–38.

The Family First Prevention Services Act, enacted as part of the Bipartisan Budget Act of 2018, will significantly change federal child welfare funding. This legislation will allow IV-E dollars, historically used to reimburse states for eligible children in foster care placements, to support evidence-based mental health and substance abuse prevention services, in-home parent skill-based programs, and kinship navigator programs. Additionally, the legislation will restrict federal funding for out-of-home placements to "family foster homes" and qualified residential treatment programs (QRTPs), eliminating reimbursement for group home and other congregate-care facilities. For children placed in QRTPs, Family First imposes strict time frames for conducting an age-appropriate, evidence-based, validated func-

tional assessment and judicial review of the placement. *See generally* Alliance for Strong Families and Communities, *Overview of Family First Prevention Services Act* (last visited April 2018), *available at* **https://www.alliance1.org/web/news/2018/feb/overview-provisions-family-first-prevention-services-act.aspx**; Children's Defense Fund, *The Family First Prevention Services Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children* (last visited April 2018), *available at* **http://www.childrensdefense.org/policy/welfare/family-first-prevention.html**.

TIP The Family First Prevention Services Act provides for phased-in implementation of its provisions, to occur over the next several years. *See* Children's Defense Fund, *Family First Prevention Services Act Implementation Timeline* (last visited April 2018), *available at* **http://www.childrensdefense.org/library/data/ffpsa-implementation.pdf**. OCR and ORPC will continue to update GALs and RPC about Colorado's implementation of these provisions.

The Colorado Department of Human Services (CDHS) 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 CDHS 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 but for some programs, such as adoption and guardianship assistance, counties are responsible for a lower percentage of the cost. *Id.*

TIP Pursuant to § 26-5-104(6)(e)–(g), CDHS is in the process of reviewing its rate-setting methodology and pursuant to § 26-5-104 (1)(c), the delivery of child welfare services task force is meeting to develop a funding methodology to incentivize counties for the provision of services and placement consistent with FFPSA.

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

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; 12 CCR 2509-07: 7.601.71(D). Out-of-home placement includes voluntary placement agreements (VPAs) as well as placement orders entered in a D&N action. 12 CCR 2509-7: 7.601.71(B)(1). The 2018 Family First Prevention Services Act will significantly alter these out-of-home placement requirements for IV-E funding. *See* **General Overview of Child Welfare Funding Streams section**, *supra*.

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.

Id. at (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.

Id. at (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* 12 CCR 2509-7: 7.601.71(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); 12 CCR 2509-7: 7.601.71(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*, 511 P.2d 898 (Colo. 1973) (specifying that 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. 12 CCR 2509-7: 7.601.71(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. *Id.* at (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. *Id.* at (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**. Additionally, the Colorado Department of Human Services is participating in the federal Title IV-E Waiver Demonstration Project, which allows greater flexibility in the use of federal funds. *See* SB 13-2311 (adding § 26-5-105.4). This program, in existence through June 30, 2019, *see* § 26-5-105.4(9), allows counties to opt into providing additional kinship supports. *See generally* CDHS Title IV-E Waiver Steering Committee website, *available at* **https://www.colorado.gov/pacific/cdhs-boards-committees-collaboration/title-iv-e-waiver-steering-committee**.

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 of Children in Care fact sheet**.

2. Family Preservation/Core Services

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.

With regard to TANF, the 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 screening, assessment, intervention services, referral to community services and support systems, counseling, assistance in developing parenting and problem-solving skills, follow up care, and crisis intervention services. § 26-5.5-104.

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 the Child Welfare System. *See* §§ 26-5-101(f), 26-5.3-102, 26-5.5-102, 26-5.5-104. The goals of the program include focusing on

family strengths by providing intensive services that support and strengthen the family and/or protect the child, preventing out-of-home placement, returning children to their own homes or uniting children with permanent families, or supervised independent living placement (SILP), and providing services that protect the child. 12 CCR 2509-4: 7.303.11 (for additional information regarding SILPs, *see* 12 CCR 2509:1-700.2, 12 CCR 2509:4-7:305.2(D), and **Transition to Adulthood Fact Sheet**). Core Services includes a broad array of services, including, but not limited to, aftercare services, day treatment, home-based intervention, intensive family therapy, life skills, mental health services, sexual abuse treatment, special economic assistance, and substance abuse treatment services. *See* 12 CCR 2509-4: 7.303.1. Core Services programs may include the following elements or services: collateral services, concrete services, crisis intervention services, diagnostic and treatment-planning services, hard services (purchase of services or distribution of cash funds), and therapeutic services. 12 CCR 2509-4: 7.303.14.

Core Services may only be used when the client's private insurance and/or other funding sources are exhausted, insufficient, or inappropriate. 12 CCR 2509-4: 7.304.662; *see also* 12 CCR 2509-5: 7.414(b)(3) (providing that state will not reimburse county for Core Services expenditures that may be reimbursed by some other source). Counties may elect to provide prevention and intervention services via any available funding source to serve children at risk of being involved in the child welfare system or at risk of continued involvement in the child welfare system. *See id.* County departments must comply with all rules of any funding source utilized.

Core Services must be made available to any client who meets criteria for services as documented in the family services plan. 12 CCR 2509-4: 7.303.12. Specifically, a child must meet all of the following:

- Meet the criteria for Program Area 4, 5, or 6 target group (defined respectively as Youth in Conflict, Children in Need of Protection, and Children in Need of Specialized Services in 12 CCR 2509-3: 7.201–7.203).
- 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.

12 CCR 2509-4: 7.303.13.

Counties may also elect to provide prevention services by way of Program Area 3 service authorizations. *See id.*; *see also* 12 CCR 2509-3: 7.2001 (outlining eligibility criteria for Program Area 3).

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 12 CCR 2509-4: 7.303.13.

Services may be provided for up to 18 months; however, one or more six-month extensions to the initial 18-month placement are available if approved by an internal county department administrative review and documentation of approval is in the case record. *See* 12 CCR 2509-4: 7.303.15.

TIP Counties must submit a Core Services plan to the State in order to be reimbursed for Core Services. *See generally* 12 CCR 2509-5: 7.414. GALs should request a copy of their county department's Core Services plan.

3. Promoting Safe and Stable Families (PSSF)

The Promoting Safe and Stable Families 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. Projects are operated by local county departments. They are designed to address the needs of their communities; therefore, services vary from place to place in the State. *See, e.g.,* **https://www.colorado.gov/pacific/cdhs/news/cdhs-awards-grants-counties-help-keep-families-together** (announcing 2017 awards).

4. 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.
- Childcare 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 2503-6: 3.604.2(A), (D), (H)(3).

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. Counsel should be familiar with any such programs in their jurisdiction.

5. 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. 12 CCR 2509-07: 7.601.72.

TIP For any child who has a disability that will interfere with the ability to work as an adult, it is very important to ensure an SSI application and evaluation are completed ahead of later adolescence to assist with transition to adult services and to ensure eligibility for ancillary services such as long-term care and vocational rehabilitation.

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/Misc/Fleecing_Report_Final_HR.pdf**.

6. 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).

7. Social Security Disability Insurance (SSDI)

This program is administered by the Social Security Administration and is available regardless of dependency status. *See generally* 42 U.S.C. § 423. When a disabled parent receives SSDI benefits based upon the parent's payment of Social Security taxes while working, children may be eligible for a cash payment that is a percentage of the parent's payment. *See* 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.

9. Victim's Compensation

Colorado's Crime Victim Compensation Act provides for compensation for eligible victims of compensable crimes, administered through victims' compensation boards in each of Colorado's 22 judicial districts. *See generally* § 24-4.1-101 *et seq.*; Colorado Division of Criminal Justice Department of Public Safety website at **https://www.colorado.gov/pacific/dcj/Vic_Comp**.

10. Vocational Rehabilitation

Colorado's Division of Vocational Rehabilitation (DVR) helps individuals with disabilities prepare for, obtain, advance in, and maintain employment by providing a range of services based on a disabled person's individual employment needs and goals. Eligibility standards, applications, and more information about DVR can be found on the division's website: **https://www.colorado.gov/pacific/dvr**.

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 whose cases have been closed in relative or kinship guardianship or allocation of parental responsibilities (APR). *See* **APR and Guardianship fact sheet**. This program has been expanded to provide assistance for foster parent guardianship and APR involving older children in limited circumstances. *Id.*

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. *See* **Adoption fact sheet**.

3. Chafee Services

A variety of supports are available to youth emancipating from foster care into adulthood. *See* **Transition to Adulthood fact sheet**.

Hearsay in D&N Proceedings

FACT SHEET

A fundamental understanding of hearsay and its exceptions is essential to counsel's ability to present relevant information to the judicial officer presiding over a D&N proceeding.

GENERAL HEARSAY PRINCIPLES

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. C.R.E. 801(a)–(c). Hearsay is not admissible except as provided by the Colorado Rules of Evidence, by applicable procedural rules, or by a Colorado statute. C.R.E. 802.

The Colorado Rules of Evidence specifically exclude two categories of statements from the definition of hearsay. First, admissions by a party-opponent are not hearsay. *See* C.R.E. 801(d)(2). Second, prior statements by a witness while testifying at a trial or hearing and subject to cross-examination, if admitted for specified purposes (inconsistent statement, consistent statement to rebut claim of fabrication or improper influence or motive, or identification), are not hearsay. C.R.E. 801(d)(1).

Common exceptions to the hearsay rule include:

1. Present sense impressions. C.R.E. 803(1).
2. Excited utterance. C.R.E. 803(2).
3. Then existing mental, emotional, or physical condition. C.R.E. 803(3).
4. Statements for the purpose of medical diagnosis or treatment. C.R.E. 803(4).

5. Past recollection recorded. C.R.E. 803(5).
6. Business records. C.R.E. 803(6).

TIP As hearsay rules apply in most D&N proceedings, counsel should review them frequently to be comfortable and familiar with them. Prior to litigation, counsel should review likely evidence and witnesses to assess the hearsay issues that may arise and to make persuasive arguments regarding the admissibility of statements. Counsel should keep in mind that most hearsay arguments involve a two-part analysis: whether the statement is offered for the truth of the matter asserted and, if so, whether a hearsay exception applies. Creating a hearsay "cheat sheet" to have in court will help remind counsel of the elements applicable to each hearsay exception.

HEARSAY AT TEMPORARY CUSTODY HEARINGS

The Children's Code provides an exception to the rules of evidence for temporary custody hearings (or shelter hearings), where any relevant information with probative value may be supplied to the court regardless of its admissibility under the Colorado Rules of Evidence. § 19-3-403.

SOCIAL STUDY AND OTHER REPORTS' EXCEPTION TO HEARSAY

Section 19-1-107 requires an agency designated by the county to make a social study and report in writing in all children's cases except adoptions. The court may receive and consider, along with other evidence, written reports and other material relating to the child's mental, physical, and social history for the purpose of determining proper disposition for the child. § 19-1-107(2). 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 admitting reports into evidence at a termination of parental rights hearing made pursuant to § 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. If counsel wants to ensure a report is admitted at trial, counsel must provide sufficient notice to the parties.

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. When reports contain statements potentially considered hearsay, counsel should ensure that the court does not consider the statements for the truth of the matter asserted and that the record reflects whether and how the court considered the statements. *See People in the Interest of D.B.*, 2017 COA 139, ¶¶ 29–37 (holding that the record reflected that the court considered statements as the caseworker's basis for making her recommendation rather than the truth of the matter asserted).

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, content 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

The admissibility of child hearsay statements is governed by § 13-25-129. 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 may be admissible in civil proceedings under § 13-25-129:

- Statements made by a person under thirteen years of age if the child is alleged to have been a victim.
- Statements by a child as defined by relevant statute or by a person under fifteen years of age that describe all or part of an offense of unlawful sexual behavior, as defined in § 16-22-102(9) performed or attempted to be 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 made by a child under age 13 that describe any criminal offense against persons in part 1 of article 3 of title 18, C.R.S.

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, 803–4 (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 old who appear incapable of receiving just impressions of the facts relating to their testimony or of relating facts 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 a decision addressed at 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. This also extends to juvenile delinquency cases. *See People ex rel. R.A.S.*, 111 P.3d 487 (Colo. App. 2004).

Colorado case law does not directly address whether *Crawford* is applicable to the introduction of child hearsay statements in D&N 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.

Statements whose primary purpose is not testimonial will not be subject to the confrontation clause analysis. In *Ohio v. Clark*, 135 S. Ct. 2173, 2181–82 (2015), for example, the United States Supreme Court held that statements made by a three-year-old child to his preschool teacher in response to the teacher's questions about his injury were not testimonial and not subject to the confrontation clause.

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 statement and that tends to confirm that the act described in the child's statement actually occurred." *People v. Bowers*, 801 P.2d 511, 525 (Colo. 1990). 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 given a final written instruction stating that "it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." § 13-25-129(2). This statute was amended in 1993 and prior to the amendment caselaw required the instruction contemporaneously with the child hearsay. The statutory amendment clarifies that the instruction is to be given with the final written instructions. *See People v. Burgess*, 946 P.2d 565, 567 (Colo. App. 1997).

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

When a witness testifies as an expert, the witness may rely, in forming an opinion, on facts or data perceived by or made known to the witness at or before the hearing if of a type reasonably relied on by experts in the qualified field of expertise. C.R.E. 703.

Under C.R.E. 705, an expert is permitted (but not required) 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 inadmissi-

ble 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). In *People in Interest of D.M.F.D.*, 497 P.3d 14, 17 (Colo. App. 2021), the Court of Appeals reversed an adjudicatory order, holding that a department cannot meet its burden of proof by relying on hearsay or other evidence that the court admitted over parents' objections for the limited purpose of the basis of the expert's opinion and not for the truth of the matter asserted.

TIP Even during a bench trial, counsel should ensure that courts are not improperly relying on hearsay evidence admitted through experts for the limited purpose of demonstrating the basis of the expert's opinion. If the court permits an expert witness to provide hearsay testimony and there is not otherwise a hearsay exception, counsel should consider renewing objections or asking the court to consider the evidence for a limited purpose.

Immigration
FACT SHEET

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 being detained by Immigration and Customs Enforcement (ICE), placed in deportation proceedings, and, ultimately, removed 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 streams, 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 best practices and current procedures.

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" individuals); **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 advocacy). *See* 8 U.S.C. § 1611(b); Final Order of the Attorney General, 66 Fed. Reg. 3613, 3615 (Jan. 16, 2001). Absent specific statutory exceptions or unless an individual is "qualified," that person will not be entitled to other federal public benefits. 8 U.S.C. § 1611(a).

SB21-199 significantly expanded access to state and local public benefits for undocumented individuals in Colorado by removing the requirement that individuals must demonstrate lawful presence to access benefits (unless lawful presence is required under federal law).

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

Immigration Law Center maintains excellent updated charts regarding program eligibility. *See* **https://www.nilc.org/issues/economic-support/table_ovrw_fedprogs/**.

2. Education

Public compulsory education is a mandated service for undocumented children. *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L.Ed. 2d 786 (1982). Prior to the passage of the Colorado ASSET Legislation (Senate Bill 13-033) in 2013, Colorado did not recognize undocumented students as in-state residents for determining tuition at higher education institutions, forcing undocumented students to pay nonresident tuition rates. Colorado ASSET now allows undocumented students to pay in-state tuition and apply for financial aid at Colorado's public colleges and universities as long as they meet certain qualifications. In general, a student will need to demonstrate that she or he: (1) has attended a Colorado high school for three years right before graduating, (2) is admitted to a participating college within twelve months of graduating, and (3) has signed an affidavit stating he or she is not legally present in the United States but is seeking or will seek status when eligible. § 23-7-110. Undocumented students who do not meet those criteria may still be admitted to Colorado colleges and universities but must pay nonresident tuition rates. Undocumented children and even those granted Deferred Action for Childhood Arrivals (DACA) status do not qualify for federal financial aid. However, they may qualify for state or college aid. Individuals granted DACA, or others with a valid social security number, may complete the Free Application for Federal Student Aid (*available at* **www.FAFSA.ed.gov**) if necessary to determine their eligibility for state or college aid. For more information on eligibility for financial aid and the FAFSA application, please see **https://studentaid.ed.gov/sa/sites/default/files/financial-aid-and-undocumented-students.pdf**.

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. *See* **https://unitedwedream.org/our-work/education-justice/**; **http://www.finaid.org/otheraid/undocumented.phtml**; **http://www.goldendoorscholars.org/**.

3. Unaccompanied Refugee Minors (URM) Program

When family reunification is not possible, children who have been certified as trafficking victims, approved for Special Immigrant Juvenile Status, or granted refugee or asylee status may qualify for URM foster care placement, case management, and other services, funded by the federal Office of Refugee Resettlement (ORR). *See* **https://www.acf.hhs.gov/orr/resource/unaccompanied-refugee-minors**. The URM program is administered by CDHS Division of Child Welfare and the Colorado Refugee Services Program. The URM program is managed by Lutheran Family Services Rocky Mountain (LFSRM) with placement agreements throughout Colorado. URM placements in Colorado include refugee youth from overseas and reclassified Unaccompanied Children (UC) who entered the U.S. seeking asylum. Refugee placements are identified and approved by LFSRM in collaboration with participating county departments and reclassified UC placements are identified and approved by either LFSRM or Denver Department of Human Services. LFSRM coordinates placements and independent living services for URM Program youth from the time of arrival until youth turn 23 years old. URM program youth are in the custody of Denver Human Services and El Paso County Human Services and corresponding judicial courts.

TIP URM program eligibility can be a critical resource for qualifying children and should be explored with an immigration lawyer whenever possible.

IMMIGRATION CUSTODY AND DETENTION

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 by 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 removal proceedings are considered civil rather than criminal in nature, the Sixth Amendment right to counsel at government expense does not apply in the context of

removal proceedings. Thus, most immigrants are forced to defend themselves against removal *pro se*, or they must hire a private immigration attorney to represent them in their case at their own expense. Children are treated largely the same as adults in removal proceedings and are also not provided with government-appointed counsel.

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. If ICE chooses to detain an adult in Colorado, the person will most likely be held at the GEO/ICE facility in Aurora, Colorado. However, ICE is authorized to transfer the person to any ICE-contracted facility in the country, 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 a parent, legal guardian, or an attorney of record directly from the ICE detention and removal operations juvenile coordinator or the Office of Refugee Resettlement, Division of Children's Services.

In Colorado, some jurisdictions notify ICE when noncitizen adults are booked into or released from jail. As of November 2017, the Division of Youth Services abolished its former policy to notify ICE of noncitizen juveniles in its custody. ICE may issue a "hold" or "detainer," requesting that the individual be held for an additional 48 hours, excluding weekends and holidays, after the person would otherwise be subject to release. *See* 8 C.F.R. §§ 236.1, 287.7. However, in Colorado all county jails now reject retainer requests as unconstitutional. *See* **https://aclu-co.org/colorado-jails-now-reject-federal-immigration-detainers/**. The Division of Youth Services also does not comply with detainer requests for juveniles. If individuals are taken into ICE custody, some may be able to post a bond to secure release while others are held in detention throughout their removal proceedings. *See generally* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 236, 66 Stat. 163 (codified at Title 8 of the U.S. Code); 8 C.F.R. § 1003.19.

ICE is supposed to provide some parents with limited protections if they are taken into custody. According to the ICE directive *Facilitating Parental Interests in the Course of Civil Immigration*

Enforcement Activities (August 23, 2013), ICE has established policies and procedures to ensure that ICE enforcement activities do not disrupt the parental rights of immigrant parents and legal guardians. This directive deals with immigrant parents and legal guardians that (1) are primary caretakers of children, (2) have direct interests in family court or child welfare proceedings, or (3) have minor US citizen or lawful permanent resident (LPR) children in the United States. The directive provides that ICE should consider whether to exercise prosecutorial discretion when the immigrant is the parent or legal guardian of a US citizen or permanent resident minor; carefully evaluate any detention decision where the person is the parent or legal guardian of a minor child; allow and arrange for detained parents or legal guardians to attend family court proceedings, either in person or through video teleconferencing; facilitate visitation between the detained parent and his or her child if visitation is required by family court; accommodate a parent or legal guardian's efforts to coordinate in the care or travel of minor children pending their removal; facilitate parole into the United States for deported immigrants who are parties to family court or other child court proceedings; and coordinate with the Department of Homeland Security and Department of Health and Human Services to improve communication and cooperation. *See* **http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf**. As of June 2021, ICE also has a policy to prohibit the detention of pregnant or nursing mothers *and* to prohibit detention of mothers of infants under one year. *See* **https://www.ice.gov/news/releases/ice-issues-new-policy-pregnant-postpartum-nursing-individuals.**

TIP An individual in detention who is 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 do not, in themselves, affect parental rights. When ultimate reunification with a detained parent is appropriate, parent's counsel and the GAL should keep apprised 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 immigra-

tion 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.

According to a 1997 settlement agreement of a major class-action lawsuit challenging the detention conditions of immigrant children, the federal government must minimize the detention of immigrant children under the age of 18, consider release of children to appropriate adults, detain minors in licensed facilities, and protect children's rights throughout their apprehension and detention. *See Flores Stipulated Settlement Agreement, Flores v. Reno* (U.S. Dist. Ct. C.D. CA 1997) ("*Flores Settlement*"). The Office of Refugee Resettlement division of Health and Human Services is charged with the care and custody of unaccompanied children. *See* Homeland Security Act of 2002, Pub. L. 107-296, § 462, 116 Stat. 2135 (H.R. 5005). Additional legal protections are provided for unaccompanied children by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), including that unaccompanied children be placed in the least restrictive setting possible. *See* TVPRA, 110 Pub. L. 457, 122 Stat. 5044. In 2014, ICE began detaining mothers and children together in "family-detention facilities" in conditions and for durations that violated the *Flores Settlement*. The Ninth Circuit Court of Appeals affirmed that protections provided for in the *Flores Settlement* apply to these "accompanied" children as well as unaccompanied children, and that unaccompanied children have the right to a bond hearing to try to secure release from ORR custody. *See Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016); *Flores v. Sessions*, 684 Fed. Appx. 603 (9th Cir. 2017). Litigation to ensure that children's rights are protected under the *Flores Settlement* remains ongoing at the time of this writing.

Juveniles may be detained under certain circumstances, or their release can be authorized to a parent, legal guardian, adult relative, an adult designated by a parent, or to another adult "sponsor" who agrees to ensure the juvenile's presence in immigration court hearings. *See* 8 C.F.R. § 236.3. Juveniles who are apprehended must be served with a notice of their rights that must be read to the child in a language she or he understands. 8 C.F.R. § 236.3(h). In the case of Mexican children, children may "elect" to be voluntary repatriated into Mexico's federal social services custody if a determination has been made that the child is not a victim of trafficking, does not have

an asylum claim, and is able to make an independent decision to withdraw his or her application for admission. *See* 8 U.S.C. § 1232.

TIP Whenever a child, parent, or special respondent in D&N and/or delinquency proceedings is determined to have immigration issues, counsel should make appropriate referrals for immigration counsel immediately. Noncitizens are at risk for detention, placement in removal proceedings, and deportation. Referral to an immigration attorney is essential to ensure the child/family is informed of any possible pathways toward lawful status or defenses against removal. It is also a good practice for undocumented youth and families to be informed of their rights, including the right to remain silent in ICE interviews. A GAL may be able to assist with an immigration case by providing documentation of domestic violence, child abuse, abandonment, neglect, or other victimization or "equities," as well as letters of support and certificates of completion of classes or other treatment programs and so forth.

CONSULATES

Consulates are available to assist noncitizen parents and children. Consulates may also assist child welfare workers working with noncitizen children 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. CDHS has MOUs with the Mexican, Guatemalan, Honduran, and Salvadoran consulates requiring the State to inform the consulates when a national of those countries is involved in a legal proceeding, such as a D&N, that could impact the rights of a parent, subject to confidentiality restrictions imposed in the Children's Code. Under the agreement the consulates must also assist with locating family members, obtaining relevant documents such as birth certificates, assisting with repatriation *when appropriate and deemed to be in the best interest of the child by the court*, confirming nationality, and obtaining evidence for Special Immigrant Juvenile Status. *See* **https://mcusercontent.com/cd781c9bc8f90270567729e9e/files/4930de27-4257-46ad-9933-241ea1124e79/IM_CW_2021_0006.pdf?mc_cid=2f65f75959&mc_eid=f504f631db.**

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 when 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.

PATHS TO LAWFUL STATUS

1. Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile Status (SIJS) provides a pathway toward permanent residency (a "green card") 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 viable. *See generally* 8 U.S.C. § 1101(a)(27)(J). Recognition as a Special Immigrant Juvenile gives a child the eventual ability to apply for work authorization and permanent residency, although as of 2016 there is a significant backlog and waiting period for children from Mexico, Guatemala, Honduras, and El Salvador. *See* CLINIC, *Surge in SIJS Approvals Creates Backlog at Adjustment Stage, available at* **https://cliniclegal.org/resources/articles-clinic/surge-sijs-approvals-creates-backlog-adjustment-stage**. Special Immigrant Juveniles may also qualify for assistance and foster care placement through the Unaccompanied Refugee Minors (URM) Program, discussed above.

The cornerstone of an SIJS case is an order establishing eligibility from a "juvenile court," defined as any court in the United States with jurisdiction to make decisions about the care and custody of juveniles. 8 C.F.R. § 204.11(a). In Colorado, these courts include D&N,

delinquency, probate, and domestic relations courts. The required court order must contain all of the following findings with detailed and case-specific facts to support each finding:

1. The child is under 21 years of age and unmarried.
2. The child is "dependent" on the juvenile court or has been legally committed to, or placed under the custody of, an agency or department of a state or an individual or entity appointed by a state or juvenile court.
3. Reunification is not viable with *one or both* parents due to abuse, abandonment, neglect, or a similar basis under state law.
4. 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). A SIJS case must be adjudicated within 180 days.

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 experienced with SIJS prior to submission to the court. Motions and orders must contain enough factual information to make clear that the court has a reasonable basis for making the findings.

Under the SIJS statute, reunification only need not be viable with *one or both* parents—so children who currently reside with or who reunify with one parent may still be eligible. Additionally, it does not matter whether the parental abuse, neglect, or abandonment occurred within the United States or abroad and that these terms are defined by state law, not federal or foreign law.

It may be important for a D&N or other juvenile case to remain open as long as possible in order for a child to maintain SIJS eligibility. If a case closes solely due to the child's age or adoption, the child will remain SIJS eligible. *See Perez-Olano v. Holder*, Case No. CV 05-3604 (C.D. Cal. 2005). However, if the case closes for another reason (e.g., a delinquency case closes upon completion of sentence), the child may lose SIJS eligibility. SIJS may still 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.

TIP A child granted residency via SIJS will never be able to petition for immigration status for either parent, even in cases in which paren-

tal rights have not been terminated or there is only one offending parent. Several other forms of status (discussed below) allow for children to petition for or include other family members 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 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, child, stepchild, parent, or stepparent of an abusive US citizen or lawful permanent resident may apply for lawful permanent residency. This process is often referred to as "self-petitioning" and is intended to prevent a victim's lack of immigration status from adding to the power and control exerted by abusers who have residency or citizenship status. "Abuse" is defined under VAWA as battery or "extreme cruelty," need not be physical in nature, and can also include pervasive psychological or emotional abuse. The abuse does not have to have been reported to authorities. The applicant can submit "any credible evidence" 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). Some derivative family members of the principal applicant may also qualify, despite not being a target of abuse themselves. While applications are pending under VAWA, applicants are first provided with "deferred action" and work authorization. VAWA recipients are eligible for a broad range of federal and state public benefits and to apply for lawful permanent residency.

3. U Visa

The "U visa" or U nonimmigrant status (8 U.S.C. § 1101(a)(15)(U)) allows victims of specified serious crimes (including crimes like domestic violence and sex assault) who have been helpful in the investigation or prosecution of the crime to obtain four years of legal status with work authorization. After three years in U status, an applicant can then apply for lawful permanent residency. To obtain a U visa, the applicant *must* provide a "certification" from a law enforcement or other government agency (local, state, or federal) with investigatory or prosecutorial authority confirming the victim's coop-

eration 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, free of charge, along with all other immigration applications), by any official designated by the agency's head to complete such certifications. Regulations specifically allow Child Protective Services to provide the necessary certification. 8 C.F.R. § 214.14(a)(2). HB21-1060 provides a uniform statewide protocol for U visa certifications. Among other important protections that should streamline the application process, the changes permit a county department or juvenile court judges or magistrates to certify that a victim is eligible for U Visa status.

The U visa regulations allow for both "direct" and "indirect" victims of crimes to qualify. *See* 8 C.F.R. § 214.14(a)(14). Direct victims can include "bystanders" who suffer due to witnessing a crime. Indirect victims can include certain immediate family members of a direct victim who was killed or is incompetent or incapacitated. Indirect victims can also include immediate family members of a child victim, even if that child is a US citizen. When a crime victim is under the age of 16, incapacitated, or incompetent, a parent, guardian, or "next friend" may provide the required assistance with law enforcement. 8 C.F.R. § 214.14(b)(3). Derivative U status is available to victim's spouses, children, and siblings in many situations. *See* INA § 101(a)(15)(U)(ii). Note that unlike several other categories of status mentioned here, U status does not result in broad eligibility for public benefits, although work authorization and lawful status alone may result in greater ability to meet parenting and treatment plans. Congress set an annual cap for U visas of 10,000. At the time of this writing, there are over 160,000 petitions for U visas pending with US Citizenship and Immigration Services. *See* **https://www.uscis.gov/sites/default/files/document/reports/I918u_visastatistics_fy2021_qtr2.pdf.** Because of this backlog, US Citizenship and Immigration Services (USCIS) set up a waitlist in which provisionally approved applicants should be granted deferred action and work authorization while they await their U visas. However, even this deferred action currently takes over four years to be approved. **https://www.uscis.gov/sites/default/files/document/reports/FY20-Immigration-Applications-Made-by-Victims-of-Abuse.pdf**. As of July 2021, USCIS has implemented a "bona fide determination" process to review whether U visa applications are "bona fide" (i.e. that they are made without fraud or deceit and contain required initial evidence and that the applicant has passed background checks). Once a bona fide determination is made,

the application should be granted work authorization. The goal of this program is for U visa applicants to receive work authorization more quickly while their applications are pending. *See* **https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5**.

4. T Visa

The "T visa" or T nonimmigrant status is a pathway toward permanent residency for 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 the applicant must demonstrate they are physically present in the United States on account of the trafficking. Compliance with reasonable requests for assistance in the investigation or prosecution of the trafficking in cases involving victims 18 years of age and older is also required, although no certification from law enforcement is necessary. T visa applicants must also demonstrate that they would suffer extreme and unusual hardship if they were removed from the United States. 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) federal foster care placement. T visa holders may apply for lawful permanent residency after three years, and certain immediate family members may also qualify for derivative T nonimmigrant status. Although there is an annual statutory cap of 5,000 T visas, as of the time of this writing, there is no backlog and applications are generally adjudicated in less than a year.

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 comprehensive case management services. The National Human Trafficking Resource Center (NHTRC) also operates a useful multilingual 24-hour hotline: 1-888-373-7888.

5. Asylum

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. 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. In general, an asylum application must be filed within one year of entering the United States, although there are some exceptions to this rule, including for unaccompanied children. *See* INA § 208(a)(2)(B), (D).

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, *see* **http://www.acf.hhs.gov/programs/orr/resource/state-of-colorado-programs-and-services-by-locality**.

TIP Children's and gender-based 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 situations in which government actors may not be the feared persecutor but may be unable or unwilling to control persecutors. 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 of information for these cases and is recommended to any practitioner interested in learning more about these areas of asylum law.

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. Deferred Action for Childhood Arrivals (DACA) and Executive Action

Deferred Action for Childhood Arrivals (DACA) was a program initiated by the Obama administration in June 2012 that provided certain individuals who had entered the United States as young children to obtain work authorization and protection against deportation for two-year periods.

The DACA program has been the subject of extensive litigation in recent years. In September 2017, the Trump administration attempted to rescind the program in its entirety. Various federal and Supreme Court orders restored the program, eventually allowing for both initial and renewal applications temporarily. However, in July 2021, a Texas federal court again restricted initial applications. At the time of this writing, only individuals previously granted DACA are eligible to submit renewal applications. DACA is frequently changing so it is imperative to consult with an immigration attorney to ascertain the current availability of DACA protections for youth. For updates from USCIS on the program, see **https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca**.

TIP Individuals with current or expired DACA should consult with an immigration attorney as soon as possible to discuss any potential alternate forms of immigration relief or pathways to legal status.

7. Other Means of Obtaining Lawful Status

There are numerous other ways to obtain lawful immigration status. In working with immigrant families, it is always important to ask about the status of relatives to identify potential 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 to 20 years long. *See generally* 8 U.S.C. §§ 1151–1159; **https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html**. Temporary protected status (TPS) is sometimes available upon presidential designation to populations from countries that suffer from natural disasters or severe civil strife. 8 U.S.C. § 1254a.

TIP As previously mentioned, a person's status or prospective eligibility for status should 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, families, and their service providers. RMIAN Children's Program is contracted with the Office for the Child's Representative to provide consultation and litigation support on immigration issues to court-appointed guardians ad litem. RMIAN also provides legal services for detained adults in removal proceedings in Aurora, Colorado. **www.rmian.org** or 303-433-2812.

American Immigration Lawyers Association (AILA). A national association of immigration lawyers. AILA has a Colorado chapter, and you can search for an immigration attorney as well as updates and information about immigration law and practice on their website. **www.aila.org**.

College in Colorado (CIC). Initiated by the Department of Higher Education, CIC's Colorado ASSET (Advancing Students for a Stronger Tomorrow)–focused website (**http://www.ciccoloradoasset.org**) has many resources for undocumented students in Colorado, including legal resources regarding ASSET and scholarship opportunities.

Immigrant Legal Resource Center (ILRC). Extensive free online resources, including a "Judicial Benchbook" on immigration issues arising in juvenile courts. In addition, ILRC offers thorough and user-friendly manuals on various forms of immigration status, including SIJS. **www.ilrc.org**.

National Immigration Law Center (NILC). Leading national experts in public (federal, state, and local) benefits eligibility for noncitizens. **www.nilc.org**.

US Citizenship and Immigration Services (USCIS). Official government website with free 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; therefore, 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. Colorado has also enacted an ICWA implementation statute. *See* § 19-1-126.

TIP It is imperative that ICWA be 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, e.g.,* 25 U.S.C. § 1914 (allowing petitions to invalidate court actions upon a showing that the action violated specified provisions of ICWA); *People ex rel. S.R.M.*, 153 P.3d 438, 441 (Colo. App. 2006) (allowing tribe to raise the issue of inadequate notice for the first time in appellate proceeding); *see also People ex rel. J.O.*, 170 P.3d 840, 841 (Colo. App. 2007) (allowing parties to raise ICWA compliance without preservation on appeal).

TIP In *People in Interest of L.L.*, 395 P.3d 1209, 1212–16 (Colo. App. 2017), the Colorado Court of Appeals described the various duties of the court and each party with respect to ICWA in a D&N proceeding. In summary, the court's responsibilities are to ask whether the child is an Indian child, follow certain procedures if it has reason to know the child is an Indian child, and, if the child is not an Indian child, instruct the parties to inform the court if they later receive information that the child is an Indian child. *Id.* at 1212 (citing 25 C.F.R. § 23.107 (2016)). The department's duties are to investigate whether the child is an Indian child, provide notice to any identified tribes, and confirm that it used due diligence to identify and work with tribes. *Id.* at 1214. The GAL plays an important role in ensuring compliance with ICWA. *Id.* at 1216. RPC's duty is to disclose, in a timely manner, any information and/or documentation indicating that the child may be or is an Indian child. *Id.*

FEDERAL AND STATE AUTHORITY SUPPORTING THE IMPLEMENTATION OF ICWA

Federal regulations and guidelines, along with the Colorado Children's Code, promote compliance with ICWA.

1. Federal Regulations

ICWA required the Secretary of the Interior to promulgate rules and regulations necessary to carry out its provisions within 180 days of its original enactment. 25 U.S.C. § 1952. However, until 2016, federal ICWA regulations were primarily procedural and administrative. 2016 ICWA Guidelines at 5. Other than regulations addressing notice, the federal ICWA regulations did not address substantive requirements and standards applicable to proceedings governed by ICWA. *Id.* In response to public comment and its own assessment of the need for regulations to promote consistent application of ICWA across the United States, the US Department of Interior Bureau of Indian Affairs (BIA) promulgated formal ICWA regulations on June 14, 2016, codified at 25 C.F.R. § 23.101-144 (2016 ICWA Regulations). These regulations "provide a binding, consistent, nationwide interpretation of ICWA's minimum standards." 2016 ICWA Guideline A.1.

TIP The 2016 ICWA Regulations apply to any child custody proceeding initiated on or after December 12, 2016. 2016 ICWA Guidelines, *Context for ICWA, the Regulations, and These Guidelines*, at 4. Given

ICWA's definition of child custody proceeding, *see* **Applicability section**, *infra*, the 2016 ICWA Regulations will apply to case events qualifying as child custody proceedings as defined by ICWA, even in D&N cases filed prior to December 12, 2016. 25 C.F.R. § 23.143.

2. Federal Guidelines

In 1979, the BIA published ICWA Guidelines. While technically not binding, these guidelines serve as persuasive authority in several published decisions. *See, e.g., People in Interest of X.H.*, 138 P.3d 299, 302 (Colo. 2006).

In 2014, the BIA invited public comment and conducted several listening sessions to determine whether to update these guidelines. In February 2015, the BIA issued updated guidelines.

After promulgating the 2016 ICWA Regulations, the BIA again published updated guidelines in December 2016 (2016 ICWA Guidelines). The December 2016 ICWA Guidelines replace the 1979 and 2015 Guidelines. 2016 ICWA Guidelines, *Context for ICWA, the Regulations, and the Guidelines*, at 4. Within four months of their publication, a division of the Colorado Court of Appeals indicated that it considered the 2016 ICWA Guidelines persuasive authority. *See L.L.*, 395 P.3d at 1212.

TIP Because the 2016 ICWA Guidelines serve as persuasive authority and provide helpful information about ICWA, GALs and RPC should read the 2016 ICWA Guidelines and have them accessible in court.

TIP The 2016 ICWA Guidelines explain that rather than being in tension with the best interests of the child, ICWA protects the best interests of Indian children by ensuring that, if possible, children remain with their parents; supporting reunification; favoring placements within a child's extended family and tribal community; providing sufficient notice about child custody proceedings to parents and tribes; enabling parents and tribes to fully participate in the proceeding; and helping adoptees access information about their tribal connections. 2016 ICWA Guideline M.1; *see also L.L.*, 395 P.3d at 1215–16. ICWA's objective rules and standards address problems arising from subjective judgments about what is best for an Indian child while allowing courts sufficient flexibility to appropriately consider the individual circumstances of each child. 2016 ICWA Guideline M.1.

3. Colorado's ICWA Implementation Statute

In 2002, Colorado enacted a statute promoting ICWA compliance. *See* § 19-1-126. In 2019, Colorado amended that statute to align that statute with the updated ICWA regulations. *Id.* This statute sets forth specific inquiry, notice, and disclosure requirements with which a petitioning or filing party must comply. § 19-1-126(1)(a)(I)(B), (1)(c), (3). It also places an obligation on all parties to disclose any information indicating the child is an Indian child in a timely manner. § 19-1-126(1)(a)(I)(B). It also places an obligation on the court to inquire as to the Indian status of a child and determine the identity of an Indian child's tribe. § 19-1-126(1)(a)(I)(A-B).

TIP When state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, ICWA requires the court to apply the higher standard. 25 U.S.C. § 1921; 25 C.F.R. § 23.106. *See* **Inquiry**, **Notice**, *and* **Transfer of Jurisdiction subsections**, *infra.*

APPLICABILITY

1. Indian Child

ICWA applies when the child is an Indian child. An "Indian child" is defined as any unmarried person who is under the age of 18 and (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4); 25 C.F.R. § 23.2. The 2016 ICWA Regulations provide that ICWA does not cease to apply simply because a child reaches the age of 18. 25 C.F.R. § 23.103(d).

TIP 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. The *My.K.M.* case clarified that, to the extent that they are different for a particular tribe, "tribal membership, not enrollment, determines ICWA applicability." 491 P.3d at 498, 500-01.

TIP In cases involving children who are not members of a federally recognized tribe but eligible for membership, RPC and GALs should ensure that there is a clear record as to whether either par-

ent is a tribal member. *See, e.g., People in Interest of K.R.*, 463 P.3d 336 (Colo. App. 2020) (remanding for further findings regarding parents' tribal membership).

The 2016 ICWA Regulations provide that ICWA applies if there is reason to know the child is an Indian child, unless and until it is determined that the child is not an Indian child as defined by ICWA. 25 C.F.R. § 23.107(b). The regulations provide a non-exhaustive list of when a court has reason to know a child is an Indian child. 25 C.F.R. § 23.107(c)(1–6). The list includes the following situations:

- Any participant in the proceeding, an officer of the court, or a tribe or agency informs the court that the child is an Indian child.
- Any participant in the proceeding, an officer of the court, or a tribe or agency informs the court that it has discovered information indicating that the child is Indian.
- The child informs the court that he or she is Indian or "gives the court reason to know" he or she is an Indian child.
- The child, the child's parent, or the child's Indian custodian resides on a reservation.
- The child is or has been a ward of a tribal court.
- The court learns that either the parents or child possesses an identification card for a membership in a tribe.

Id. In *People in Interest of E.M.*, 2021 COA 152 (Dec. 16, 2021), the Colorado Court of Appeals held that juvenile courts must ensure notice is sent in compliance with ICWA any time the department or court has reason to know the child is an Indian child pursuant to ICWA, and the reason to know provisions should be interpreted expansively. If there is reason to know, but the court cannot confirm, that the child is an Indian child, the court must treat the child as an Indian child unless and until it is determined that the child does not meet the definition of an Indian child. 25 C.F.R. § 23.107(b)(2).

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. 25 C.F.R. § 23.108; *People ex rel. J.A.S.*, 160 P.3d 257, 260 (Colo. App. 2007); 2016 ICWA Guideline B.7.

TIP In *People in Interest of K.C.*, 487 P.3d 263, 270 (Colo. 2021), the Colorado Supreme Court held that the Court of Appeals erred when it required the trial court to conduct an enrollment hearing, determining that no authority for such a hearing existed, and that such a hearing conflicts with a tribe's exclusive right to determine

tribal membership. The Court noted that, while no federal or state law imposes a duty on the department to assist with enrolling eligible children in a tribe, it may be best practice for the department to do so. *Id.* at 274.

The 2016 ICWA Regulations make clear that a determination of whether a child is Indian may not include consideration of "factors such as the parents or the Indian child's participation in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 25 C.F.R. § 23.103(c); *see also In re N.B.*, 199 P.3d 16, 20–22 (Colo. App. 2007) (rejecting "existing Indian family" doctrine adopted by some states prior to the 2016 ICWA Regulations).

TIP The GAL's independent investigation must include assessment of any potential tribal affiliation. CJD 04-06(V)(D)(5).

TIP The GAL or RPC may advocate for children to become enrolled members of a tribe during a D&N proceeding. There may be scholarships and/or free health services available to an enrolled child. The additional protections of ICWA may benefit both the respondent parent and the child.

2. Child Custody Proceedings

ICWA applies to "child custody proceedings," defined in ICWA as any action that may culminate in one of the following outcomes: foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 U.S.C. § 1903(1), 25 C.F.R. §§ 23.2, 23.103. A foster care placement is defined as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i); 25 C.F.R. § 23.2. Child custody proceedings include both involuntary proceedings and voluntary placements that could prevent the parent or Indian custodian from immediately regaining custody upon demand. 25 U.S.C. § 1903(1); 25 C.F.R. § 23.103(a). If the parents agree to a placement under threat of removal by a state agency, the placement is not voluntary and the involuntary provisions of ICWA apply. 25 C.F.R. § 23.2. For example, in *People in Interest of K.G.*,

2017 COA 153, a division of the Colorado Court of Appeals held that a D&N proceeding resulting in allocation of parental responsibilities to an aunt and uncle is a child custody proceeding as defined by ICWA. Similarly, in *People in Interest of O.S-H.*, 2021 COA 130 (Oct 28, 2021), the Court of Appeals held that ICWA applies to paternity determinations made in D&N cases.

TIP If parents consent to the placement of an Indian child within the context of a D&N proceeding, the placement is not voluntary and the sections of ICWA that apply to involuntary proceedings are applicable.

ICWA also applies to proceedings "involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, pre-adoptive, or adoptive placement, or termination of parental rights." 25 C.F.R. § 23.103.

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. 25 U.S.C. § 1903(1).

3. Emergency Proceedings

ICWA addresses emergency removals and placements. 25 U.S.C. § 1922. The 2016 ICWA Regulations define an emergency proceeding as any court action involving an emergency removal or emergency placement of an Indian child, clarify that ICWA applies to emergency proceedings, and provide specific pleading, evidentiary, and temporal requirements with regard to such proceedings. 25 C.F.R. § 23.113; **Burdens of Proof / Requisite Findings section**, *infra.*

PROCEDURE

1. Inquiry

The Colorado Children's Code requires the court to ask each participant in child-custody proceedings whether the participant knows or has reason to know the child is an Indian child. § 19-1-126(1)(a)(I); *see also* § 19-3-602(1.5)(a)(I). 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); *see also* § 19-3-602(1.5)(a)(I), (b).

The court must ask each participant at the commencement of any child custody or emergency proceeding whether there is reason to know the child who is the subject of the proceeding is an Indian

child. 25 C.F.R. § 107(a). All responses must be on the record. *Id.* The court must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. *Id.*

TIP The inquiry required by ICWA applies to each proceeding defined as a child custody proceeding. *See* **Child Custody Proceedings section**, *supra.* A division of the Colorado Court of Appeals held that when a court inquires whether there is reason to know that the child is an Indian child at the temporary custody proceeding, it must repeat the inquiry upon the filing of a motion to terminate the parent-child legal relationship, at least where the court has not already identified the child as an Indian child and the petitioning party has not disclosed the efforts it made to determine if the child is an Indian child. *People in Interest of C.A.*, 2017 COA 135, ¶ 2. Similarly, a division of the Colorado Court of Appeals held that an ICWA inquiry made in a previous D&N case does not relieve the court of its responsibility to make a new inquiry in a subsequent case involving the same parents. *People in Interest of A.D.*, 2017 COA 61, ¶ 1.

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. GALs should keep a log of inquiries made by the court as a method of ensuring required inquiries are made and facilitating the designation of the record on any appeal. Sample logs can be found on OCR's Litigation Toolkit.

Similarly, RPCs should check compliance with ICWA throughout the case but particularly prior to any custody hearings. RPC should bring lack of compliance or notice issues to the trial court's attention. A sample ICWA checklist is available on ORPC's Motions Bank. RPC should routinely check with clients to ensure that any new information regarding ICWA heritage is provided to all parties and the courts. RPC can obtain investigators if a client believes he or she is enrolled or a family member is enrolled but needs assistance finding relevant information or involving the tribe.

TIP An ICWA assessment form, JDF 567, is available on the Colorado Judicial Branch website. GALs may consider requesting a court order requiring parents to complete the ICWA affidavit and file it with the court within seven days, the time period required for the relative affidavit. *See* § 19-3-403(3.6)(a)(III).

TIP Even if the parents have no additional information about potential Indian heritage or fail to provide additional information, notice must be sent with then-existing information. The notice must be resent if additional information is discovered at a later date.

2. Notice

a. Notice requirements for emergency removals/placements. The 2016 ICWA Regulations state that a petition for a court order authorizing emergency removal or continued emergency placement, or its accompanying documents, should contain the following: (a) the steps taken to provide notice to the child's parents, custodians, and tribe about the emergency proceeding; (b) if the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA regional director; and (c) if the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe's jurisdiction. 25 C.F.R. § 23.113(d)(3)–(4), (9).

The 2016 ICWA Guidelines acknowledge that emergency proceedings do not require notice via certified or registered mail. 2016 ICWA Guideline C.9. However, where a state agency believes a child may be an Indian child, the agency should take all practical steps to contact parents, Indian custodians, and tribes, such as by telephone, in person, by email, and through other forms of written communication. *Id.*

TIP While the 2016 ICWA Regulations applicable to emergency proceedings do not contain the notice requirements applicable to child custody proceedings such as foster care placement and termination of parental rights, they do institute stringent pleading recommendations, evidentiary requirements, and temporal requirements. 25 C.F.R. § 23.113; **Burdens of Proof / Requisite Findings section**, *infra.*

TIP When the emergency placement criteria are met and the timing of a preliminary protective hearing has not allowed for the notice required for child custody proceedings, the court may order emergency removal or continued emergency placement at the preliminary protective hearing. As the emergency placement must be limited to 30 days unless the court makes specific findings, (*see*

Burdens of Proof / Requisite Findings: Emergency Removal/ Placement subsection, *infra*, the notice requirements applicable to child custody proceedings require the receipt of notice at least ten days in advance of the hearing, *see* **Notice requirements for child custody proceedings subsection**, *infra*, GALs in support of ongoing out-of-home placement should ensure the department is issuing timely notice to all required tribes. Additionally, the GAL should work with the department to secure the testimony of a qualified expert witness to support the required findings for foster care placement. *See* **Burdens of Proof / Requisite Findings: Foster Care Placement subsection**, *infra.*

b. Notice requirements for child custody proceedings.

i. ***When notice is required in child custody proceedings.*** Notice is required in involuntary child custody proceedings such as the foster care placements and termination of parental rights where a state court knows or has reason to know that an Indian child is involved. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a)(1). The **Child Custody Proceedings section**, *supra*, defines foster care placement and termination proceedings pursuant to ICWA.

TIP Neither ICWA nor the 2016 ICWA Regulations require notice of every hearing to be sent to every tribe, parent, or Indian custodian. However, the 2016 ICWA Guidelines recommend that notice of the following be sent to tribes, parents, and Indian custodians: each hearing, each change in placement, each change in permanency plan or concurrent plan, and transfer of jurisdiction to another state or receipt of jurisdiction from another state. 2016 ICWA Guideline D.1. The guidelines do not specify the type of recommended notice. *Id.*

ii. ***Who must provide notice of child custody proceedings.*** ICWA requires the party seeking the foster care placement of, or termination of parental rights to, an Indian child to send notice. 25 U.S.C. § 1902(a).

iii. ***Who must receive notice of child custody proceedings.*** ICWA requires notice to be sent to the parents; Indian custodian, if applicable; and the child's tribe. 25 U.S.C. § 1912(a).

The 2016 ICWA Regulations require notice to be sent to tribes, the child's parent, and the child's Indian custodian. 25 C.F.R. § 23.111(b). Copies must be sent to the BIA. 25 C.F.R. § 23.11(a).

TIP The Federal Register provides the list of "Designated Tribal Agents for Service of Notice," which is updated regularly, and 25 C.F.R. § 23.105 provides detailed information on how to contact tribes.

TIP Failure to send proper notice to the tribe often results in a remand. *See, e.g., In the Interest of L.L.*, 395 P.3d at 1214 (Colo. App. 2017); *In re T.M.W.*, 208 P.3d 272, 275 (Colo. App. 2009). At least one division of the Court of Appeals has held that although the failure to comply with ICWA's notice provisions does not divest a trial court of its subject matter jurisdiction to enter adjudicatory and dispositional orders, such failure does invalidate dispositional orders because dispositional orders constitute a child custody proceeding pursuant to ICWA. *People in the Interest of M.V.*, 432 P.3d 628, 632–36 (Colo. App. 2018).

When the identity and location of the parent, Indian custodian, or tribe cannot be determined, ICWA and the 2016 ICWA Regulations require notice to be sent to the Secretary of the Interior by sending the appropriate paperwork to the regional office of the Bureau of Indian Affairs. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(e).

Although ICWA states that the Secretary of the Interior has fifteen days after receipt of the notice to provide requisite notice to the parent, Indian custodian, or tribe (25 U.S.C § 1912(a)), the 2016 ICWA Regulations provide that where the Secretary is unable to verify that the child is an Indian child or is unable to locate the parents or Indian custodian, the Secretary will inform the court and state how much more time, if any, the Secretary needs to complete the verification or search. 25 C.F.R. § 23.11(c). The BIA will not make a determination of tribal membership but may, in some instances, be able to identify tribes to contact. 25 C.F.R. § 23.111(e).

iv. ***Notice elements.*** ICWA and the 2016 ICWA Regulations require notice to be in clear and understandable language and to include specific information regarding the child, tribe(s), and proceeding. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(d).

The 2016 ICWA Regulations provide numerous requirements for what must be included in the notice. 25 C.F.R. § 23.111(d). The regulations explain that notice should include as much information as is known regarding the child's direct lineal ancestors. 25 C.F.R. § 23.111(e). In a case where a father claimed tribal heritage from a state lacking federally recognized tribes with designated tribal agents within its borders, a division of the Court of Appeals held

that the BIA bears the burden of determining tribal connections from such vague information, but remanded the case to the trial court because the notice sent to the BIA failed to mention that the father reported a tribal connection to a specific state. *People in the Interest of I.B.-R.*, 439 P.3d 38, 41-2. (Colo. App. 2018).

v. ***Method for sending notice.*** ICWA requires notice by registered mail with return receipt requested. *Id.*

The 2016 ICWA Regulations permit notice by registered mail or certified mail, return receipt requested. 25 C.F.R. § 23.111(c).

The 2016 ICWA Regulations provide that although notice may be provided by personal service or electronically, those methods do not replace the registered/certified mail requirement. 25 C.F.R. § 23.111(c). Moreover, the 2016 ICWA Guidelines encourage states to be proactive in contacting parents, custodians, and tribes by phone, email, and other means, in addition to the registered/certified mail requirements. 2016 ICWA Guideline D.2.

TIP If a tribe has not responded to notice, the 2016 ICWA Guidelines recommend the party making notice contact the tribe via telephone. 2016 ICWA Guideline D.10.

vi. ***Proof of notice.*** The 2016 ICWA Regulations require the party seeking placement or termination of an Indian child to file an original or copy of each notice with the court, together with any return receipts or other proof of service. 25 C.F.R. § 23.111(a)(12).

TIP A division of the Court of Appeals remanded due to insufficient notice where the department only filed an unsigned and undated return receipt. *People in the Interest of Z.C.*, 2019 COA 71M, ¶¶ 18–21.

vii. ***Timing of hearing after notice.*** 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 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.*

RIGHTS

1. Right to Counsel

ICWA requires courts to appoint counsel for an indigent parent or Indian custodian 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.*

The 2016 ICWA Regulations state that where a parent or Indian custodian appears in court without an attorney, the court must inform the parent/custodian of his or her rights, including the applicable right to appointed counsel, the right to request transfer of the child custody proceeding to tribal court, the right to object to such transfer, and the right to request additional time to prepare for the child custody proceeding and, if not already a party, the right to intervene. 25 C.F.R. § 23.111(g).

TIP Courts can provisionally appoint counsel for incarcerated or absent parents who have not yet completed a JDF 208 form. Available counsel should also inquire with caseworkers, county attorneys, and GALs about contact information for absent parents. Counsel should attempt to call absent parents to secure their attendance by telephone at the proceedings and should seek provisional appointments for those parents.

2. Intervention

A tribe or Indian custodian may intervene in state court proceedings at any point. 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.

3. Inspection of Court Documents

All parties, including the Indian parent and the tribe, have the right to inspect all court documents. 25 U.S.C. § 1912(c).

JURISDICTIONAL ISSUES

1. Full Faith and Credit

Full faith and credit should be afforded to all public acts, records, and judicial proceedings of any Indian tribe. 25 U.S.C. § 1911(d).

2. 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); 25 C.F.R. § 23.110. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48–52 (1989), the United States Supreme Court 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 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. ICWA does not define the term "imminent physical damage or harm," but examples given in the guidelines include when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence. 2016 ICWA Guideline C.2. 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. 25 U.S.C. § 1922. 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.*

3. Transfer of Jurisdiction

Upon the petition of either parent, the Indian custodian, or the tribe, a state court shall transfer a proceeding involving an Indian child to the tribal court absent good cause to the contrary, an objection by a parent, or a decline of transfer by the tribal court. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.115. The request for transfer may be made at any time and may be made orally on the record or in writing. 25 C.F.R. § 115. The state court must ensure that the tribal court is promptly notified in writing of the transfer petition. 25 C.F.R. § 116.

TIP A parent's ability to essentially veto the transfer by objecting does not turn on the parent's Native American heritage or status as an Indian parent.

The 2016 ICWA Regulations establish the procedure that must be implemented if any party asserts good cause not to transfer. 25 C.F.R. §§ 23.116–118. If the court believes or any party asserts that good cause not to transfer the case exists, the reasons must be stated orally on the record or provided in writing on the record and to the parties of the child custody proceeding. *See* 25 C.F.R. § 23.118(a). Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause exists. 25 C.F.R. § 23.118(b).

The party opposing transfer bears the burden of establishing good cause to deny transfer. *People in the Interest of T.E.R.*, 305 P.3d 414 (Colo. App. 2013). A clear and convincing burden of proof applies. *See In re J.L.P.*, 870 P.2d 1252, 1257 (Colo. App. 1994).

The 2016 ICWA Regulations provide that in determining whether good cause to deny transfer exists, the court must not consider:

- whether the proceeding is at an advanced stage, if the Indian child's parent, custodian, or tribe did not receive notice of the proceeding until an advanced stage;
- whether there have been prior proceedings involving the child in which no transfer was requested;
- whether transfer could affect the child's placement;
- the Indian child's cultural connections with the tribe or the reservation; and
- socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.

25 C.F.R. § 23.118(c)(1–5).

As to the first criterion stated above, Colorado courts have held a one-year delay did not constitute good cause to deny transfer when a permanency planning hearing had not been held, *J.L.P.*, 870 P.2d at 1257–58, but a three-and-one-half-year delay did constitute good cause even though a permanency planning hearing had not been held, *A.T.W.S.*, 899 P.2d at 226–27. The 2016 ICWA Guidelines clarify that whether the proceeding is at an advanced stage must be considered in light of ICWA's definition of child custody proceedings, rather than the case as a whole. 2016 ICWA Guideline F.5. For example, a request made subsequent to a motion to terminate parental rights would not constitute an advanced stage because the termination of parental rights proceeding is considered a new proceeding for this purpose. *Id.*

TIP The 2016 ICWA Guidelines provide additional explanation as to each of the prohibited reasons for denying transfer, and counsel

should review the guidelines in detail when faced with any transfer of jurisdiction issue.

TIP Colorado caselaw explains that good cause to deny transfer is determined on a case-by-case basis. *People in the Interest of A.T.W.S.*, 899 P.2d 223, 226 (Colo. App. 1994). 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. *People in Interest of J.L.P.*, 870 P.2d 1252, 1258–59 (Colo. App. 1994). The transfer issue is not about what the outcome of the case will be but instead is about who gets to decide that issue; ICWA presumes that the tribal court will make a decision about the best interests of the child based upon standards adopted by the tribe. *See* 2016 ICWA Guideline F.5.

The basis for the court's decision to deny transfer should be stated orally on the record or in a written order. 25 C.F.R. § 118(d). Transfer of jurisdiction to a tribal court is subject to the tribal court's declination of such jurisdiction. 25 U.S.C. § 1911(b).

BURDENS OF PROOF / REQUISITE FINDINGS

1. Emergency Removal/Placement

ICWA specifically provides that it shall not be construed to prevent the emergency removal of an Indian child who is a resident of or domiciled on a reservation but temporarily located off the reservation. 25 U.S.C. § 1922. The 2016 ICWA Regulations define emergency proceedings broader—as any court action involving the emergency removal or emergency placement of an Indian child. 25 C.F.R. § 23.2. The 2016 ICWA Guidelines explain that both the legislative history and the decisions of multiple courts support the conclusion that ICWA's emergency proceedings provisions apply to both Indian children domiciled off the reservation and Indian children domiciled on the reservation but temporarily off of the reservation. 2016 ICWA Guideline C.1.

ICWA permits emergency removal/placements "under applicable state law, in order to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922.

The 2016 ICWA Regulations contain special provisions applicable to emergency proceedings, defined to include any court action that involves an emergency removal or emergency placement of

an Indian child. 25 C.F.R. §§ 23.2, 23.103(a)(2), 23.113(b). As an example, the court must make a finding on the record that the emergency removal/placement is necessary to prevent imminent physical damage or harm to the child. 25 C.F.R. § 23.113(b)(1).

TIP The 2016 ICWA Regulations list specific content recommendations for petitions for emergency removal. 25 C.F.R. § 23.1113(d). Counsel should review these regulations prior to a hearing on emergency removal/placement.

TIP Although the ICWA placement preferences do not apply during emergency proceedings, the 2016 ICWA Guidelines recommend that state agencies try to identify extended family or other individuals as possible emergency placements and strive to provide an initial placement that meets the placement preferences, as doing so will help prevent placement disruption if the child needs to be moved to a placement preference once a child custody proceeding is initiated. ICWA Guideline C.6. If a non-preferred placement is made during the emergency proceeding, the agency should have a concurrent plan for placement as soon as possible with a preferred placement. 2016 ICWA Guideline C.6. It is also important to note that the agency has an obligation to make a diligent search for a preferred placement before a finding of good cause can be made at a later disposition hearing based upon unavailability of a preferred placement. 25 CFR § 23.132(c)(5).

TIP Although active efforts are not required during emergency proceedings, the 2016 ICWA Guidelines recommend that state agencies work with tribes, parents, and other parties as soon as possible to provide active efforts to reunify the family. ICWA Guideline C.8.

At any hearings during the emergency proceeding period, the court must make ongoing determinations as to whether the emergency removal is no longer necessary to prevent physical damage or harm to the child. 25 C.F.R. § 23.113(b)(1). Additionally, it must promptly hold a hearing on whether the removal continues to be necessary whenever new information indicates that the emergency situation has ended. 25 C.F.R. § 23.113(b)(3). The court must immediately terminate or ensure that the agency immediately terminates the emergency placement once the court or agency possesses sufficient evidence to determine that the emergency removal is no longer necessary to prevent imminent physical damage or harm to the child. 25 C.F.R. § 23.113(b)(4).

An emergency proceeding terminates by the initiation of an ICWA-defined child custody proceeding, transfer of jurisdiction to the appropriate tribe, or restoration of the child to the parent or Indian custodian. 25 C.F.R. § 23.113(c). An emergency proceeding should not be continued for more than 30 days unless the court finds that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; the court has been unable to transfer jurisdiction to the appropriate Indian tribe; and it has not been possible to initiate an ICWA-defined child custody proceeding. 25 C.F.R. § 23.113(e).

TIP When a court has ordered emergency placement, whether at the preliminary protective hearing or another hearing in a D&N case, GALs in support of ongoing placement should advocate for the prompt setting of a foster care placement hearing, compliance with the notice provisions applicable to child custody proceedings, and timely endorsement/subpoena of a qualified expert witness (QEW) to testify as to the requisite findings for foster care placement. *See* **Foster Care Placement subsection**, *infra*; **Notice subsection**, *supra.*

2. Foster Care Placement

The 2016 ICWA Regulations state that foster care placement includes any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated. 25 C.F.R. § 23.2.

If at any point during the proceeding any party asserts or the court has reason to believe that the Indian child may have been improperly removed or retained, the court must expeditiously determine whether there was an improper removal or retention. 25 C.F.R. § 23.114(a). If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and order the Indian child returned immediately, unless such return would subject the child to substantial and immediate danger or threat of such danger. 25 C.F.R. § 23.114(b).

a. Serious emotional or physical damage. ICWA provides that before a state court orders foster care placement of an Indian child, the court must make a finding based on clear and convincing evidence "that the continued custody of the child by the parent or Indian cus-

todian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e).

The 2016 ICWA Regulations explain that evidence must show a causal relationship between the existence of particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child. 25 C.F.R. § 23.121(c). Without such a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute the requisite clear and convincing evidence. 25 C.F.R. § 23.121(d).

ICWA requires that this standard be supported by testimony from a QEW. 25 U.S.C. § 1912(e). The 2016 ICWA Regulations require the QEW to be qualified to testify whether the continued custody is likely to result in serious emotional or physical damage to the child. 25 C.F.R. § 21.122(a). Additionally, the QEW should be qualified to testify as to the prevailing social and cultural standards of the tribe. *Id.* A QEW has expertise beyond typical caseworker and social worker expertise. 2016 ICWA Guideline G.2. This is because the purpose of the QEW was to ensure that relevant cultural information is provided to the court and that the expert testimony is contextualized within the tribe's social and cultural standards. Thus, this knowledge is unnecessary only if it would be plainly irrelevant to the issue before the court such when eliciting evidence that ongoing sexual abuse is harmful to children. *Id.* 2016 ICWA Guideline G.2. The social worker regularly assigned to the child may not serve as the QEW in child custody proceedings concerning the child. 25 C.F.R. § 23.122(c).

TIP The court or any party to the proceeding may request the assistance of the Indian child's tribe or the BIA office serving the tribe in locating persons qualified to serve as QEWs. 25 C.F.R. § 23.122(b). Additionally, the OCR's website contains links to other states' designation of QEWs as well as witnesses identified by other GALs.

TIP A division of the Colorado Court of Appeals held that in a termination proceeding a QEW need not specifically opine that continued custody by the parent would likely result in serious emotional or physical damage to the child. *People in Interest of D.B.* 414 P.3d 46, 48, 49 (Colo. App. 2017), *cert. den. People in the Interest of D.B.*, 2017 SC 819.

TIP The GAL or RPC should contact the tribe or other agencies to identify persons with knowledge about the cultural aspects of tribal life, social norms, and customs that may assist in determining whether a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. The QEW's testimony should be focused on whether a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage, given the prevailing social and cultural standards of the Indian child's tribe.

b. Active efforts. Before the court can remove an Indian child from his or her home for placement in foster care, 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). The 2016 ICWA Regulations define active efforts as affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. 25 C.F.R. § 23.2. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the child, parents, extended family members, Indian custodians, and tribe. *Id.* Active efforts must be tailored to the facts and circumstances of the case. *Id.* Active efforts should be provided and documented in the case plan. *Id.*

Active efforts are more than reasonable efforts. *People ex rel. A.R.*, 310 P.3d 1007, 1015, *as modified on denial of reh'g* (Dec. 27, 2012). Active efforts must involve assisting the parents through the steps of the treatment plan. 2016 ICWA Guideline E.2. In *People in Interest of My.K.M.*, 491 P.3d 495, 503 (Colo. App. 2020), the Court of Appeals held that the failure to make active efforts for a short period of time relative to the case length is not, by itself, dispositive on the issue of active efforts overall. 491 P.3d at 503. However, even significant efforts by the department may not satisfy the active efforts requirement if a critical service is overlooked. *Id.* Because of this, the Court of Appeals vacated the termination hearing as to mother for the department's failure to provide job assistance or training, despite evidence of the mother's lack of engagement in other services. *See id.* at 504. The Colorado Supreme Court granted a petition for certiorari in this case, and as of February 2022, the matter remains pending before the Colorado Supreme Court.

TIP The 2016 ICWA Regulations contain specific examples of active efforts, and counsel should be familiar with these examples. *See id.* The department cannot utilize the argument that it lacks resources to provide active efforts in order to refuse the mandate to provide efforts. There are no exceptions in ICWA to the mandate to provide active efforts.

TIP In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561–62 (2013) (also known as the "Baby Veronica" case), a plurality of the United States Supreme Court held that 25 U.S.C. § 1912(d) (active efforts) and (f) (beyond a reasonable doubt in termination proceedings) did not apply in a private adoption case because the Indian father abandoned the child before birth and never had custody of the child. The plurality reasoned that because the father "had never had legal or physical custody" of the child, the required findings concerning the likelihood that "continued custody" would result in serious emotional or physical damage to the child and the provision of active efforts to prevent the "breakup" of the Indian family applicable to termination of parental rights under these subsections did not apply. *Baby Girl*, 133 S. Ct. at 261–62. The 2016 ICWA Regulations define "continued custody" as including "physical or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past." 25 C.F.R. § 23.2. One of the five justices who joined the majority in *Baby Girl* wrote a concurring opinion where he indicated his view that the court's intention was to decide no more than was necessary to decide the specific case involved in that case. *Baby Girl*, 133 S. Ct. at 2572. Thus, counsel should not automatically assume *Baby Girl* applies to foster care placements in D&N cases, given the distinct factual circumstances applicable to D&N proceedings and the Regulations' updated definition of legal custody and Colorado's custody statutes, which are very different from the statutes at issue in *Baby Girl*.

TIP RPC and GALs must advocate for treatment plan services that actively engage the family and comply with the active efforts mandate. Attorneys must diligently monitor that the services are provided in a timely manner. RPC and GALs should consider filing motions with the court if services are not being provided in accordance with the treatment plan as soon as problems develop.

3. Termination of Parental Rights

a. Serious emotional or physical damage. ICWA requires state courts terminating parental rights to an Indian child to 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). The 2016 ICWA Regulations explain that evidence must demonstrate a causal relationship between the conditions and the damage. 25 C.F.R. § 23.121(c)(d). The evidence regarding the serious emotional or physical damage must be supported by testimony from a QEW. 25 U.S.C. § 1912(f).

TIP

A division of the Colorado Court of Appeals held that a QEW need not specifically opine that continued custody by the parent would likely result in serious emotional or physical damage to the child. *People in Interest of D.B.* 414 P.3d 46, 48, 49 (Colo. App. 2017), *cert. den*. *People in the Interest of D.B.*, 2017 SC 819. As a matter of practice, GALs supporting termination should elicit specific testimony from the QEW establishing the likelihood of serious emotional or physical damage to the child.

In *People in Interest of K.N.B.E.*, 453 P.3d 140 (Colo. App. 2019), the Court of Appeals held that a parent's due process rights were not violated when a QEW interviewed her outside the presence of her counsel or her GAL; her counsel's representation during the termination hearing, ability to cross-examine the QEW, and introduction of her own expert's report and testimony sufficiently protected mother's due process rights.

b. Active efforts. ICWA requires a party seeking termination of parental rights to demonstrate that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts proved unsuccessful. 25 U.S.C. § 1912(d). The 2016 ICWA Regulations explain that active efforts must be documented in detail in the record. 25 C.F.R. § 23.120(b). See **Foster Care Placement section**, *supra*.

4. Placement Preferences

ICWA requires that placement of an Indian child be in the least restrictive, most family-like setting that meets the child's needs. 25 U.S.C. § 1915(b). Additionally, the placement must be within reasonable proximity to the child's home if the child's needs can be met. *Id.*

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 must 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).

TIP

The *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2564–65, plurality held that the 25 U.S.C. § 1915(a) placement preferences did not apply in a private adoption case "where no alternative party has formally sought to adopt the child." Given the diligent search requirements applicable to child welfare proceedings and the differences between the adoption process in a case that starts as a dependency as opposed to the private adoption context in *Baby Girl*, it is unclear how this analysis will apply to a D&N proceeding.

ICWA provides that any deviation from the placement preferences must be justified by good cause. 25 U.S.C. § 1915(b). Any good cause finding must be made on the record. 25 C.F.R. § 23.129. The proponent of deviation must state the reasons justifying the deviation on the record or in writing and has the burden of proving good cause by clear and convincing evidence. 25 C.F.R. § 23.132(a)–(b). The 2016 ICWA Regulations provide the following factors for determining good cause to deviate from the placement preferences:

- the request of one or both parents, if the parent attests or parents attest that the parent or parents reviewed the placement options, if any, that comply with the placement preferences;
- the request of the child if of sufficient age and capacity to understand the decision being made;
- a sibling attachment that can be maintained only through a particular placement;
- the extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences reside; and/or

- the unavailability of a suitable placement following a court determination that a diligent search was conducted to find suitable placements meeting the preference criteria, but none was located. The standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

25 C.F.R. § 132(c)(1–5).

State courts may also deviate from the preferences when the tribe has established a different order of preference for good cause and the placement is the least restrictive setting appropriate to meet the child's needs. 25 U.S.C. § 1915(b)–(c). Where appropriate, the preference of the child or parent shall be considered. *Id.*

However, state courts may not deviate from ICWA's placement preferences "based on the socioeconomic status of any placement relative to another placement." 25 C.F.R. § 23.132(d). Likewise, the court may not deviate from the preferences "based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132(e).

In *People ex rel. A.R.*, 310 P.3d 1007, 1017 (Colo. App. 2012), a division of the Court of Appeals held that the ICWA placement preferences are relevant in determining *which* placement is in a child's best interests, while a less drastic alternatives analysis considers *whether* any placement short of termination would be in the best interests of the child. Consistent with this holding, the division reversed and remanded the order granting the department authority to consent to the child's adoption because the order failed to grant the department authority to place the child with relatives, consistent with ICWA's placement preferences. *Id.* at 1017–19.

TIP GALs and RPC may want to seek a court order directing the department to contact all child placement agencies in the state to confirm the availability of an ICWA-compliant home. GALs and RPC may want to contact the family's tribe for help in locating an ICWA-compliant home. HB 21-1151 allows a federally recognized Indian tribe to certify its own foster homes.

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 12 CCR 2509-4: 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 **https://aphsa.org/AAICPC/default.aspx**.

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. References to the regulations developed by the AAICPC will be cited in this fact sheet in the following format: "ICPC Reg. No. __."

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 national efforts have been underway to prevent its enactment. It is unlikely that the revised ICPC will go into effect.

PURPOSE OF THE 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* 12 CCR 2509-4: 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; 12 CCR 2509-4: 7.307.32(C); *see also* 7.307.32(D) (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; 12 CCR 2509-4: 7.307.31.
- When a child in a D&N proceeding moves out of state with a relative, foster parent, or prospective adoptive parents, as well as in certain situations involving runaway youth. *See* 12 CCR 2509-4: 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.

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* 12 CCR 2509-4: 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). Colorado courts have not yet resolved whether the ICPC applies to placement of a child with an out-of-state parent. *See People in the Interest of I.J.O.*, 465 P.3d 66, 69 (Colo. App. 2019).

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 a child, 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. Other state decisions addressing the issue have come to varying conclusions, and GALs can find caselaw supporting both sides of this issue. *See generally In the Interest of S.R.C.-Q.*, 367 P.3d 1276, 1280–81 (Kan. App. 2016) (analyzing other states' decisions regarding the application of the ICPC to parents); see also NACC Summary of State Cases Addressing ICPC, available at: **https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/icpc_appendix_2.pdf.**

At times, a GAL's concerns about a child's safety if placed with an out-of-state placement may lead the GAL to support the application of the ICPC for a parent. In circumstances in which the GAL believes application of the ICPC would be contrary to the best interests of a child, either because of the delays the ICPC process would cause or the potentially negative impact of home study requirements unrelated to the safety or welfare of the child, the GAL should gather and present evidence showing the parent's relationship to the child and ability to provide safe and appropriate care for the child so the court can make an informed decision about placement with the out-of-state parent.

TIP

RPC for fit parents should argue that the terms of the actual compact do not require an ICPC study. "The ICPC is primarily procedural, and it governs the relations between states when decisions are made as to where to place a dependent child." *In re D.N.*, 858 So. 2d 1087, 1093 (Fla. Dist. Ct. App. 2003). The origins of the ICPC trace back to the 1950s, when a group of social service administrators came together to address problems involving interstate adoptions and foster care placements. *See In re R.S.*, No. 58 September Term, 2019, Maryland Court of Appeals (published August 17, 2020). The ICPC was designed to create a system for states to supervise children in interstate placements. Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents under the Interstate Compact on the Placement of Children*, 25 Yale L. & Pol'y Rev. 63, 68 (2006).

RPC opposing ICPC's applicability to a parent should argue that the Colorado regulation is invalid because it is inconsistent with the compact. RPC making this argument can rely on caselaw from some other states. *See, e.g., McComb v. Wambaugh*, 934 F.2d 474, 480–81 (3rd Cir. 1991) (holding that the ICPC does not require home studies of parents and Regulation No. 3 has no effect because it is inconsistent with the compact); *Arkansas Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 888 n.3 (Ark. 2002) (stating that any interpretation indicating that the ICPC applies to out-of-state placements with natural parents "is contrary to the plain language of the statute"); *In re M.W.*, 130 N.E. 3d 114 (Ind. App. 2019) (holding the ICPC does not apply to placement with an out of state parent based on the plain language of the compact); *In re Alexis O*, 157 N.H. 781 (N.H. 2008) (holding the plain language of the compact bars its application to placement of children with out-of-state parents).

RPC for fit out-of-state parents should also argue that the home study requirement violates parents' substantive due process rights. The interests of biological parents are not diminished because they do not live with their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); *Bowen v. Gilliard*, 483 U.S. 587, 614–15 (1987) (Brennan J., dissenting) (recognizing a child's fundamental interest in maintaining a relationship with a father who did not live in the same home); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (holding that unwed fathers who do not live with their children have a fundamental interest in raising their children). Current custodial status does not reduce a natural parent's fundamental interest in the child. Application of the ICPC home study requirement to an out-of-state, noncustodial parent interferes with the parent's fundamental interest in the "care, custody, and management" of his or her child. Home studies may be denied for many reasons—such as cramped living quarters or the presence of lead paint—that have nothing to do with fitness. Because the court cannot send a child to an out-of-state parent after an adverse home study, application of the compact denies custody to that parent without a finding of unfitness or imminent harm to the child.

TIP If the court does order the department to refer a parent for an ICPC and the ICPC is subsequently denied, RPCs should consider arguing that approval of an ICPC is not a precondition to placing the child with a parent. *See, e.g., San Diego Cnty. Health & Human Servs. Agency v. Christine L.*, 193 Cal. Rptr. 3d 378, 393 n.8 (Cal. Ct. App. 2015). In addition, the RPC should advocate that services and visitation be provided for out-of-state parents as part of reasonable efforts, particularly when an ICPC has been denied. *See I.J.O.*, 2019 COA 151 (Colo. App. 2019).

TIP If allocation of parental responsibilities is granted to a parent and the case is then closed, ICPC is no longer applicable. RPC may also wish to advocate for a client to come to Colorado to allow for allocation of parental rights (APR) and case closure if other arguments fail.

ICPC regulations provide that a visit is exempt from the ICPC. *See* ICPC Reg. No. 9. The ICPC defines any stay or proposed stay of longer

than 30 days as a placement rather than a visit, with the exception of visits that last for the duration of a school vacation as defined by the school's academic calendar. ICPC Reg. No. 9(5). 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* 12 CCR 2509-4: 7.307.51 (detailing obligations of the department or child placement agency when Colorado is the sending state); ICPC 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. ICPC Reg. No. 1(6)(a). 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(7)(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. 12 CCR 2509-4: 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* 12 CCR 2509-4: 7.307.6; ICPC Reg. No. 7.

An expedited placement decision can be made only when the placement of the child is with a parent, stepparent, adult brother or sister, adult uncle or aunt, grandparent, or guardian. 12 CCR 2509-4: 7.307.6(B). The court must enter an expedited placement decision court order for an expedited placement procedure to apply. 12 CCR 2509-4: 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.

12 CCR 2509-4: 7.307.62(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. 12 CCR 2509-4: 7.307.64. 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)(a). Such provisional approval or denial must be communicated in writing and completed within seven calendar days of receipt of the completed request packet. ICPC Reg. No. 7(6)(b). 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; 12 CCR 2509-4: 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); 12 CCR 2509-4: 7.307.51(E). 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. 11(9)(c).

TIP

ICPC Reg. No. 11(7) outlines specific requirements for the 90-day report, including, but not limited to, detailed information about the child's school performance, health status, current circumstances, placement and caretaker, and unmet needs. The GAL should review the 90-day report and directly contact the out-of-state caseworker with any follow up questions. While CJD 04-06(V)(G) exempts GALs from the in-person investigative requirements for placements located 100 miles outside the jurisdiction of the court, it clarifies the GAL's ongoing obligation to independently investigate the placement. Specifically, GALs continue to have an obligation to engage in personal interviews with the child and caregivers and to independently assess the appropriateness of the placement through electronic or other means of communication. To the extent possible, the GAL should try to see the child in the placement, and the OCR will pay reasonable costs that comply with the OCR's billing policies and procedures. *Id.* GALs must obtain OCR preapproval to be reimbursed for out-of-state travel costs.

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. Foster Parents

Pursuant to § 19-3-507(5)(a), "foster parents who have the child in their care for more than three months who have information or knowledge concerning the care and protection of the child" have the right to intervene after adjudication. This statute conditions foster parent intervention upon the amount of time a child has been in the care of the foster parent and the foster parent's ability to inform the court about the "care and protection of the child." *A.M. v. A.C.*, 296 P.3d 1026, 1031 (Colo. 2013).

2. Relatives

Following adjudication, parents, grandparents, and relatives may intervene as a matter of right pursuant to § 19-3-507(5)(a) without regard to whether the child has previously been in their care or the amount of time the child has been in their care. *In the Interest of O.C.*, 308 P. 3d 1218, 1222 (Colo. 2013).

TIP The *O.C.* Court did not analyze whether the statutory requirement that the potential intervenor has "information or knowledge concerning the care and protection of the child" applies only to foster parents or also to parents, grandparents, and relatives. *Id.*

Colorado courts also view a relative's request for legal custody pursuant to § 19-3-605(1) as a request to intervene. *See, e.g., 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.*, 153 P.3d at 443; *People in the Interest of C.E.*, 923 P.2d at 386.

3. Tribes and Indian Custodians

The Indian Child Welfare Act provides that a tribe or Indian custodian may intervene in state court proceedings at any point. *See* 25 U.S.C. § 1911(c); **ICWA fact sheet**.

INTERVENORS' PARTICIPATION IN D&N PROCEEDINGS

The Colorado Supreme Court has issued several decisions defining parameters for participation by foster parents who have intervened pursuant to § 19-3-507(5)(a). These cases are grounded in an understanding that the intervention provided for foster parents in § 19-3-507(5)(a) stems from foster parent intervenors' "ability to provide the court with valuable and current information about the children in their care" rather than a recognition of any legally protected interest in the outcome of the proceedings. *See C.W.B. Jr. v. A.S.*, 410 P.3d 438, 445–46 (Colo. 2018).

In *A.M. v. A.C.*, 296 P.3d 1026, 1033 (Colo. 2013), the Colorado Supreme Court held that foster parents who meet the statutory criteria for intervention under § 19-3-507(5)(a) may participate fully in the termination hearing. Such participation includes making opening statements, cross-examining witnesses, introducing evidence, making evidentiary objections, and giving the closing argument in the termination of parental rights hearing. *Id.* at 1037–38. Evidentiary principles, rather than the intervenor's foster parent status, govern the evidence that a foster parent intervenor may present at the termination hearing. *Id.* at 1034. Similarly, the Colorado Court of Appeals has held that an intervenor relative seeking custody may fully participate in the hearing regarding the request, including presenting evidence. *People in the Interest of C.P.*, 524 P.2d 316, 319–20 (Colo. App. 1974).

In *C.W.B.*, 410 P.3d at 440, the Colorado Supreme Court held that § 19-3-507(5)(a) did not confer standing to foster parents to appeal an order denying termination of parental rights when neither the department nor the GAL sought appellate review. Reasoning that § 19-3-507(5)(a) conferred only procedural and not substantive rights, the Court concluded that foster parent intervenors do not have an interest, as a matter of law, in the outcome of the termination proceeding. *C.W.B.*, 410 P.3d at 446. Additionally, the Court made clear that neither statute nor caselaw suggests that foster parent intervenors have authority to initiate termination proceedings. *Id.* at 447.

TIP Counsel should object to intervenor participation that exceeds the parameters set forth by the Supreme Court's ruling in *A.M.*

A former foster parent who no longer has the child in his or her care does not have a right to participate as an intervenor under § 19-3-507(5)(a). *See A.M.*, 296 P.3d at 1034 (analyzing the Court of Appeals decision in *People ex rel. A.W.R.*, 17 P.3d 192 (Colo. App. 2000) and concluding that this decision "did not impose a new limitation on the rights of intervenors, but instead, merely applied the three-month placement requirement . . . to a situation where a child's placement with a foster parent had expired").

Additionally, "preadoptive" foster parents do not have a constitutionally protected liberty interest in their relationship with a foster child and are not entitled to due processes concerning removal of the child from their care. *See M.S. v. People*, 303 P.3d 102, 106 (Colo. 2013); *C.W.B.*, 410 P.3d at 446.

TIP Neither the *C.W.B.* nor the *M.S.* decision address the interests and policy considerations applicable to intervention under ICWA, *see* **ICWA fact sheet**, or relative intervention, *cf. O.C.*, 308 P.3d at 1221 (discussing the family preservation and reunification purposes of the Children's Code in relation to relative intervention).

Intervenors do not have standing to represent the best interests of the child. *See C.W.B.*, 410 P.3d at 440 (holding that there is no need to confer standing on foster parents to represent the best interests of the child on appeal because "the GAL is expressly authorized by statute to advocate for the child's best interests at all stages in the proceeding"); *People in the Interest of G.S.*, 820 P.2d 1178, 1181 (Colo. App. 1991) (holding that an order authorizing the grandmother's intervention did not require her to be treated as the child's representative).

Intervenors are entitled to service of notice of appeal. *People ex rel. S.R.M.*, 153 P.3d 438, 439–40 (Colo. App. 2006) (citing C.A.R. 3(d)(8)).

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); *see also People in Interest of A.B.A.*, 2019 COA 125. 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); *People in Interest of M.C.*, 2017 COA 60) (holding that D&N proceedings are subject to the UCCJEA). *In re M.M.V.*, 2020 COA 94 (holding that the UCCJEA applies to a termination proceeding which is initiated in a stepparent adoption case). 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).

2. Duty of the Parties to a Child Custody Proceeding

Each party to the proceeding must provide information related to his or her participation in another child custody proceeding regarding the named child as well as information about where the child has lived for the last five years. § 14-13-209(1). The party must also provide the court, case number, and date of the proceeding, along with information about any other proceeding that could impact the current proceeding and the name and address of any person not a party to the proceeding who has physical custody of the child or who claims rights to custody, visitation, or parenting time. *Id.*

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 182 consecutive days (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 a right to legal custody or parental responsibilities. § 14-13-102(13).

TIP In order to provide accurate and complete information to the court, the GAL should inquire of the parties and the child about any previous court involvement, the length of time they have been in the state, and other factors that may impact UCCJEA determination. To avoid potential appellate issues, the GAL also should ensure the court makes correct UCCJEA findings.

TIP At their first meeting, RPC should inquire of clients about where the family has lived and the length of time the child has lived in each state. The RPC should inquire about any previous court involvement, including, but not limited to, child custody orders, paternity actions, child support cases, adoption orders, guardianship cases, and protection order cases. RPC must notify the court and other parties of any prior court involvement.

3. 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 initial jurisdiction. *See* § 14-13-201, official comment. A state establishes home state jurisdiction if the child and a parent have lived there for 182 days immediately before the proceeding commences, 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 pursuant to § 14-13-207 or § 14-13-208, a state may establish significant connection jurisdiction when it is the location of "substantial" evidence and the child and at least one parent 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 (or vacuum) 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.

These four statutory grounds constitute the only basis for the court's exercise of initial jurisdiction under the UCCJEA. *See Madrone v. Madrone*, 290 P.3d 478, 482 (Colo. 2012) (rejecting the intent of the parties to remain in Colorado as a test for jurisdiction under the UCCJEA).

4. 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 is 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). By its nature, TEJ is limited; it lasts so long as the abandonment or emergency as defined by the UCCJEA exists. *S.A.G.*, 487 P.3d at 683. A court may assume TEJ in abuse but not neglect cases. § 14-13-204(1), official comment.

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: 1) a child-custody proceeding in another state; or 2) that Colorado may not be the child's home state, the court exercising temporary emergency jurisdiction must immediately determine whether it or another state has ongoing jurisdiction. *S.A.G.* 487 P.3d at 685–86. If the court determines another state may have jurisdiction, the Colorado court exercising temporary emergency jurisdiction must communicate with the court in the other state to determine how to proceed. *See People in Interest of C.L.T.,* 405 P.3d 210, 215 (Colo. App. 2017); *S.A.G.*, 487 P.3d at 686–87; *see also* §14-13-110. If the Colorado court determines Colorado is not the home state and that another state does not have jurisdiction, Colorado may be able to assert significant-connection jurisdiction, more-appropriate forum jurisdiction, or last resort jurisdiction. *S.A.G.* 487 P.3d at 685; *see also* **Initial Jurisdiction section** *supra*.

A court acting only under temporary emergency jurisdiction does not typically have the jurisdiction to issue permanent orders (including adjudication orders and orders terminating parental rights). *See e.g., S.A.G.*, 487 P.3d at 684. However, § 14-13-204(2) provides that orders issued under TEJ may become final where no child custody proceeding has commenced in the jurisdictional state, the temporary orders state they will become final, and Colorado becomes the home state of the child.

If the juvenile court determines that Colorado is not the child's home state, the court must determine whether another state qualifies as the child's home state. *See id.* at 685–86. If another state might

have home-state jurisdiction, the Colorado juvenile court must "conduct a full analysis of its non-emergency jurisdiction." *Id.* at 686. In doing so, if the Colorado court determines the out-of-state court does not have jurisdiction, the Colorado court must then determine whether it has obtained non-emergency jurisdiction under the significant-connection, more-appropriate-forum, or last-resort provisions of the UCCJEA. *Id.*; *see also* **Initial Jurisdiction section** *supra.*

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). A record of communication between courts can be made in a variety of ways so long as it is in a perceivable form. § 14-13-110(5). The communication must be made by the court and could be via telephone, or electronic communication. *See In re M.M.V.*, 469 P.3d 556 (Colo. App. 2020). Parties may participate in the communication with the other court, and if they are not included in the communication, the court must give parties the opportunity to present evidence and argument before making its decision. § 14-13-110(2).

The Court in *S.A.G.*, 487 P.3d at 687-88, provided additional guidance to practitioners and juvenile courts as to how communication between the two states should occur. The out-of-state court need not decline jurisdiction in any proscribed way, but instead, can decline jurisdiction in any manner that conveys its intent not to exercise jurisdiction including through inaction or refusing to discuss the issue of jurisdiction. *Id.* at 688. Additionally, if an out-of-state court feels it cannot weigh in or must decline jurisdiction due to lacking a local case, the *S.A.G.* court pointed to language in the UCCJEA which authorizes the Colorado court to request the appropriate state to take certain actions. *Id.* at 688 (citing §14-13-112).

5. 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).

6. Modification Jurisdiction

The provisions regarding modification and ECJ dovetail with one another. If a prior child custody order was issued in another state, the only procedures for the court to assert modification jurisdiction under the UCCJEA are set forth in §14-13-203. In order to modify the prior child custody order of another state, a court of this state must have jurisdiction to make an initial determination under §14-13-201(1)(a) or (1)(b), AND: 1) find that the child and parents do not presently reside in the other state; OR 2) a court of the other state determines it no longer has exclusive, continuing jurisdiction under a provision of law adopted by that state that is in substantial conformity with §14-13-202 or that a court of this state would be a more convenient forum under a provision of law adopted by that state that is in substantial conformity with §14-13-207. §14-13-203; *see also People in Interest of B.H.*, 488 P.3d 1026, 1035 (Colo. 2021). Mere physical presence in the state is not dispositive. *Id.* While the other state need not assent to the Colorado court's finding on residence, the Colorado court must communicate with the issuing state before continuing. *Brandt v. Brandt*, 268 P.3d 406, 408 (Colo. 2012); *see also* §14-13-110.

7. 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 with 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).

8. 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, 204–5 (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, 204–5 (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 also ensure that any order sought to be enforced in Colorado courts was entered in compliance with these jurisdictional requirements. Note that while the UCCJEA does not require consideration of the child's best interests in determining jurisdiction, the PKPA expressly requires such consideration. *See* 28 U.S.C. § 1738A(c)(2)(B)(ii), (D)(ii).

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. 22 U.S.C. § 9001 *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. 22 U.S.C. § 9003(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. 22 U.S.C. § 9003(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** (listing 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 pro-

cedures 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 v. 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 the Interest of A.P.H.*, 98 P.3d 955, 957–58 (Colo. App. 2004) (applying § 19-1-108(3)(a) instead of C.R.M. 5(a) to determine whether the magistrate had properly advised the 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 § 19-2.5-610 or transfer hearings held pursuant to § 19-2.5-802. § 19-1-108(1). They may also issue citations for contempt, conduct contempt proceedings, and enter orders for contempt. C.R.M. 5(b); *In re M.B.-M.*, 252 P.3d 506, 509 (Colo. App. 2011). 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(1). § 19-1-108(6).

Section 13-5-201(3) 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. District court magistrates may not reconsider their own final orders other than to correct clerical errors pursuant to C.R.M. 5(a). *M.B.-M.*, 252 P.3d at 510. However, magistrates can review or modify orders entered

which do not constitute a final and appealable order. *See People in Interest of J.D.*, 464 P.3d 785, 789 (Colo. 2020).

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 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. *Id.*

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 seven days after receiving notice of the setting. § 19-1-108(3)(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 goals (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(h).

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 the 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).

TIP In some districts, the practice is to allow dispositional hearings to be heard before a magistrate even when the adjudicatory hearing has taken place before a judge. A division of the Court of Appeals has held that when a district court has entered an adjudication order but the accompanying dispositional order has been entered by a magistrate, § 19-1-108(5.5) does not require the district court to review the magistrate's dispositional order before a parent may appeal the adjudicatory order. *People in Interest of R.J.* 451 P.3d 1232 (Colo. App. 2019).

A petition for review of a magistrate's order in a D&N proceeding must be filed within seven days after the parties have received notice of the magistrate's ruling. § 19-1-108(5.5). In a D&N proceeding, the seven-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 take into account not only 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). In *People in Interest of L.B-H-P.*, 482 P.3d 527, 529–30 (Colo. App. 2021), the Court of Appeals defined excusable neglect as a situation where the failure results from circumstances which would cause a reasonably careful person to neglect a duty, such as when counsel's medical condition is so physically or mentally disabling as to render counsel unable to file the requested relief or at least seek an extension of time.

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 will be construed in light of the purpose of the Children's Code. *See C.S.*, 83 P.3d at 635.

RPC must consider the necessity of a petition for review and immediately request transcripts if transcripts are necessary for the petition. RPC should also consider filing a motion for extension of time to allow time for the transcripts to be received and considered by the district court and in that motion argue that due process requires access to a "record of sufficient completeness to permit proper appellate consideration" of the parent's claims. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (citations omitted).

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, *People in the Interest of M.A.M.*, 167 P.3d 169, 173 (Colo. App. 2007); *People ex rel. C.Y.*, 275 P.3d 762, 766 (Colo. App. 2012), 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* **Appeals fact sheet**.

TIP There is not settled caselaw 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 907–8, 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 14 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 face a significantly higher risk of mental and physical health problems. *See* Kristin Turney and Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 5 (2016), *available at* **http://pediatrics.aappublications.org/content/138/5/e20161118**.

Every foster child has the right to receive adequate and appropriate medical, dental, vision, and mental health services. § 19-7-101(d). 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. 12 CCR 2509-8: 7.708.41. 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. 12 CCR 2509-4: 7.304.61(A). Additionally, the department must ensure that the medical screening is consistent with the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) initial screening requirements. *See id.*; **EPSDT subsection**, *infra.*
- The child's medical history is among the information shared with the placement provider before placing the child. 12 CCR 2509-4: 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. 12 CCR 2509-4: 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. 12 CCR 2509-4: 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. 12 CCR 2509-4: 7.304.62(G).

TIP 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 baby bottle tooth decay in very young children and multiple dental cavities in older children. *See Healthy Foster Care America, Dental and Oral Health* (American Academy of Pediatrics), *available at* **https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Pages/Oral-Health.aspx**. GALs should ensure the department complies with the dental screening and services requirements and should also ask about the child's dental health history and habits during the independent investigation.

- 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. 12 CCR 2509-4: 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* 12 CCR 2509-4: 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. 12 CCR 2509-4: 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. 12 CCR 2509-5: 7.402.1(A)(1). 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* 12 CCR 2509-5: 7.402.1(A)(4) (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. 12 CCR 2509-5: 7.402.1(A)(5), (8).

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.* 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. 10 CCR 2505-10: 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. 10 CCR 2505-10: 8.280.4(A)(5). When a screening indicates the need for further examination, diagnostic services must be provided. 10 CCR 2505-10: 8.280.4(C). Treatment to address conditions discovered by the screening and diagnostic services must be made available. *Id.*

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. 10 CCR 2505-10: 8.280.4(E); *see also* 10 CCR 2505-10: 8.280.5 (listing limitations and special considerations for certain services).

TIP If coverage is denied for a service, the GAL may contact the managed care ombudsperson for EPSDT (303-830-3560 or 1-877-HELP-123) or the Medicaid customer service department (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 Law 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 children through age 18 and pregnant women 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. 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* **https://www.coloradowic.gov/** (on the Colorado Department of Public Health and Environment website).

4. Mental Health Services

In addition to receiving mental health treatment through Medicaid, children may also qualify for mental health services under CHP + , the child/family may receive Core Services for mental health through the county department of health services, *see* **Funding and Rate Issues fact sheet**, or services may be accessed through the Child Mental Health Treatment Act, *see generally* § 27-67-101 *et seq.;* 2 CCR 502-1: 21.200.4.

TIP Colorado currently utilizes a system of Regional Accountable Entities (RAEs), which in 2017 replaced the use of Behavioral Health Organizations (BHOs). Information about RAEs can be found at **https://www.colorado.gov/pacific/hcpf/accphase2**. Two Colorado-based organizations that may provide helpful information in navigating Colorado's mental health system are Mental Health America of Colorado (**www. http://www.mentalhealthcolorado.org/**) and the Federation of Families for Children's Mental Health–Colorado Chapter (**www.coloradofederation.org**). HB20-1237 promotes consistency in services for children in out-of-home

placement by providing that even when a child's placement changes to a different RAE, the child remains assigned to the RAE region covering the county with jurisdiction over the matter unless that county or the child's legal guardian requests a change in the RAE assignment. *See* § 25.5-5-402(6)(b).

TIP

GALs should ensure that each child receives appropriate mental health services to meet the child's specific mental health needs. National studies consistently show a disproportionate use of psychotropic medications for children in foster care. *See* "Psychotropic Medication Guidelines for Children and Adolescents in Colorado's Child Welfare System" (CDHS & CHCPF October 23, 2017) *available at* **https://drive.google.com/file/d/0B5G5k6It2hLCcVVYVmxhd3VYM3M/view**. During 2015–2016, 26 percent of children in foster care were prescribed at least one form of psychotropic medication, compared to approximately 6 percent of children not in foster care. *Id.* at 12. If a child is placed on psychotropic medication, the GAL should ensure that such medication is appropriate, part of a comprehensive treatment plan, and properly managed.

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?

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?

Kate O'Leary, *Advocate's Guide to the Use of Psychotropic Medications in Children and Adolescents*, 25 ABA CHILD LAW PRACTICE 85, 89 (American Bar Association, August 2006).

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 court may authorize 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 seeks to limit a child's access to medical care for religious reasons 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. § 13-22-701 *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* § 13-22-705; **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 sexually transmitted infections, including HIV, without the consent of the parent or guardian. § 25-4-409. If the minor is older than 13, the results of the examination or treatment need not be divulged to anyone other than the minor, unless necessary under reporting requirements of Title 19. *Id.* For minors 13 or younger, the health care provider may involve the minor's parents. *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. 12 CCR 2509-7: 7.608.2(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. 12 CCR 2509-7: 7.608.2(B). The county policy may limit test results based on the "need to know" and must be in compliance with state confidentiality laws. *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). If the application is not made voluntarily by a minor 15 or older upon the recommendation of a mental health provider, 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.*

SPECIAL CONSIDERATIONS

1. 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* **https://www.americanbar.org/content/dam/aba/administrative/child_law/ethical_rep.authcheckdam.pdf**.

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, *available at* **https://www.zerotothree.org/resources/453-healthy-beginnings-healthy-futures-a-judge-s-guide** (hereafter *Healthy Beginnings*) (*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 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)).

2. Addressing the Unique Needs of Teens in Care

Youth transitioning out of foster care "face significant medical and mental health care needs," often exacerbated by lack of access to insurance. *See Policy Statement: Health Care of Youth Aging out of Foster Care* (American Academy of Pediatrics 2012), *available at* **http://pediatrics.aappublications.org/content/pediatrics/early/2012/11/21/peds.2012-2603.full.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 ensure ongoing compliance with the screening, assessment, and services requirements outlined in this fact sheet and 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. *See* **Transition to Adulthood fact sheet.**

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 strategies 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(1), 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. *See, e.g., People v. District Court*, 731 P.2d 652, 657–59 (Colo. 1987) (holding that the juvenile court did not exceed its jurisdiction in joining district attorney and law enforcement as parties to D&N proceeding for the purpose of issuing protective orders).

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). *See, e.g., District Court*, 731 P.2d at 654.

TIP In *People v. Gabriesheski*, 262 P.3d 653, 660–61 (Colo. 2011), the Colorado Supreme Court held that the trial court erred in relying on § 19-3-207 to prohibit examination of a caseworker without making specific findings as to whether the statements to that professional were made pursuant to compliance with court treatment orders. The mere fact that the caseworker was a professional involved in the D&N case did not trigger § 19-3-207 protections. Counsel seeking to protect statements made to any professional during the course of a D&N proceeding should advocate for orders clarifying the relationship of the statements to court-ordered treatment.

TIP Despite the statutory protection of § 19-3-207(3), some defense attorneys recommend parents exercise their right to remain silent and allow a default judgment to enter. Counsel representing clients who have pending criminal cases that are related to the facts of the D&N should consult with defense counsel prior to a client entering an admission.

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.* The Court of Appeals has held that protections of this subsection apply only to formal admissions to allegations in the petition and not to testimonial statements. *See People v. Stroud*, 356 P.3d 903, 909 (Colo. App. 2014).

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 pursuant 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 (2000); *People in the Interest of A.M.D.*, 648 P.2d 625, 632 (Colo. 1982). State intrusion into this protected relationship "cue[s] constitutional due process concerns," *see Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982), and gives rise to rights and protections throughout the D&N proceeding. A fundamental requirement of due process is the opportunity to be heard within a meaningful time frame. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. *Santosky v. Kramer*, 455 U.S. at 753.

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).

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). In ICWA cases, active efforts to reunify the family must be made. *See* **ICWA fact sheet**. If the child is placed out of the home, each parent is also entitled to suggest relatives believed by the parent to be appropriate

caretakers for the child. § 19-3-403(3.6)(a)(III). In addition, 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).

TIP RPC should be familiar with services in a family's community to advocate for community-based services that can be provided to parents and children to prevent out-of-home placement. Examples of such supports / protective orders may include, but are not limited to, one parent moving out of the home; protective orders; respite care or protective day care; the presence of an appropriate relative, kin, or neighbor in the home during key points of the day; and intensive in-home services, coaching, and monitoring by the department.

REPRESENTATION BY COUNSEL

Parents have the statutory right to be represented by counsel at every stage 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 16-02 (setting forth appointment and indigency screening procedures for court-appointed counsel).

In some circumstances, parents also have a constitutional right to counsel when necessary to ensure due process and a fundamentally fair procedure. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 31–32 (1981).

Courts are to appoint counsel by the first preliminary protective hearing. CJD 16-02(VIII)(a). An appointed RPC cannot represent more than one parent in the same case. CJD 16-02(III)(d). 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. Courts have the authority to provisionally appoint RPC for parents when parents cannot immediately establish indigency. CJD 16-02(VI)(d).

The ORPC appoints appellate counsel pursuant to CJD 16-02(IV). In nearly all circumstances, appellate counsel will not be trial counsel.

TIP RPC must strictly follow the procedures for transmitting appellate waivers and appellate transmittal sheets as outlined in CJD 16-02. These procedures ensure appellate counsel is appointed and appeals are timely filed.

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 a 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). However, CJD 16-02 grants the ORPC authority to appoint substitute counsel. RPC must follow the ORPC practice standards when seeking to withdraw to protect a client's rights.

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 (holding 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).

TIP Once counsel has been appointed in a D&N case, constitutional principles developed in criminal cases define the scope of counsel's obligation to the client. *A.L.L. v. People*, 226 P.3d 1054, 1062 (Colo. 2010); *see also People ex rel. C.Z.*, 262 P.3d 895, 901 (Colo. App. 2010). Accordingly, those constitutional principles govern parents' rights when an attorney seeks to withdraw. When an indigent client objects to court-appointed counsel, the court must inquire into the matter. *People v. Gonyea*, 195 P.3d 1171, 1173 (Colo. App. 2008). If the court finds that good cause exists, such as a conflict

of interest or a complete breakdown in communication, the court must appoint new counsel. *Id.* Not all disagreements between parents and counsel give rise to conflict warranting withdrawal. *People v. Schultheis*, 638 P.2d 8, 15 (Colo. 1981). RPC must protect client confidentiality and request *ex parte in camera* hearings to allow the court to make findings about the conflict between the client and counsel. *People v. Bergerud*, 223 P.3d 686, 694 (Colo. 2010). A hearing is necessary to protect the parent's rights. A fundamental requirement of due process is the opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Erroneous denial of a respondent parent's right to counsel during a substantial part of a parental rights termination hearing will require application of an automatic reversible error standard. *See In Interest of R.D.*, 277 P.3d 889, 896 (Colo. App. 2012). Effectively dismissing counsel by precluding counsel from participating in a contested hearing in a parent's absence is a violation of a parent's statutory right to counsel. *See id.* at 893 (reversing order terminating parental rights).

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. In determining whether a parent has been denied effective assistance of counsel, reviewing courts apply the Strickland standard. A parent must first "show that counsel's performance was outside the wide range of professionally competent assistance." *A.R. v. D.R.*, 456 P.3d 1266, 1280 (Colo. 2020) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)). Prejudice may be presumed if counsel "*entirely* fails to subject the [department or GAL's] case to *meaningful* adversarial testing." *A.R.*, 456 P.3d at 1281 (quoting *U.S. v. Cronic*, 466 U.S. 648, 659 (1984)). This presumption applies only in relatively narrow circumstances. *Id. See, e.g, In re M.A.W.*, 456 P.3d 1284 (2020) (declining to presume prejudice where trial counsel failed to request a continuance of a termination hearing or to cross examine the caseworker and finding that these instances of deficient performance did not prejudice the parent under the *Strickland* standard). To prove prejudice as a result of counsel's deficient performance, parents must show "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *A.R.*, 456 P.3d at 1280.

APPOINTMENT OF A GAL

A GAL must be appointed for a respondent 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.'" *M.M.* 726 P.2d at 1120. If a conservator has already been appointed, that person should serve as the GAL for the parent. § 19-1-111(c); *see also* **Preliminary Protective Proceeding chapter**.

The court must make specific findings justifying the appointment of the GAL. *See People in Interest of T.M.S.*, 2019 COA 136. The parent's GAL has an assistive role of facilitating communication between the parent and RPC and helping the parent participate in the proceeding. The GAL for parent does not have the right to participate in the proceedings as a party and may not advocate against a parent's goal of protecting her fundamental liberty interest in the care, custody, and management of her child. *See id.*

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. In ICWA cases, additional notice requirements apply. *See* **ICWA fact sheet**.

ADMINISTRATIVE REVIEWS

If an administrative review is ordered, all counsel of record must be notified of the review and may appear at the review. § 19-1-115(4)(c). Parents are entitled to participate in an administrative review. 42 U.S.C. § 675(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. § 19-1-103(93).

TIP Neither caselaw 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 efforts to notify the parent is required and the parent may challenge the order. § 19-1-104(3)(b).

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). *See* **Adjudicatory Hearing chapter**.

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).

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; 12 CCR 2409.4: 7.301.22. 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).

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).

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**. Parents

are entitled to face-to-face visits absent safety concerns. *People ex rel. D.G.*, 140 P.3d 299, 302 (Colo. App. 2006); *People in Interest of E.S.*, 494 P.3d 1142, 1146 (Colo. App. 2021); *People in Interest of A.A.*, 479 P.3d 57, 63 (Colo. App. 2020).

TIP RPCs should consider litigating denials of visitation by requiring the Department and GAL to show that visitation will directly affect the safety of the child(ren) unless reduced or stopped. *See also In re D.G.*, 140 P.3d 299 (Colo. App. 2006). Parents are entitled to a hearing within 72 hours of the "ongoing reduction in, suspension of, or increase in the level of supervision, including a change from in-person visitation to virtual visitation." C.R.S. § 19-3-217(3) (2021).

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 through the ORPC. § 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). In addition, the Court of Appeals has held that parents do not have a due process right to have counsel present when interviewed by a qualified expert witness, and that a parent's due process rights are not violated where a parent appears through counsel, is able to present evidence, and cross-examine witnesses. *See People in Interest of K.N.B.E.*, 457 P.3d 140, 142 (Colo. App. 2019).

TIP ORPC appoints experts for parents throughout a case and requires advance approval from the ORPC. *See* CJD 16-02(VII) and CJD 16-02 Attachment A. Experts should be requested early in the case to maximize effectiveness and to better serve families by supporting arguments that children should return or remain home.

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, childcare, 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.

SPECIAL CONSIDERATIONS FOR D&N PROCEEDINGS

Age of the parent is not a basis for adjudicating a child dependent or neglected. *See* **Adjudicatory Hearing chapter**. Similarly, when a minor parent is the subject child of a D&N proceeding, a separate D&N filing on his or her child is not required to secure pay for that child's placement. 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. 12 CCR 2509-7: 7.601.71; *see also* 42 U.S.C. § 675(4)(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 Counsel 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. An appropriate 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. HB 19-1193 is intended to improve access to behavioral health supports for pregnant and parenting women, and attorneys should consider the services and supports established pursuant to this legislation in advocating for alternatives to filing a D&N proceeding.

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 counsel 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.

TIP When advocating for teen parents, regardless of whether an attorney is RPC or a GAL and regardless of whether the teen is the parent or the child, counsel should keep in mind the developmental stage of the teen. Research demonstrates that the teenage brain relies more on the limbic system than the prefrontal cortex in decision-making and that the ventral striatum—in other words, the "reward center of the brain"—responds much more strongly in teens. Rebecca Harkness, Sue Abrams, and Abby Eskin, *Building a Safety Net for Teen Parents in Foster Care: California's Approach*,

36 ABA Child Law Practice 69 (2017). "Having more awareness of how a young parent makes decisions and responds to rewards" will enhance attorneys' engagement with and advocacy on behalf of teens. *Id.* at 70. Additionally, counsel should maximize all opportunities within the D&N proceeding to build up a support system for young parents, as such supports are correlated with positive outcomes. *Id.*

Attorneys should also keep in mind that teen fathers also face challenges and require enhanced advocacy and services. *See, e.g.*, Maeve E. Gearing, *How Do You Teach a Kid to Be a Dad?*, 35 ABA Child Law Practice 31 (2016).

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. 12 CCR 2509-8: 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 to 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

In addition to the housing supports available through the D&N proceeding, Section 8 vouchers provide a rent subsidy to recipient low-income families living in private housing units in the community. *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 24 who have left foster care or will leave foster care within 90 days in accordance with a transition plan and who are homeless or at risk of homelessness. 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: **https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/family**.

Youth eligible for transition to adulthood services may be eligible for room and board assistance, depending on the local department's transition program. *See* **Transition to Adulthood fact sheet**.

CHILDCARE

Colorado Child Care Assistant Program (CCCAP) 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 2503-9: 3.905(H). Additionally, education/training is deemed an eligible activity for teen parents in all counties, whereas counties must specifically designate eligible activities for adults. *See* 9 CCR 2503-9: 3.903 (defining "eligible activities" and "teen parent"), 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 or the fee would produce a hardship on the parent. 9 CCR 2503-9: 3.910(F), (S). For the purposes of CCCAP, 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. 9 CCR 2503-9: 3.903. General information about CCCAP is available at **https://www.colorado.gov/pacific/cdhs/child-care-assistance**.

TIP Many counties have waitlists for their CCCAP programs. Because childcare availability can impact a teen parent's options for employment and education, counsel should work with the teen to get the teen on the waitlist for CCCAP as soon as possible.

Child Welfare childcare 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 12 CCR 2509-4: 7.302.1, 7.302.2. The need for such childcare must be documented in the family services plan. 12 CCR 2509-4: 7.302.2.

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. 9 CCR 2503-6: 3.604.2(O).

2. Women, Infants, and Children Program (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 **https://www.coloradowic.gov/**.

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 in §§ 19-4-101 through 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 $25 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, or free mediation for access and visitation issues—that they can provide to young parents in need of services.

Reasonable Efforts
FACT SHEET

Reasonable efforts define 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 also 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** and 45 C.F.R. § 1356.21 *et seq*.

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 a 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 that reasonable efforts to reunite the family are not required pursuant to § 19-1-115 (7). § 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)(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. § 19-3-702.5(1)(b).
- 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 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 needs or situation prohibit the child or youth from a successful permanent placement. § 702(5)(a).

- 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 Reasonable efforts should be addressed at every hearing. *See* Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Guideline V at 231 (National Council of Juvenile and Family Court Judges, Reno, Nevada, 2016); Leonard Edwards, Reasonable Efforts: A Judicial Perspective (Casey Family Programs and Philanthropic Ventures Foundation, 2014). 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. E.C.*, 259 P.3d 1272, 1276 (Colo. App. 2010), *People ex rel. T.M.W.*, 208 P.3d 272, 275 (Colo. App. 2009); *In the Interest of M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005); *but see People ex rel. S.N.-V.*, 300 P.3d 911, 915–16 (Colo. App. 2011) and *People in Interest of K.B.*, 369 P.3d 822, 826 (Colo. App. 2016). 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. Because a lack of reasonable efforts finding can impact funding for the department, it can be a valuable tool to encourage compliance and provision of services. The OCR's Litigation Toolkit contains a sample "no reasonable efforts" motion. The ORPC Motions Bank contains sample "no reasonable efforts" motions. A GAL may also consider asking the court to hold a no reasonable efforts finding in

abeyance for a short period of time to encourage the department to provide those reasonable efforts quickly.

Exceptions to the reasonable efforts can be found at 42 U.S.C. § 671(a)(15)(C)–(E). These exceptions are set forth in §§ 19-1-115(7) and 19-3-604(1)(b). *See* **Preliminary Protective Hearing 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) and (7). 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(a)(15).

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 do the following:

- Promote the immediate health, safety, and well-being of the child.
- Reduce the risk of future maltreatment of the child who has previously been abused or neglected and protect siblings and any children who are members of the same household.
- Avoid unnecessary placement of the child 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(5), 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.
- Individual case plans.
- Home-based family and crisis counseling.
- Assessments.
- Information and referral services.
- Visitation services.
- Placement services.

§ 19-3-208(2)(b).

TIP Visiting services are an important aspect of reasonable efforts and should be provided for each child unless the child's health and safety would be impacted. *See People ex rel. D.G.*, 140 P.3d 299, 302 (Colo. App. 2006); *People in Interest of A.A.*, 479 P.3d 57, 62 (Colo. App. 2020); *People in Interest of E.S.*, 484 P. 3d 1142, 1147 (Colo. App. 2021); C.R.S. §19-3-217 (2021); **Visits fact sheet**.

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.
- Foster care prevention 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 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. Counsel may access Volume 7 either on the secretary of state's website or through Westlaw.

TIP Counsel should carefully review Core Services listed in Volume 7 and ask the court to order services that can be funded with Core Services funding. *See* 12 C.C.R. § 2509-4: 7.303.14. The ORPC Motions Bank includes sample motions to request funding for services utilizing Volume 7 as authority.

TIP Reasonable efforts determinations should include whether, for parents and children who are disabled under the Americans with Disabilities Act (ADA), the department has made reasonable accommodations in the provision of services under the treatment plan. *See* **Disabilities and Accommodations fact sheet**. HB 18-1104 explicitly requires services to meet the requirements of the ADA. *See* §§ 19-3-100.5(5), 19-3-208(2).

Reinstatement of the Parent-Child Legal Relationship

FACT SHEET

In 2014, the General Assembly found that some children who have not been adopted after the termination or relinquishment of the parent-child legal relationship might benefit from a reinstatement of the parent-child legal relationship. Consistent with these findings, it enacted § 19-3-612 to give children who have lingered in the system without achieving permanency and whose circumstances meet its reinstatement criteria an opportunity to reunite with a rehabilitated former parent.

TIP GALs should continue to keep reinstatement of the parent-child legal relationship in mind as a permanency option for children who have not achieved permanency or who have experienced failed permanency, such as a disrupted adoption. The GAL's investigation and assessment of the possibility of reinstatement of the parent-child legal relationship should include outreach to and conversations with relatives and the parent, consultation with the child, and an independent investigation of the parent's current circumstances and ability to care for the child.

QUALIFICATIONS/CONDITIONS

Section 19-3-612 enumerates the threshold requirements for filing a petition for reinstatement of the parent-child legal relationship. Specifically, a petition must allege the following:

- The child is 12 years of age or older.

- A child younger than 12 who is part of a sibling group as defined in § 19-1-103(98.5) that includes a sibling age 12 or older for whom a reinstatement petition has been filed and who independently meets the remaining criteria for reinstatement is also eligible for reinstatement.

- Both the child and the former parent consent to the petition for reinstatement.
- The child does not have a legal parent, is not in an adoptive placement, and is not likely to be adopted within a reasonable period of time, and other permanency options have been exhausted.
- The child is in the legal custody of a county department.
- The date of the final order terminating the parent-child legal relationship was at least three years before the filing of a petition.
  - The court may allow an earlier petition for reinstatement if it finds that it is in the best interests of the child to consider a petition sooner than three years from the date of the final termination order.
- The dependency action did *not* involve:
  - substantiated allegations of sexual abuse;
  - an incident of egregious abuse or neglect against a child; or
  - a near fatality or a suspicious fatality or near fatality as defined in § 26-1-139.

§ 19-3-612(2).

PROCESS

1. Petition

For children under the age of 16, the county department with custody of a child or the child's GAL may file a petition to reinstate the parent-child relationship. § 19-3-612(2). Additionally, a child who is 16 years of age or older may also file his or her own petition. § 19-3-612(3). While the former parent may not file the petition, if a former parent contacts either the county department that has custody of the child or the child's GAL about possible reinstatement of the parent-child legal relationship, that party must notify the other party within 30 days of the contact and provide the name and address of the former parent. § 19-3-612(4).

The petition must contain all the allegations required by § 19-3-612(2), *see* **Qualifications/Conditions section**, *supra*, and it must

also state the name and age of the child, the county department that has legal custody of the child, and the name and address of the former parent wishing to be reinstated. § 19-3-612(6). The petition must be verified, and the statements made in the petition may be made upon information and belief. *Id.*

TIP Samples of reinstatement petitions and accompanying forms can be found in the OCR's Litigation Toolkit. Because of the similar requirements in adoption to have children consent at age 12, GALs should consider using a formal consent form based on those used in adoption cases.

The petition must be served on the child's GAL, the county department with legal custody of the child, and the former parent who is named in the petition. § 19-3-612(6). The former parent who is named in the petition is entitled to court-appointed counsel once that petition is filed if the parent meets the income eligibility criteria for public counsel, or the parent may retain counsel at his or her own expense. § 19-3-612(5).

2. Initial Hearing

The court must set an initial hearing within 63 days of receipt of the petition. § 19-3-612(7). The court shall provide notice of this hearing to the department with legal custody of the child, the GAL, and the former parent named in the petition. *Id.* In addition, the court must provide notice to the foster parents of the child and, if the child is an Indian child, the child's tribe. *Id.*

At the hearing, the court must consider and make findings about the following threshold conditions:

- The child is 12 years of age or older or meets the sibling group requirement.
- Both the former parent and the child consent to reinstatement.
- The child does not have a legal parent, is not in an adoptive placement, and is not likely to be adopted within a reasonable period of time, and other permanency options have been exhausted.
- The child is in the legal custody of a county department of human services.
- The date of the final order of termination was entered at least three years before the filing of the petition *or* it is in the child's best interests to consider a petition filed less than three years after the final order of termination.

- The original D&N action did not involve substantiated allegations of sexual abuse, an incident of egregious abuse or neglect against a child, a near fatality or a suspicious fatality or near fatality as defined in § 26-1-139.

The court must find that these threshold conditions have been established by clear and convincing evidence. § 19-3-612(9)(a). Additionally, the court must make findings regarding the following:

- whether the child is of sufficient age and maturity and able to express his or her wishes about reinstatement;
- whether the former parent has remedied the conditions that led to the child's removal and termination of the parent-child legal relationship;
- what temporary transition services would be needed by the child and former parent to make reunification successful;
- whether the former parent can provide a safe and stable home for the child;
- whether the former parent has participated in an assessment that supports that reinstatement is in the best interests of the child.

§ 19-3-612(9)(b)–(f).

The Colorado state board promulgated rules around reinstatement of parental rights in January 2016, requiring that an assessment of the parent shall include the following:

- Completing the current Colorado Family Risk Assessment tool.
- Conducting a home visit and inspecting the home for the appropriateness of having a child/youth live there and whether it is adequate to meet the child's/youth's needs.
- Reviewing the termination of parental rights reasons and assessing that those issues no longer exist or no longer present a safety concern.
- Conducting background checks of the former parent and any other adults (18 years of age and older) in the home and sharing the results with all parties to the case, which include the court, attorneys, and other professionals:
  - Check child abuse and/or neglect records in every state where any adult residing in the home has lived in the five years preceding the filing of the petition for reinstatement.
  - Check fingerprint-based criminal history check from the Colorado Bureau of Investigation (CBI), or other state back-

ground check if the parent or other adults in the home lived in another state, and the Federal Bureau of Investigation (FBI).
    - Review the State Judicial Department's case management system and include any finds in the case record.
    - Review the CBI sex offender registry and the national sex offender website.
- Completing a safety assessment at the time the child/youth is placed into the former parent's home.

TIP In addition to what is required by the state board, the following evaluations and assessments may be relevant and helpful: parent-child interactional evaluations, parental fitness evaluations, and family therapy with an assessment component. GALs may consider consulting with the child's therapist or an independent expert to identify other potentially relevant assessments, being mindful not to waive or violate any privileges contrary to the best interests or legal rights of the child. *See* **Children's Psychotherapist-Patient Privilege fact sheet**.

At the hearing, the court must consider information from the county department with legal custody of the child, the child, the GAL, the former parent, the person or agency providing care for the child, and any other person or agency that may aid the court in its review. § 19-3-612(8).

TIP A child's attendance at the initial hearing is necessary to articulate the child's understanding and consent. The GAL should ensure the child knows what to expect and is prepared for the hearing.

If the court finds the threshold conditions are not met, the court shall dismiss the petition. § 19-3-612(10). If the court finds the conditions have been met and that it is in the best interests of the child to work toward reinstatement of the parent-child legal relationship, then the court must approve a transition plan. § 19-3-612(10).

TIP The GAL should conduct a thorough investigation prior to the initial hearing in order to assess the child's best interests and to present evidence relevant to each of the threshold considerations. This investigation should include consultation with the child and an assessment of the child's ability to consent to reinstatement, as well as an independent investigation of the parent's home and success in remedying the issues leading to the termination of the parent-child legal relationship.

3. Transition Plan

If the court finds at the initial hearing that the threshold conditions for reinstatement have been met and that it is in the best interests of the child to work toward reinstatement of the parent-child legal relationship, it must approve a transition plan developed by the county department and designed for reinstatement of the parent-child legal relationship. § 19-3-612(10). The transition plan should include a plan for visitation or placement and designate a trial period of up to six months. *Id.* During the trial period, custody of the child remains with the department. *Id.* As part of the plan, the department shall provide transition services, as needed. *Id.*

TIP Prior to the initial hearing, the GAL should prepare to advocate for transition services and visits that are consistent with the child's best interests. The GAL should obtain the proposed transition plan from the department and try to address any deficiencies in the plan prior to the hearing.

The department is required to assess the visitation or placement with the former parent. § 19-3-612(10). If visitation or placement becomes unsafe for the child or is no longer in the child's best interests, the procedures outlined in §§ 19-3-401 and 19-3-403 should be followed. *Id.*

TIP During the trial period, the GAL should monitor ongoing progress and advocate for any additional services necessary. While the statute does not require review hearings, the GAL should consider requesting additional review hearings if court oversight will advance the plan.

At least 30 days prior to the expiration of the designated trial period, the department must submit a written report regarding the success of the visitation or temporary placement with the former parent. *Id.* The report must be submitted to the court, the former parent, and the GAL. *Id.*

4. Final Reinstatement Hearing

The court shall schedule a final hearing prior to the expiration of the designated trial period. § 19-3-612(11)(a).

At the hearing, the court must again ensure the threshold requirements are still met and shall consider:

- whether the trial period of visitation or placement of the child with the former parent was successful;

- whether the child will lose or gain any benefits or services as a result of reinstatement and how this may affect the child; and
- whether reinstatement is in the best interests of the child.

Id.

After consideration, the court may grant the petition to reinstate parental rights, dismiss the petition, or continue the matter. § 19-3-612(11)(b). In order to reinstate the parent-child legal relationship, the court must find by clear and convincing evidence that doing so is in the best interests of the child. § 19-3-612(11)(b)(I). If the court dismisses the petition, then the county department retains legal custody, the department must arrange for the immediate placement of the child, and the court must set a permanency plan hearing in accordance with § 19-3-702. § 19-3-612(11)(b)(II). If the court continues the matter, the continuance shall not exceed 60 days and the court must either dismiss or grant the petition within 12 months of its filing. § 19-3-612(11)(b)(III). The court may require the former parent or the department to take certain actions before the next hearing. *Id.*

5. Legal Effect of Reinstatement of the Parent-Child Legal Relationship

Upon granting the petition to reinstate parental rights, all rights, powers, privileges, immunities, duties, and obligations of the former parent named in the petition are restored, including those related to custody, control, and support of the child. § 19-3-612(12). However, the parent is not liable for support for the period of time between termination of parental rights and the reinstatement. § 19-3-612(15). The court may require periodic review of the case within 90 days of reinstatement. § 19-3-612(12).

Relative and Kinship Placement
FACT SHEET

For children who must be placed out of the home, placement with relatives or kin promotes meaningful emotional and cultural ties, minimizes the trauma of out-of-home placement, and supports and strengthens the family's ability to protect the children and to provide permanency. 12 CCR 2509-4: 7.304.21(B). Research shows that living with relatives benefits children in several ways, including minimizing trauma, improving well-being, increasing permanency, improving behavioral and mental health outcomes, promoting sibling ties, providing a supportive bridge for older youth, and preserving children's cultural identity and community connections. *See* Heidi Redlich Epstein, *Kinship Care Is Better for Children and Families*, 36 ABA Child Law Practice 77 (July/August 2017).

The use of kinship or relative care for children who must be placed away from their parents furthers the Children's Code's 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. Kin

In Colorado, "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. § 19-1-103(71.3). 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, with a power of attorney, 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

Noncertified kinship care means a child is being cared for by a relative or kin who has a significant relationship with the child but does not meet the certification requirements for a kinship foster home or has chosen not to pursue certification. § 19-1-103(78.7). The kinship care provider may be awarded temporary custody by the juvenile court. §§ 19-3-403(7), 19-1-115(1)(a), 19-3-508(1)(b). The kinship provider and every adult living in the home is required to do a fingerprint-based background check through the Colorado Bureau of Investigation (CBI) and the Federal Bureau of Investigation (FBI) to determine if the kin or any household member has been convicted of child abuse; a crime of violence; an offense involving unlawful sexual behavior; a felony with the underlying factual basis of domestic violence; a felony within the preceding five years involving physical assault, battery, or drug-related offenses; or a pattern of misdemeanor convictions within the preceding ten years. § 19-3-407(1)(a). Additionally, the department will review the court case management system, the state case management system, and the child

abuse and/or neglect registries from every state the adult has lived in for the past five years and the CBI and national sex offender registries. 12 CCR 2509-4: 7.304.21(E)(8). The department must share the results of the fingerprint-based background checks with the GAL pursuant to a court order. *See* § 19-3-203(2).

TIP If the department is unwilling to share the results of the fingerprint background check, the GAL should file a motion with the court pursuant to § 19-3-203(2). It is important that the GAL review the results to make an independent determination about the appropriateness of the placement. If the report identifies any questions or concerns, the GAL should seek additional information from the kinship providers, which may include additional documentation from the previous cases, treatment records, and release to speak with probation or parole officers or other treating professionals. Protective orders may also be an effective tool to address concerns.

The Children's Code generally prohibits the department from placing the child with a noncertified kin provider if the kin or any adult living in the home has been convicted of any of the crimes enumerated in § 19-3-407(1)(a), is a registered sex offender, or has a finding of child abuse or neglect determined to present an unsafe placement for the child. *See* § 19-3-407(2). However, the statute does provide an exception for placements that occur in accordance with CDHS rules or pursuant to "an order of the court affirming placement of the child with the kin." § 19-3-407(3); *see also* § 19-3-508(8) (requiring a court entering a decree for placement with the legal custody of a relative or county department to ensure the completion of all required background checks and that the placement is in the best interests of the child). CDHS rules prescribe a process for addressing and remedying concerns resulting from the identification of a "disqualifying factor" in an existing noncertified kinship placement. *See* 12 CCR 2509-4: 7.304.21(D)(9). This process requires the development of a plan to address and remedy the concerns as soon as possible but no later than two weeks after the placement. The plan must be based on consideration of the placement circumstances, the child's vulnerability, safety issues, necessary supports, and alternative solutions. *Id.*

TIP If the GAL's independent investigation leads the GAL to believe a kinship placement would be safe and appropriate for a child, the GAL should advocate for the department's compliance with its own safety planning process, *see id.*, and/or file a motion requesting the court to order placement with the relative or kin pursuant to § 19-3-407(3).

Noncertified kinship caregivers are eligible for some supports, including family preservation, certification for kinship foster care (including waivers of non-safety certification standards), relative guardianship assistance program, and other funding and in-kind kinship support services available through the department. *See* 12 CCR 2509-4: 7.304.21(E). The department must inform the kinship providers about these options for support and, if the kin is available and willing, assess the kin for foster care certification. *See id.* Noncertified kin may also be available for TANF, child support, social security, and/or death benefits. *See* **Funding and Support for Relative and Kinship Caregivers section**, *infra.*

TIP It is important for the GAL to assess what supports and services are needed for kinship providers and the child. Consistent with the best interests of the child, the GAL should confirm that noncertified kin are receiving all available supports and have been informed of all supports and the opportunity for certification. Noncertified kinship providers do not have the same level of support as foster families and may need guidance on where to go for assistance, what services are available for the child, and what the expectations of the court are. In order to ensure placement stability for the client, the GAL should communicate with kinship providers frequently and make sure they are an active participant in case planning and meetings.

2. Certified Kinship Care

Certified kinship care refers to placement with a relative or kin who has become a certified foster home through a county department or licensed child placement agency pursuant to § 26-6-106.3. 12 CCR 2509-1: 7.000.2. The kinship home must meet the same requirements as non-kinship foster homes to become certified, except that the county director or his/her designee may waive non-safety certification standards for kinship providers on a case-by-case basis. 12 CCR 2509-8: 7.708.7. Certified kinship caregivers for Title IV-E eligible children are entitled to the same level of reimbursement as non-related caregivers. 12 CCR 2509-8: 7.708.7(E)(2)(c).

Kinship caregivers who are not certified foster parents at the time of the child's placement may apply for provisional licensing for an emergency or "child-specific" placement. 12 CCR 2509-6: 7.500.311(C)–(D). The relative has 60 calendar days to complete the training and must submit to CBI and FBI background checks

(including sex offender registries) and child abuse and neglect records checks for every state they have lived in for the past five years. *Id.*

TIP The Colorado Department of Human Services has a kinship connection webpage, which can be accessed at **https://www.colorado.gov/pacific/cdhs/kinship-connection**. It contains resources and guides for kinship placements, including a Kinship Family Foster Care and Non-Certified Kinship Care Comparison chart: **https://www.colorado.gov/pacific/cdhs/kinship-connection**.

TIP A kin provider, either certified or noncertified, 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. 12 CCR 2509-1: 7.000(D); 12 CCR 2509-2: 7.104.1(C)(10). The family services plan must document initial and ongoing kinship placement efforts. 12 CCR 2509-4: 7.301.24(G).

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)(G)(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.

- 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). The court shall inquire about documentation of the required screening and background checks when placing the child in the legal custody of a relative. § 19-3-508(8).
- 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 specific posture and status of the case.

- 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 a 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 a 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. 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. 12 CCR 2509-4: 7.304.21(E)(3)(a)–(b). The kinship care provider shall be advised of all support options available. 12 CCR 2509-4: 7.304.21(E)(2)(a)(1). 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. 12 CCR 2509-4: 7.301.24(J).

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

Colorado regulations provide several options for maximizing support to kinship providers. The county department may consider the kinship provider a means of family preservation and eligible for family preservation services. *See* 12 CCR 2509-4: 7.304.21(E)(2)(a); **Funding and Rate Issues fact sheet**. A kinship provider may also become a certified foster care home and eligible for waiver of non-safety certification standards. 12 CCR 2509-4: 7.304.21(E)(2)(b). County departments can also put into place other funding and support services, including in-kind or concrete services, as mutually agreed upon with the provider. *Id.* at (E)(2)(b).

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; 12 CCR 2509-4: 7.311 *et seq.* The rules require reimbursement for nonrecurring expenses incurred in obtaining guardianship, including legal fees. 12 CCR 2509-4: 7.311.72; *see also* **APR/Guardianship fact sheet**.

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 care 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. 12 CCR 2509-4: 7.304.21(E)(6). The preferred permanent placement is adoption, legal guardianship, or permanent custody. *Id.*; *see also* **Adoption fact sheet**; **APR/Guardianship fact sheet**. 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)(a)(III); *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 for Relative and Kinship Caregivers section**, *supra*.

3. ICWA Preferences

The Indian Child Welfare Act sets forth the requirement that whenever removal from the home is necessary for an Indian child 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); 12 CCR 2509-4: 7.309.6; 12 CCR 2509-4: 7.309.82; *see also* **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 (ICPC). §§ 19-1-115(3)(b), 24-60-1801 *et seq.*; *see also* **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. Processes for expediting ICPC placement can be found at 12 CCR 2509-4: 7.307.6.

5. Intervention

Parents, grandparents, and relatives may intervene as a matter of right without regard to whether the child has previously been in their care. *People in Interest of O.C.*, 308 P. 3d 1218, 1222 (2013); *see also* **Intervenors fact sheet**.

Relinquishment
FACT SHEET

At times parents wish to relinquish parental rights when adoption is an appropriate permanency goal for a child. Article 5 of the Children's Code provides procedures for relinquishment that is a necessary option to promote permanency for children.

RELINQUISHMENT PROCEDURE

The Children's Code allows parental rights to be terminated upon the granting of a petition for relinquishment. § 19-5-103. Venue is proper in the county where the petitioner (parent) or the child resides. § 19-5-102(1). The child must be in Colorado or Colorado must be the home state of the child being relinquished. § 19-5-103(12). While a court may consider a parent's request that a child be placed with a relative or foster parent, the court is not bound by the parent's request. § 19-5-104(2)(a). Conditional or partial relinquishment of parental rights is not authorized. *K.W.E. v. People*, 500 P.2d 167, 168 (Colo. App. 1972). Minor parents are expressly permitted to relinquish parental rights under the statute. *See* § 19-5-104(9); *Batton v. Massar*, 369 P.2d 434, 438 (Colo. 1962).

TIP Counsel must ensure minor parents who seek to relinquish receive relinquishment counseling appropriate to their maturity and developmental level and also ensure they completely understand the rights they are giving up when relinquishing. *See* **Pregnant and Parenting Teens fact sheet**.

TIP A GAL may be appointed to represent the best interests of the child in relinquishment cases if the court finds that there is a conflict of interest between the child and the parent, such appointment would be in the best interests of the child, or the child is 12 years of age or older and the welfare of the child mandates such appointment. § 19-5-103(9). If the court opens a new case for the relinquishment proceeding that pertains to a current D&N client, counsel should ensure the court orders the appointment of the GAL in the relinquishment case as well.

TIP In *People in Interest of L.M.*, 416 P.3d 875 (Colo. 2018), the Colorado Supreme Court held that a juvenile court must proceed under Article 3 when involuntarilty terminating a parent's rights in a D&N proceeding. The trial court erred in proceeding under Article 5 to terminate the father's rights after the mother had voluntarily relinquished her rights.

Prior to filing a petition for relinquishment, parents must obtain relinquishment counseling, and the department must make reasonable attempts to provide relinquishment counseling that is accessible to the parent where a motion for termination has been filed if so requested by the parent. § 19-5-103(1)(a), (4)(c). That counseling should be provided by the county department where the parent resides or from a licensed child placement agency. *Id.* The purpose of counseling is to ensure parents understand the seriousness and finality of a relinquishment order. *See Smith v. Welfare Dept. of City and County of Denver*, 355 P.2d 317, 319 (Colo. 1960) (interpreting earlier version of statute that required advice rather than counseling).

A petition for relinquishment must be accompanied by an affidavit of relinquishment counseling, a copy of the child's birth certificate, and relinquishment interrogatories. § 19-5-103 (1)(b). Counsel filing a petition for relinquishment must also make ICWA inquiries and send notice pursuant to ICWA. §§ 19-5-103 (1.5), 19-1-126; 25 U.S.C. § 1901 *et seq.*

TIP A relinquishment proceeding may constitute a new child welfare proceeding pursuant to ICWA and requires new inquiries and notices. *See* 25 U.S.C. §§ 1903(1)(a), 1913; **ICWA fact sheet**.

TIP If a parent seeks to relinquish parental rights, counsel should ask for the court to order relinquishment counseling be provided by the county for the parent. The counseling is a prerequisite to filing a petition for relinquishment. Forms for relinquishment can be found on the Colorado Judicial website at **https://www.courts.state.co.us**

/Forms/Forms_List.cfm?Form_Type_ID=12. When a termination motion has been filed, respondent parents may pursue relinquishment, and relinquishment proceedings should be certified into the dependency and neglect action. § 19-5-103(4)(c).

TIP If a child is under the age of one year, the parent can have the county department assist with expedited relinquishment proceedings pursuant to §§ 19-5-103.5 and 19-5-103.7. Counsel must be cautious to ensure parental due process rights for all parents, including the non-relinquishing parent, are protected. *See In re C.L.S.*, 252 P.3d 556, 559 (Colo. App. 2011); *In re J.M.A.*, 240 P.3d 547, 551 (Colo. App. 2010).

RELINQUISHMENT HEARINGS

The primary consideration in a relinquishment proceeding is the best interests of the child. § 19-5-103(7)(a)(III). There is a rebuttable presumption that relinquishment is not in the best interests of a child over the age of 12 who objects to relinquishment. § 19-5-103(7)(b). Prior to granting a relinquishment, the court must find relinquishment counseling has been provided and the parent's decision to relinquish is knowing and voluntary and not the result of any threats, coercion, or undue influence or inducements. § 19-5-103(7)(a).

TIP If a parent has an intellectual or developmental disability, counsel and the courts must ensure the parent understands all of his or her rights, as well as the effect and finality of the relinquishment order; otherwise, the relinquishment can be challenged. *See Petition of J. B. P.*, 608 P.2d 847, 849 (Colo. App. 1980). Counsel might consider requesting a GAL be appointed for a parent who has an intellectual or developmental disability. § 19-1-111(2)(c); *see also* **Preliminary Protective Hearing chapter** (describing considerations for appointment of a GAL for the parent). Counsel should consult with experts who work with individuals with intellectual and developmental disabilities to assist in assessing capacity and competency to consent to relinquishment. *Cf.* § 25.5-10-231 (outlining procedure to determine capacity to consent to sterilization).

Courts may interview children in court. § 19-5-103(10). Counsel may be present at the interview, and a record must be made of the interview. *Id.*; *see also* **Children in Court fact sheet**. Courts may also hear from professional personnel. § 19-5-103(11). Opinions of professional personnel are to be provided in writing to the parties in advance of the hearing and are part of the court file, but under seal. *Id.*

Parties can request that professional personnel be made available for cross-examination at the relinquishment hearing. *Id.*

Grandparents and other relatives can ask for custody of a relinquished child if they make a timely request prior to the relinquishment hearing. § 19-5-104(2)(a). Courts shall give preference to grandparents and other specified relatives when timely requests have been made and the placement is in the best interests of a child. *Id.* While grandparents and other relatives can participate in a D&N proceeding, they do not have standing to participate in a relinquishment. *See Petition of B.D.G.*, 881 P.2d 375, 378 (Colo. App. 1993). Grandparents and other specified relatives do not have right to notice about the relinquishment proceedings. § 19-5-104(2)(a). When a sibling group has been relinquished, it is presumed to be in the best interests of the siblings to place them together. § 19-5-104(2)(b).

EFFECT OF RELINQUISHMENT

Relinquishment does not terminate the relationship between or among siblings that are subject to the petition. § 19-5-101(3). A final order of relinquishment does not terminate the obligation for child support until an adoption decree is entered. § 19-5-104(5). A child also remains an heir of the relinquishing parents until an adoption decree is entered. *Id.*

REVOCATION

Relinquishment are final orders and cannot be disturbed in the absence of clear and convincing evidence of fraud or duress. § 19-3-104(7)(a). A relinquishing parent must make his or her claim of fraud or duress within 91 days of the relinquishment order. *Id.*

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). Consistent with federal law, Colorado's Children's Code and child welfare regulations provide numerous protections for siblings in D&N proceedings.

TIP HB 19-1288 contains strong declarative language about the importance of being able to continue sibling relationships for youth and children in foster care and the role of all involved adults to promote sibling relationships. *See* § 19-7-202. This legislation also outlines a list of nineteen rights that apply to siblings in foster care, regardless of whether parental rights have been terminated. *See* § 19-7-203(1). These rights include, but are not limited to joint placement, placement in close geographical distances, prompt notification of changes in sibling placement, frequent and meaningful contact with siblings and opportunities to be actively involved in each other's lives, foster and adoptive placements who are trained on the importance of sibling relationships, and GALs who advocate for frequent and meaningful contact. *Id.* The legislation makes clear that these rights do not apply when they are not in the best interests of each sibling. *Id.* Revisions to Volume 7 reinforce this important legislation and can serve as a helpful tool in advocating for sibling placement and contact with department staff. *See* 12

CCR 2509-4:7.301.24; 12 CCR 2509-4: 7.304.201, 12 CCR 2509-1:700 et seq., 12 CCR 2509-2:7.106.121(A)(2).

OCR's Youth Center contains a siblings bill of rights that GALs can distribute to children/youth and use as a communication tool. *See* https://coloradochildrep.org/youth-center/. OCR can also make these materials available in printed form upon request.

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). This definition of sibling includes a sibling, by birth, of an adopted person. *Id.* 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 biological sibling, a step-sibling or former step-sibling, or an adoptive sibling.

2. Sibling Group

A "sibling group" means biological siblings. § 19-1-103(98.5).

TIP HB 18-1288 eliminated the requirement that siblings needed to be raised together or have lived together in order to qualify for the protections applicable to sibling groups.

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. 12 CCR 2509-4: 7.304.61(C). These efforts shall be documented in the child's case record. *Id.*

The Preventing Sex Trafficking and Strengthening Families Act provides for more expansive search of siblings by requiring the department to notify all parents of a sibling of the child, where such parent has legal custody of such sibling, in addition to other relatives. *See* P.L. 113-128 § 209 (amending 42 U.S.C. § 671(a)(29)). For the purpose of these provisions, "sibling" is defined to include individuals

defined as siblings under state law as well as individuals who would have been considered a sibling of the child under state law but for a termination or other disruption of parental rights. *See id.* (adding 42 U.S.C. § 675(12)).

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 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). Adult siblings may be eligible to serve as noncertified kinship caregivers. *See* **Relative and Kinship Placement fact sheet**. Adult siblings may also be eligible to serve as a certified foster placement, as well as for the provisional licensure and non-safety certification waivers applicable to other relatives and kin. *See id.*

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); 12 CCR 2509-4: 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; 12 CCR 2509-8: 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. 12 CCR 2509-4: 7.304.64(B). The department must ensure that timely and regularly scheduled sibling visits are outlined in case plans based on individual circumstances and needs of youth. § 19-7-204(2)(d). The department must provide information on sibling contact in the visiting plan and must consult the youth about the youth's wishes as to sibling contact. § 19-7-204(1).

If in the best interest of each sibling, the department must promote frequent contact between siblings (including in-person visits, phone calls, texts, etc.). § 19-7-204(2)(a). Sibling contact should not be limited to time or duration of contact with parents, and restrictions of sibling visits should not be a consequence for a behavior problem, unless the visit is contrary to the best interests of one of the siblings. § 19-7-204(2)(b), (c).

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. 12 CCR 2509-4: 7.304.64(B)(5).

If a child in foster care requests an opportunity to visit a sibling, the county department that has legal custody of the child shall

arrange the visit within a reasonable amount of time and document the visit. § 19-7-204(3). If a sibling requests to visit a sibling 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. § 19-7-204(4). If a criminal action is pending in which any of the siblings 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 visits between the siblings. § 19-7-204(5).

TIP For the purposes of sibling visits, § 19-7-204(7) defines "sibling" to include a biological sibling, a step-sibling or former step-sibling, or an adoptive sibling. Additionally, CDHS regulations implementing this statute require the department to follow these procedures upon the request of a GAL. *See* 12 CCR 2509-4: 7.304.64(C).

Upon a mutual request for sibling visits or a GAL request for a sibling visit on behalf of a child, 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.

12 CCR 2509-4: 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. § 19-7-204(5). It must document its reasons for making this determination. *Id.*

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 review the department's documentation regarding sibling visits and should also engage in independent investigation to assess whether sibling visits are in the best

interests of the child. 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. In fact, CDHS regulations state that children in foster care should expect their GAL to advocate for frequent contact with siblings unless the GAL determines that contact is not in the best interests of the youth. 12 CCR 2509-4: 7.304.201(2)(L).

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); 12 CCR 2509-4: 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. 12 CCR 2509-4: 7.301.24(K). 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. 12 CCR 2509-4: 7.301.24(K)(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(6)(f). In determining whether a child is in a permanent

home, the court shall consider placement of the children or youth together as a sibling group. 19-3-702(4)(f). 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(3); *see also* **Placement of Siblings Together in Foster Care subsection**, *supra*.

TIP Sibling placement may positively affect permanency outcomes, including return home, adoption, and subsidized guardianship. *See* Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption: A Bulletin for Professionals* at 6–7 (January 2013), *available at* **https://www.childwelfare.gov/pubPDFs/siblingissues.pdf**.

TIP Parents may support or object to sibling visits. RPC for a parent whose position differs from the GAL or department should argue that a fit parent's fundamental right to parent without state interference outweighs the statutory provisions in the Children's Code.

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. 12 CCR 2509-4: 7.311.21. Although Title IV-E eligibility is not a requirement for RGAP, *see* 12 CCR 2509-4: 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, the prospective relative guardian, and the county department that the arrangement is in the best interests of the siblings. 12 CCR 2509-4: 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.12 CCR 2509-4: 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. § 19-5-207.3(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 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. 12 CCR 2509-4: 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

Camp to Belong (an international nonprofit organization dedicated to reuniting brothers and sisters who have been separated in foster care through week-long summer camps and other events): **http://camptobelong.org/**.

Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption: A Bulletin for Professionals* (January 2013), *available at* https://www.childwelfare.gov/pubs/siblingissues/.

Elevating Connections (a Colorado-based nonprofit organization that hosts Camp to Belong in Colorado and other connecting events): http://www.elevatingconnections.org.

National Center for Youth Law, *Keeping Siblings Together: Past, Present, and Future, available at* https://youthlaw.org/publication/keeping-siblings-together-past-present-and-future/.

National Resource Center for Family-Centered Practice and Permanency Planning, *Siblings Hot Topics web page:* http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/siblings.html.

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 voluntarily or involuntarily joined in a [D&N] proceeding 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 spou-

sal 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; **Contempt fact sheet**.

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.*

TIP Counsel must consider whether to ask for protective orders limiting access to records and the case file for special respondents when in the best interests of a child or to protect the privacy rights of the parties.

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
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 requires 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, their ability to provide reasonable parental care, and the child's welfare and safety are the critical issues in determining whether reunification and termination of the court's jurisdiction are appropriate. *See* § 19-1-102(1)(c); *People ex rel. E.D.*, 221 P.3d 65, 68 (Colo. App. 2009); *see also Interest of A.W.R.*, 17 P.3d 192, 198 (Colo. App. 2000) (stating the pivotal concern in maintaining a child in his or her own home is the parents' ability to provide reasonable parental care). "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; success is determined by whether the treatment plan corrected

or improved the original conduct or condition and whether the parent is able to give the child reasonable parental care. *See, e.g., People in the Interest of C.L.I.*, 710 P.2d 1183, 1185 (Colo. App. 1985).

TIP The Colorado Family Safety Assessment continuum, comprising safety, risk, and needs assessments, is utilized throughout the D&N case. *See* 12 CCR 2509-4: 7.301.1 and 12 CCR 2509-2: 7.107.1 *et seq.* Counsel should obtain discovery of the assessment materials from the county department to fully assess the need for continued court involvement. The GAL should also engage in an independent investigation of the child's best interests and consult with the child in a developmentally appropriate manner to understand the child's position regarding reunification. *See* CJD 04-06(V)(B), (D).

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.*, 271 P.3d 1116, 1122 (Colo. App. 2011); *see also* **Adjudicatory Hearing chapter**. The case must also be dismissed if there are no child protective issues and the department is not providing services. *See People ex rel. E.D.*, 221 P.3d 65, 68.

TIP A motion 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). 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.

A deferred/continued adjudication shall extend no longer than six months without review by the court and may be continued for only one additional six-month period. *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).

FOSTER YOUTH IN TRANSITION

Youth who meet Colorado's Foster Youth in Transition Program (FYTP) eligibility criteria have the right to receive services through this program at least until the age of 21. §19-7-304 (eligibility and

enrollment). Youth may access this program by entering into a Voluntary Services Agreement (VSA), §19-7-306, at which point, a new case is created by the filing of a petition with the court in an Article 7 case, §19-7-307. For additional information on the FYTP program, see **Transition to Adulthood fact sheet**.

TIP GALs should consider objecting to the termination of the court's jurisdiction for any youth under age 18 who has not obtained permanency through placement with family or a family-like option. Prior to agreeing to termination of any case involving an older 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 transition to adulthood–planning requirements are fulfilled, including the development of a meaningful transition plan. *See* **Transition to Adulthood fact sheet**. GALs should also be aware 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 transition to adulthood services. *See id.*

Prior to closing a case before a child's eighteenth birthday, the court or the child's GAL must notify the child that the child will lose the right to continue to receive Medicaid until the maximum age set by federal law if the case closes before the child's eighteenth birthday. § 19-3-702(4)(c).

ACHIEVMENT OF PERMANENCY PLAN OF ADOPTION, GUARDIANSHIP, OR ALLOCATION OF PARENTAL RESPONSIBILITIES (APR)

The adoption of the child, 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).

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. 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, 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** and **APR/Guardianship fact sheets**.

Trafficking
FACT SHEET

Children involved in D&N proceedings face heightened risk of human trafficking and commercial sexual exploitation. *See* Cristina Cooper and Eva J. Klain, *What the Preventing Sex Trafficking and Strengthening Families Act Means for Your Practice*, 35 ABA Child Law Practice 161, 161 (November 2016); Allison Newcombe, *An Advocate's Guide to Protecting Trafficking Victims in the Child Welfare System*, 34 ABA Child Law Practice 145, 150 (October 2015). The Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub. L. No. 113-183 (PSSFA), requires state and child welfare agencies to implement policies and procedures to address this issue.

TIP Children suspected of being victims of human trafficking or at risk for human trafficking present complex issues for practitioners. GALs should advocate for effective identification, case planning and treatment, and protections in all cases in which trafficking may be an issue.

DEFINITION OF CHILD ABUSE

Section 19-1-103(1)(a)(VIII) includes in the definition of "abuse" or "child abuse and neglect" those cases in which a child is subjected to human trafficking for sexual servitude as outlined in C.R.S. § 18-3-504. "Third-party abuse" incorporates this definition. § 19-1-103(108).

Section 19-3-308(4)(c) provides that when a county department of human services receives a report and concludes that a child has been a victim of intrafamilial, institutional, or third-party abuse in

which he or she has been subjected to human trafficking for sexual servitude under C.R.S. § 18-3-504 or commercial sexual exploitation of a child, the department must, when necessary and appropriate, immediately offer social services to the child and family. The statute specifically permits the department to file a petition on behalf of the child in juvenile court. *Id.*

IDENTIFICATION AND SERVICES

The PSSFA requires state and child welfare agencies to implement policies and procedures regarding the identification, reporting, and determination of appropriate services for victims of human trafficking. *See* PSSFA at § 101 (amending 42 U.S.C. § 671(a)(9)(C)(i)).

Colorado regulations require county departments to do the following when a county has reason to believe a child is, or is at risk of being, a victim of human trafficking: screen the child for risk of human trafficking using a state-approved human trafficking screen; determine service needs; and document the details of the screening, assessment, and services. 12 CCR 2509-4: 7.303.4(A)(1)–(3) ; 12 CCR 2509-1:7.000.2.

Additionally, upon the return of a child who has been missing from a county department's custody, the department must make reasonable efforts to determine the primary factors that contributed to the child being missing and to determine the child's experiences while missing, including conducting a human trafficking screen to determine if the child is a possible human trafficking victim. 12 CCR 2509-4: 7.303.4(B)(3). The department must respond to these factors when providing services. *Id.*

TIP As part of the GAL's independent investigation, the GAL should investigate and advocate for appropriate services related to the child's trafficking.

PROCEDURES FOR LOCATING MISSING CHILDREN

The PSSFA also addresses the increased risk of human trafficking for foster children who run from foster care by requiring child welfare agencies to implement procedures to rapidly locate a child missing from foster care, determine why the child ran from foster care, and determine whether the child was a victim of human trafficking while missing from care. *See* PSSFA at § 104 (amending 42 U.S.C. § 671(a)(35)).

The state and tribal child welfare agencies must report the missing child to local law enforcement and the National Center for Missing and Exploited Children within 24 hours of the child being reported missing to the child welfare agency. *Id.*

In 2015 Colorado also adopted the same requirements as the PSSFA regarding the law enforcement and NCMEC notice when a child is missing from agency custody. § 19-1-115.3. Law enforcement receiving notification pursuant to this statute must notify the Colorado Bureau of Investigation for transmission to the Federal Bureau of Investigation for entry into the National Crime Information Center database. C.R.S. § 16-2.7-103.

Colorado regulations further enforce this PSSFA provision by providing that if a child in the legal custody of the county department is missing, the department must do the following:

- Report immediately and no later than 24 hours to the local law enforcement agency and the National Center for Missing and Exploited Children.
- Make reasonable efforts to locate the child and document those efforts a minimum of once per month in the state Automated Case Management System.

12 CCR 2509-4: 7.303.4(b)(1)–(2).

The county must also conduct a screening to determine whether the child was subject to human trafficking. *See* **Identification and Services section**, *supra*.

LAW ENFORCEMENT REPORTING REQUIREMENTS

The PSSFA requires child welfare agencies to report immediately (no later than 24 hours) to law enforcement after receiving information on a child identified as a human trafficking victim. PSSFA at § 102 (amending 42 U.S.C. § 671(a)(34)).

Section 19-3-308(4)(c) provides that if at any time after the commencement of an investigation the county department has reasonable cause to suspect the child or any child under the same care is a victim of human trafficking, the department must notify local law enforcement as soon as reasonably practical. Colorado regulations further reinforce this requirement by requiring a county department that has reason to believe a child is, or is at risk of being, a victim of human trafficking to report immediately and no later than 24 hours upon discovery to the local law enforcement agency. 12 CCR 2509-4: 7.303.4(1)(4)–(5).

TIP GALs can promote compliance with these provisions by assisting in the identification process and establishing connections with local human trafficking task forces, boards, or subcommittees.

TIP These statutes contemplate a joint investigation with law enforcement and the county department of human services in cases involving trafficking. Many law enforcement agencies have specialized units that handle trafficking cases and/or work collaboratively with the Federal Bureau of Investigation's Innocence Lost Task Force. As these investigative activities will implicate the D&N proceedings and the best interests of the child, the GAL should be diligent in knowing who within the law enforcement agency is conducting the investigation and advocating for the child's best interests during the law enforcement interview process. In addition to advocating for any available protections against criminal or juvenile prosecution, *see* **Immunity / Safe Harbor section**, *infra*, the GAL should advocate for an interview process that will not further traumatize the child. Considerations regarding the time and location of the interview, the qualities and training of the interviewer, and the implementation of supportive services may all assist in reducing further trauma to the child.

IMMUNITY / SAFE HARBOR

Some states have passed safe harbor legislation providing immunity for prostitution-related offenses for minors, *see Child Sex Trafficking Legal Overview*, 34 ABA Child Law Practice 151 (October 2015). SB 19-185 provides an affirmative defense to many charges for a minor who can prove by a preponderance of the evidence that he or she was, at the time of the offense, a victim of human trafficking for involuntary or sexual servitude and was forced or coerced into engaging in the criminal act charged. *See* § 18-1-713.

Additionally, § 18-3-504(2.5) provides an affirmative defense to the offense of Human Trafficking of a Minor for Sexual Servitude if the individual charged can show by a preponderance of the evidence that at the time of the offense he or she was a victim of human trafficking for sexual servitude who was forced or coerced into engaging in the human trafficking of minors for sexual servitude. Individuals may be able to get some conviction records sealed through § 24-72-706, and juvenile expungement procedures may apply to some offenses related to trafficking. *See* **Crossover Youth fact sheet**.

TIP When there is an open delinquency case, GALs should engage in ongoing communication with the child's defense counsel regarding the D&N trafficking investigation so that the child's counsel can take any steps necessary to protect the child from making incriminating statements in law enforcement interviews related to their victimization. GALs should also work with defense counsel to advocate for immunity agreements prior to any interviews and should advocate for protective orders under § 19-3-207(2.5), making sure that the child is aware of the limitations of such orders. *See* § 19-3-207 fact sheet.

Transition to Adulthood
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 not only may be related to the issues leading to involvement with the child welfare system but also may 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 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 transition to adulthood 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 at* 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 authorized services to former foster youth ages 18 to 21 and imposed 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. States were also provided with the option to extend Medicaid coverage to former foster youth (up to age 21 at that time). 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.

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, contained several provisions promoting the permanency and improved well-being of older youth. First, the law allowed states to expand the definition of "child" for IV-E reimbursement to include youth in foster care up to age 21. 42 U.S.C. § 675(8)(B). A state could then receive federal matching funds if it extended 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 required that personalized transition plans for youth aging out of foster care be developed within 90 days prior to the youth's exit from foster care. 42 U.S.C. § 675(5)(H). Independent living program services became available to children adopted or

placed in kinship guardianship at age 16 or older, and eligibility for education and training vouchers was extended to children who exit foster care to kinship guardianship or adoption at age 16 or older. 42 U.S.C. § 677(a)(6), (i)(2).

3. Preventing Sex Trafficking and Strengthening Families Act

The Preventing Sex Trafficking and Strengthening Families Act of 2014 (PSSFA), Pub. L. No. 113-183, 128 Stat. 1919, sought to protect foster children and improve the child welfare system by (1) preventing children/youth over whom the State has responsibility for placement, care, or supervision from becoming victims of sex trafficking; (2) creating "normalcy" for youth in foster care; (3) improving the permanency goal of other planned permanent living arrangement (OPPLA); and (4) increasing the amount of adoption incentive payments and improving guardianship subsidies. Among other changes, the act prohibits OPPLA as a permanency goal for children under the age of 16; requires documentation of intensive, ongoing, and unsuccessful efforts for family placement for children with an OPPLA goal; requires that children ages 14 years and older assist in the development of and be consulted about their case plan; and sets forth improvements in practice concerning youth participation in enrichment activities, youth empowerment during the case planning process, and notification of youth rights.

COLORADO PROGRAMS TO PREPARE YOUTH FOR A SUCCESSFUL TRANSITION TO ADULTHOOD

1. Documentation of Transition to Adulthood Services in the Family Services Plan

For youth ages 14 and older, the family service plan must include a description of services and programs that will help the child prepare for the transition from foster care to successful adulthood. *See* 42 U.S.C. § 675(1)(D). The child must be involved in the development of the plan and is entitled to select up to two members of the team developing the plan. 42 U.S.C. § 675(5)(B), (C)(iii)–(iv), (D). The department must provide the child with a document describing his or her rights with respect to education, health, visitation, and court participation. *Id.* (amending 42 U.S.C. § 675a(b)).

Colorado regulations require 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 14 and older.

12 CCR 2509-4: 7.305.1. The department is mandated to assess all youth in foster care who have reached the age of 14 for transition to adulthood services and to complete the relevant section of the family services plan, regardless of the specified permanency goal. 12 CCR 2509-4: 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 in consideration of their age and appropriate developmental expectations/milestones, along with an evaluation of individual, family, community, and financial support resources available to promote emancipation or semi-independent living. *Id.* Following the assessment, the Roadmap to Success (RTS) must be developed. 12 CCR 2509-4:7.305.2(C) Federal requirements regarding youth participation, youth selection of the members of the planning team, and notification of youth rights are reflected in 12 CCR 2509-4:7.305.2(C). Note that the Preventing Sex Trafficking and Strengthening Families Act replaced the term "independent living" with "transition planning for successful adulthood." *See* 42 U.S.C. § 675(1)(D), (5)(C)(i)–(ii).

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. 12 CCR 2509-4: 7.301.23(A). The GAL should ensure that each service satisfies these criteria. The GAL should also ensure that the child is involved in the development of his or her plan for successful transition to adulthood and that the plan is tailored appropriately to the child's strengths and needs. As with any service, a "cookie cutter" approach to developing a transition 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 services and programs to prepare for a transition to successful adulthood 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 14 years of age or older includes independent living services needed to assist the youth to make the transition from foster care to a successful adulthood. 42

U.S.C. § 675(5)(c). Independent living, however, is not a permanency goal. *See* **Permanency Hearing chapter**.

3. Credit Check

The Children's Code provides that youth in foster care over the age of 16 are entitled to a free credit report. § 19-7-102(1). Colorado regulations extend this protection to children age 14 and over. 12 CCR 2509-4: 7.305.2(E). The department must inform the court of inaccuracies of the report and refer the matter to a nonprofit or governmental entity. § 19-7-102(1); s*ee also* 12 CCR 2509-4: 7.305.2(E) (detailing procedures). The GAL must be informed if there is evidence of identity theft. 12 CCR 2509-4: 7.305.2(E)(4). The GAL must then advise the youth of possible consequences and options to address the identity theft. § 19-7-102(1). CDHS must maintain 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. This plan must be developed a minimum of 90 business days prior to the projected emancipation date of the youth. 12 CCR 2509-4: 7.305.2(F). 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 and Other Required Records subsection**, *infra*. The youth must be provided with a copy of the plan, free of charge. 12 CCR 2509-4: 7.305.2(F).

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 earlier 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, and proof of foster care. 42 U.S.C. § 675(5)(I); § 19-3-702(4)(d); § 26-5-101(3)(o); 12 CCR 2509-4: 7.305.5. The youth must also be provided with a Health Passport, health insurance information, and other pertinent health records and educational records. § 19-3-702(4)(d); 12 CCR 2509-4: 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 26. § 25.5-5-101(1)(e). Prior to closing a case before a child's eighteenth birthday, the court or the child's GAL must notify the child that the child will lose the right to continue to receive Medicaid until the maximum age set by federal law if the case closes before the child's eighteenth birthday. § 19-3-702(4)(c).

7. Transition of Youth with Intellectual and Developmental Disabilities into the Adult System

HB 14-1368 provides for the transition of youth with intellectual and developmental disabilities who are being served through the child welfare system into the home and community-based programs for adults with developmental disabilities. *See generally* § 25.5-6-409.5. This legislation required the transition of youth over the age of 18 at the time of the legislation unless the court or an interdisciplinary team determined that due to extenuating circumstances such transition was not in the best interests of a youth. *See* § 25.5-6-409.5(2), (3)(a). Departments have ongoing responsibilities to identify children in the child welfare system with intellectual and developmental disabilities who will become 18 in the upcoming six months and to plan for their transition into the adult system prior to their eighteenth birthday. § 25.5-6-409.5(3)(b)–(c). The best interests of the child must take precedence over any transition process. § 25.5-6-409.5(5).

8. Driver's License

HB19-1023 eliminated significant barriers for foster youth in obtaining a driver's permit and license. The statute also allows foster children who obtain a driver's instruction permit to drive with any person who holds a valid driver's license and is at least 21 years of age.

See § 42-2-106(1)(h). It permits minors sixteen years of age or older to independently contract for motor vehicle insurance. Youth in foster care may now submit their own proof of insurance and obtain their driver's license without the signature of a responsible adult, GAL, or representative of the department or DYS. § 42-2-108(1)(a)(I)(A). This is in addition to the previously existing process by which youth in foster care may submit their own proof of insurance and a GAL or a representative of the county department or DYS may sign the application without signing an affidavit of liability. *See* 42-2-108(1)(a)(II). The GAL or representative must notify the court, obtain consent from the foster parent if the youth is under seventeen, and consult with the foster parent if the youth is seventeen or older. *Id.* HB21-104 clarified that, by signing an application the individual does not impute liability on themselves or waive any existing governmental immunity. §42-2-108(2)(b). The legislation also clarifies that minors sixteen years of age or older may independently contract for motor vehicle insurance. § 10-4-104.

FOSTER YOUTH IN TRANSITION PROGRAM

HB 21-109, Colorado's Foster Youth in Transition Program (FYTP), empowers older youth who currently reside or previously resided in foster/kinship care to make important decisions about their lives while receiving services and supports as they transition to adulthood.

TIP OCR's website has a FYTP resource page with a link to online referral forms, information about the program, and other resources: **https://coloradochildrep.org/youth-center/transition-program/**. Additionally, OCR's litigation toolkit has many legal resources to help attorneys who represent youth under the FYTP, such as flow charts, resources explaining the program and the role of counsel, sample pleadings and links to form petitions and Voluntary Service Agreements (VSA).

1. Eligible Youth

Eligible youth must meet certain criteria. First, the youth needs to be at least 18 years old but less than 21 year old (unless an older age is required by federal law). §19-7-304(1)(a). Second, on or after the youth's sixteenth birthday, the youth must have been placed in foster care as defined in §19-1-103, or have been adjudicated dependent

and neglected and placed in noncertified kinship care. §19-7-304(1)(b). Third, to the extent such requirements are not waived by federal law, the youth must be: engaged in or intend to engage in completing secondary education (or an education program leading to an equivalent credit); attending an institution that provides postsecondary or vocational education; working part- or full-time for at least eighty hours per month; or participating in a program or activity designed to promote employment or remove barriers to employment. §19-7-304(1)(c)(I). The education or work requirement does not apply to an individual who is incapable of engaging in such activities as a result of a medical condition if documentation of this condition is regularly updated. §19-7-304(1)(c)(II). Fourth, the youth must enter into a Voluntary Services Agreement (VSA) and be substantially fulfilling the youth's obligations under the VSA. §19-7-304(1)(d). A VSA is a standardized agreement entered into by a participating youth pursuant to §19-7-306.

TIP The definition of foster care in §19-1-103(66) includes, not only being placed in the custody of a county department of human services, but also being in the custody of DYS and placed in a community-based placement. Therefore, youth in JD cases who were in the legal custody of a county department of human services, in kinship placement, or who were in a community-based placement by DYS on or after the age of 16 are eligible for the FYTP regardless of whether they were adjudicated dependent and neglected.

Youth have the right to appeal a county department's decision that they are not eligible. §19-7-315; 12 CCR 2509-3, 7.203.42 (A)(3). Youth may also file a petition with the court asserting their eligibility for the program. §19-7-307(1).

2. Services and Support

Under the FYTP, a county department must offer to participants, at minimum, assistance with Medicaid enrollment, safe, affordable and stable housing, and case management services. §19-7-305(1). Case management services must include assistance with the following items: employment or other financial support and financial literacy, §19-7-305(1)(c)(II); driver's license/identification card, §19-7-305(1)(c)(III); expungement of criminal records (upon request and if available), §19-7-305(1)(c)(5); as applicable, Special Immigrant Juvenile Status (upon request and if available), §19-7-305(1)(c)(VII); obtaining health and education records, §19-7-305(1)(c)(VIII); developing long-

term relationships, §19-7-305(1)(c)(IX); and relative information, §19-7-305(1)(c)(X).

Counties must also provide eligible youth with assistance with securing safe, affordable, and stable housing. §19-7-305(b). If the county has legal authority for physical placement of the child, the youth may be placed in any placement approved by the county or the court for which the participating youth is otherwise eligible, so long as the youth consents and the placement is the least restrictive option to meet the participating youth's needs. §19-7-305(1)(b)(I)(B). If the placement is a qualified residential treatment program (QRTP), then the procedures at §19-1-115 must be followed. Any foster care or residential placement may be paid for out of foster care maintenance or other housing assistance funds. §19-7-305(1)(b)(I)(A). Any expenses to be paid by the youth must be based on the youth's ability to pay. §19-7-305(1)(b)(I)(A).

If the county does not have legal authority for physical placement of the youth, the youth may reside anywhere where the youth is eligible to live. §19-7-305(1)(b)(II)(A). In which case, the youth may access any financial support for the housing that the youth is eligible to receive. §19-7-305(1)(b)(II)(B).

TIP The services specifically described in the FYTP statute are the minimum of what counties must provide. Counsel for youth should advocate for any additional services that would assist the youth in making a successful transition to adulthood.

3. Right to Counsel, Client-Directed Representation

Youth participating in Colorado's Foster Youth in Transition Program have the right to legal representation by client-directed counsel throughout all phases of the program. §19-7-308(1). This is accomplished in one of three ways: 1) by the automatic transition from the GAL to a client-directed representation role when a youth turns 18 in an open D&N proceeding; 2) the pre-filing assignment of counsel by the Office of the Child's Representative for youth choosing to reenter the system after age 18; or 3) the appointment of counsel by the court for all youth appearing in Article 7 proceedings. *Id.*; §19-7-306(1)(b).

In ongoing dependency and neglect proceedings, HB 21-1094 provides that the youth's GAL begins acting as client-directed counsel immediately upon the youth turning age 18. §19-3-203(4). However, an exception exists if the youth is deemed incapacitated, in which

case the GAL continues with best interest representation and client-directed counsel is also appointed. § 19-3-203(4). §19-3-704 (referencing Article 15). A motion to determine incapacity must be filed prior to the youth's eighteenth birthday. §19-3-704(1).

While the GAL's transition to the counsel role is automatic, at the first hearing following a youth's 18th birthday, the Court must advise the youth of the right to counsel and the option to either consent to have the same attorney who served as their GAL continue as counsel (if that attorney remains available and has no conflicts of interest) or to have a different attorney appointed as counsel from the OCR's appointment list. §19-3-203(5). The legislation clarifies that the OCR oversees and pays for these attorney services. §13-91-105(1)(a)(VI). *See also* **Article 7 Proceedings and Right to Counsel** section, *infra*.

TIP To ensure this right to counsel is protected and to avoid conflict issues that may arise from the automatic transition to counsel in specific cases, GALs should file pleadings with the court to resolve any anticipated issues prior to the youth's eighteenth birthday, including notices of the transition of the GAL role and request to set the transition hearing, motions to appoint a new attorney to serve as counsel prior to the youth's eighteenth birthday due to a conflict, and motions for determination of incapacity/continuation of the GAL appointment. OCR's Litigation Toolkit contains many helpful resources for attorneys explaining and implementing client-directed representation, including but not limited to visuals to help explain the difference and a sample client engagement letter.

4. Accessing the Foster Youth in Transition Program

Eligible youth may enter the FYTP in one of two ways: 1) directly from a D&N proceeding through a transition hearing; or 2) by reentering the system after leaving it.

a. Transition Hearing. For all youth turning 18 while a D&N case is ongoing, a transition hearing must be held within 35 days of youth turning 18 to determine whether youth will opt into the transition program or choose to emancipate. §19-3-705(1). At the transition hearing, a youth either requests to emancipate, asks for a continuance, or opts in to the transition program. *Id.* Emancipation requires an emancipation discharge hearing, and a personalized emancipation transition plan must be developed and finalized no more than 90 days prior to the hearing. §19-7-302(3), §19-7-310(1). When emanci-

pating a youth, the court must follow hearing requirements and case closure procedures set forth in the statute. *See* § 19-3-705(4); Case **Closure Hearing and Emancipation** section, *infra*.

If a youth requests a continuance, the continuance may be for up to 119 days, but it may not go beyond the last day of the month the youth turns the maximum age allowed. §19-3-705(3)(e). The youth may request a continuance if they need additional time to decide or to prepare for emancipation. §19-7-310(5). The court may also order a continuance, with the youth's consent, to allow time to improve the plan, to gather necessary documents and records or for other reasons necessary to allow for successful transition to adulthood. §19-3-705(5).

At least seven days before the transition hearing, the department must file a report with the court that includes several requirements. §19-3-705(2). First, the report must include a description of the department's reasonable efforts towards achieving the youth's permanency goals and a successful transition to adulthood. §19-3-705(2)(a). Second, the report must include an affirmation that the department has provided the youth with all necessary records and documents as listed in the statute. §19-3-705(2)(b). Third, the report must include an affirmation that the department has informed the youth, in a developmentally appropriate manner, of the benefits and options available to the youth through the FYTP and the voluntary nature of that program. §19-3-705(2)(c). Fourth, the report must include a statement of whether the youth has made the preliminary decision whether to emancipate or to enter the FYTP. §19-3-705(2)(d). If the youth has chosen to emancipate, then the report should include a copy of the youth's emancipation transition plan, finalized no more than 90 days prior to the youth's transition. §19-3-705(2)(d)(I). If the youth is choosing to enter the FYTP, then the department shall file a petition according to §19-7-307. *See* **Article 7 Proceedings and Right to Counsel** section, *infra*.

TIP Prior to the transition hearing, counsel for youth should ensure that the youth is aware of the options available under the FYTP. Regardless of whether the youth chooses to enter into the FYTP or emancipate, counsel for youth should ensure that the youth has received all the necessary records and documents prior to the transition hearing in order to set the youth up for as much success as possible in their transition to adulthood. At the transition hearing, counsel for youth should ensure that the youth receives a full advisement of their rights from the court.

TIP If the youth who is the subject of the transition hearing is the only child involved in the D&N case, the D&N will close upon the youth's emancipation or transition to the FYTP, at which point RPC's representation of the parent(s) ceases.

b. Reentering the System. Under HB 21-109, any eligible youth who does not have a current dependency and neglect case but wants to receive services may reenter the system as many times as the youth would like to. §19-7-301(2), §19-7-304(2). In order to initiate this process, the youth should contact the county department where the youth believes they resides. §19-7-304(2). If the youth contacts the county, the county must explain the program and determine whether the youth is eligible within three business days of the youth's request. §19-7-304(3). Within three days of an eligible youth's decision to enter the program, the county must prepare and execute a VSA. *Id.* Within the same timeframe, the county must refer the youth to OCR for the appointment of counsel. §19-7-306(1)(b). Within 90 days of entering into a VSA with the youth, the county must initiate an Article 7 proceeding by filing a petition. §19-7-304(3). With or without the assistance of counsel or the county, an eligible youth may file a petition with the court to initiate an Article 7 case at any time. §19-1-307(1).

If determined not to be eligible, the county must notify the youth and provide reasons for such determination, information on how to appeal the denial and contact information for the OCR. *Id.*

If a youth contacts the OCR directly inquiring about the FYTP, the OCR will typically assign the youth an attorney when the referral is received. The attorney may help the youth with issues related to the Article 7 case, such as requesting services, understanding the youth's options, pursuing an appeal of a denial, etc.

5. Commencement of Article 7 Proceeding and Appointment of Counsel

If a youth chooses to opt-in to the FYTP, a Petition, a Voluntary Services Agreement (VSA) and a Roadmap to Success (RTS) must be filed with the court in an Article 7 case. §19-3-705(6). A VSA is a standardized form specifying the terms of the youth's participation in the program. §19-7-302(15). A RTS is an individualized document describing the services needed to help the youth transition to successful adulthood, based upon the youth's own goals, and it should include a description of the youth's barriers and the support activi-

ties needed to address the barriers. §19-7-302(15).

Either the county department or the youth may file an Article 7 Petition with the court at any time. §19-7-304(3). For youth opting into the FYTP as a continuation of the services they are receiving through their open D&N case, the department must file the Petition pursuant to § 19-7-307 before the court may dismiss the Article 3 case. §19-3-705(6).

TIP The Colorado Department of Human Services has created and made available several forms and other helpful documents, including a standardized VSA and petition for FYTP cases. *See* **https://drive.google.com/drive/folders/1ZYQTqCPR9U8HWycZW51gCeG8oJOcy_rL**.

At the commencement of the Article 7 proceeding, the youth will likely already have counsel through counsel's appointment in the D&N proceeding or because the OCR has assigned counsel for youth receiving voluntary services through the FYTP. §19-7-308(1). If not, the court may appoint counsel for the youth from the appointment eligibility list. §19-7-306(1)(b), 19-7-308(1). If a youth would like their previous GAL to serve as counsel and the attorney is eligible to take such cases, the court may appoint that attorney. §19-3-203(5). For youth 18 or order who have diminished capacity, the court may appoint a GAL to represent the youth's best interest. §19-7-308(2). Note that the GAL does not replace client-directed counsel. *Id.* All youth, regardless of diminished capacity, have a right to counsel in Article 7 proceedings. §19-7-306(1)(b).

7. Periodic Reviews in Article 7 Cases

In an Article 7 FYTP case, periodic reviews must occur at least once every six months to ensure that the transition program is providing the youth with the necessary services and supports. §19-7-312(1), (2). The court will conduct the periodic review hearing in a way that seeks youth's meaningful participation, including offering remote options for participation to accommodate the participating youth's work, school, or treatment commitments. §19-7-312(6). If the court finds the youth is not substantially fulfilling their obligations pursuant to the VSA, the court can enter orders for the county to provide additional services and supports to the youth. §19-7-312(4). The court can also enter orders for the youth to follow in order to continue to be eligible for the program. §19-7-312(5). The court must make findings regarding reasonable efforts to implement the youth's

case plan/RTS, the continued need for foster care, and whether the placement is the least restrictive setting to meet the youth's needs. §19-7-312(7). Because the FYTP is a voluntary program, contempt against the youth is not available as an option for compliance.

TIP The FYTP defines an eligible youth as one who is engaged in *or intends to engage in* education, work or an educational or work-related program. *See* §19-7-304(1)(c)(1). Therefore, an attorney representing a youth who wants continue with the FYTP, but faces barriers to attending school or engaging in employment, should consider advocating for the youth's continued eligibility in the program.

8. Case Closure and Emancipation

As long as certain procedures are followed, closure of the Article 7 case may occur at any time upon the youth's request or based on a county department's motion to determine if the youth still meets eligibility requirements. §19-1-307(4)(b), §19-7-313(1)(b), (c). However, case closure ***must*** occur prior to the last day of the month the youth turns the maximum age. §19-7-313(1)(b). At least 90 days prior to case closure due to the youth turning the maximum age, the county must provide the participating youth with written notice of the date the VSA will end, the youth's transition plan, and information about community resources that may benefit the youth. §19-7-313(1)(c).

If a youth is emancipating, an emancipation discharge hearing is required prior to case closure. §19-7-313(1)(a), (1)(b), (2). The court may continue the emancipation discharge hearing up to 119 days with the youth's consent but not past the last day of the month in which youth turns 21 (or greater age as required by federal law). §19-3-705(3)(e), (5). The county must finalize an Emancipation Transition Plan (ETP) no more than 90 days prior to the date of the emancipation discharge hearing. §19-7-310(1). An ETP must include specific options concerning housing, health insurance, education, local opportunities for mentors and continuing support services, and workforce supports and employment services. *Id.* The ETP must also include information concerning the importance of designating another individual to make health care treatment decisions on the participating youth's behalf if the youth becomes unable to participate in such decisions and the participating youth does not have, or does not want, a relative or legal guardian who would otherwise be authorized to make such decisions. *Id.* The ETP must pro-

vide the participating youth with the option to execute a health care power of attorney and include details at the participating youth's discretion. *Id.*

At least 7 days prior to the hearing, the county must file a report with the court that includes: a reasonable efforts description; an affirmation that the youth has been provided with necessary records, documents, and contacts; and a copy of the youth's ETP. §19-7-310(4). At the emancipation discharge hearing, the Court must review the ETP and determine if the county has made reasonable efforts toward the youth's permanency goals and preparing the youth for a successful transition to adulthood. §19-3-310(3)(a), (b). The court must also determine whether the youth has been provided with all necessary records/documents required, and whether the youth has been enrolled in Medicaid or advised of Medicaid eligibility. §19-3-310(3)(c), (d). Finally, the court will advise the youth about the right to re-enter up to the maximum age allowed. §19-7-310(3)(e).

Venue
FACT SHEET

The Children's Code establishes specific substantive and procedural requirements for determining the proper venue for a D&N proceeding and any change of venue.

VENUE AT THE COMMENCEMENT OF THE PROCEEDING

All D&N proceedings must be commenced in the county in which the child resides or is present. § 19-3-201(a)(a). The Children's Code does provide an exception for petitions to reinstate the parent-child legal relationship, which must be filed in the county that has legal custody of the child. *See* § 19-3-201(1)(b); **Reinstatement of the Parent-Child Legal Relationship fact sheet**.

CHANGE OF VENUE

1. Permissibility of Change of Venue

When proceedings are commenced in a county other than that of a child's residence, the court may transfer the case to the county where the child's legal parent or guardian resides or is located unless any of the following circumstances exist:

- Transfer would be detrimental to the best interests of the child.
- Adjudication has not taken place (unless continued pursuant to § 19-3-505(5)).

- The legal parent or guardian has a history of frequent moves, unless there is evidence of stability in the most recent move indicating an intent to remain in the new residence for six or more months.
- The case is likely to be closed within three to six months.
- The transfer will disrupt the continuity or provision of services.
- The case is an expedited permanency planning hearing, unless the party supporting transfer rebuts, by a preponderance of evidence, that the change of venue would result in a delay in the proceeding that would be detrimental to the best interests of the child.

§ 19-3-201(2)(a)–(f), (3).

The Children's Code makes clear that the child's residence is determined by the county in which the child's legal parent or guardian resides or is located, regardless of whether the child physically resides in a foster care or residential facility located in another county. § 19-3-201(1.5).

2. Procedures Applicable to Change of Venue

If permitted under the statute, the court may transfer venue upon its own motion or the motion of any interested party. § 19-3-201(2).

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).

TIP A wealth of social science research exists demonstrating the benefits of visits and identifying relevant considerations for attorneys. GALs can access information about this research through the OCR's Litigation Toolkit, available at **www.coloradochildrep.org**. RPC can access this research through the ORPC.

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). In determining whether visiting services are necessary and appropriate, the health and safety of the child are the paramount concerns. *See B.C.*, 122 P.3d at 1070. 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. 12 CCR 2509-4: 7.304.64.

The visiting plan shall specify the frequency and type of contact with parents and others with the child, as appropriate (unless vis-

its are determined to be detrimental to the child). 12 CCR 2509-4: 7.304.64(B). At a minimum, the visiting plan should provide methods 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; and the child's permanency plan. *Id.*

TIP Counsel should advocate for a visiting plan designed to address the unique needs and circumstances of the child and family and ensure that all factors deemed relevant by Colorado regulations are considered in the development of the visiting plan.

When children have been removed from their parents' care, parent-child visitation is a strong predictor of family reunification. *See Family Reunification: What the Evidence Shows*, Child Welfare Information Gateway Issue Brief (June 2011), *available at* **https://www.childwelfare.gov/pubPDFs/family_reunification.pdf**. Effective visit planning involves planning not only for logistics but also for opportunities to build parental skills and improve the interaction between parents and children. *Id.* 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. Counsel should advocate for visits to be conducted in as homelike a setting as possible and advocate for settings that that replicate the unique social and cultural environments in which attachment relationships would normally develop.

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 and advocate for the most normalized setting appropriate.

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* **Reasonable Efforts fact sheet**. 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). Face-to-face visits should occur absent concerns about the child's health or safety. Visits should not be curtailed or restricted based on a blanket policy, such as on a department rule prohibiting visitation for parents who have warrants, *People in Interest of E.S.*, 494 P.3d 1142, 1147 (Colo. App. 2021), or a rule which requires parents to demonstrate sobriety for a certain period of time prior to starting visits, *People in Interest of A.A.*, 479 P.3d 57, 63 (Colo. App. 2020). Instead, any restriction on visits must be necessary to provide for the health and safety of a child in an individual case. *See E.S.*, 494 P.3d at 1147; A.A., 479 P.3d 57.

TIP As appropriate, counsel should make arguments regarding visits within a reasonable efforts framework 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 and an obligation to order visits pursuant to § 19-1-114(2)(b) and §19-3-217. It is not necessary for a treatment plan to be adopted for visitation to begin, and pursuant to §19-3-217,

visits between parents and children should be arranged as soon as possible following removal from the home. §19-3-217(1). 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. *Id.* (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. HB21-1101 mandates this policy by requiring that, at the temporary custody hearing, the court enter temporary orders for reasonable visitation as long as the court finds visitation is in the best interest of the child. §19-3-217(1). Additionally, the court is to order contact (phone, virtual or in-person) between the child and parent within 72 hours, excluding weekends and holidays, unless the parties agree to a delay or if the court finds that a delay is in the best interest of the child. *Id.*

TIP The limited information available at the preliminary protective hearing 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 the period of time required by statute. *See* §19-3-217.

Counsel can facilitate timely visits by identifying who the ongoing caseworker will be at the preliminary protective hearing and ensuring that 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 kin, 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.

TIP Studies have demonstrated that caseworker attempts to engage parents have an effect on the regularity of parent visits *See, e.g.*, Ande Nesmith, *Factors Influencing the Regularity of Parental Visits with Children in Foster Care*, 32 Child and Adolescent Social Work Journal 219–28 (June 2015). Caseworker activities of calling parents, helping parents resolve scheduling or location conflicts, and working with parents to find solutions to other barriers can help increase parents' attendance at visits. *See id.* RPC should advocate for increased caseworker engagement tasks by conveying that that caseworkers or contracted providers are responsible for more than an initial courtesy call; they must continue their efforts to engage parents and to document these efforts in the case file as long as visits are permitted or ordered by the court.

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 types of visits described below may be used to maximize the

duration, frequency, and benefits of visits. The GAL should talk to the child about the child's experience at the visits and ideas for appropriate visit settings and activities as part of the GAL's independent investigation. *See* CJD 04-06(V)(b).

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 in-person visits.

1. Supervised Visits at the Department

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.

TIP 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. In addition, the GAL (or qualified staff) is required to observe the child's interaction with parents pursuant to CJD 04-06.

2. Visits Supervised 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, *see* § 19-1-103(71.3), recognizes the important role a child's pre-placement network of support can continue to play during the child's out-of-home placement. 12 CCR 2509-4: 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 similar to that of kin, such as a pastor, former teacher, or neighbor. 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, the 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/sites/default/files/visit_coaching_manual.pdf.

5. Therapeutic Visits

Therapeutic visits engage the use of mental health professionals to promote attachment and develop parenting skills. *See* Margaret Smariga, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*, 26 ABA Child Law Practice 117, 123 (October 2007). This service may be beneficial when a parent's own childhood may have not provided many examples of positive, nurturing relationships, *see id.*, or when the issues that have resulted in the D&N proceeding require therapeutic support for children during contact with parents.

6. 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.

7. Unsupervised Visits

Unsupervised visits are just as they sound—unsupervised.

8. 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, what security procedures are required, 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* Barbara Bosley et al., eds., *Parenting from Prison: A Resource Guide for Parents Incarcerated in Colorado* 42 (2002), *available at* **https://www.ccjrc.org/wp-content/uploads/2016/02/ParentingFromPrison.pdf** (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. 12 CCR 2509-4: 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.* at 302.

Once visitation is granted, a parent cannot have an ongoing suspension, reduction or restriction of those visits unless: 1) the court enters an emergency court order (in which case the parent is entitled to a hearing within 72 hours unless the parties agree otherwise); 2) the court holds a hearing to suspend, reduce or restrict visits and enters such an order. §19-3-217(3). This provision does not prevent the department from cancelling a visit if the child's health or welfare is endangered or if a parent consents. *Id.* This provision does not apply if there is a protection order or if facility prevents the visit from occurring. §19-3-217(4).

TIP Counsel should be cautious not to automatically interpret a child's negative reaction to a visit as an indication that visits must restricted. 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. See 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 visitation. *Id.* at 21.

TIP GALs should be vigilant in ensuring that any modification to the visiting plan is consistent with the purpose of the Children's Code, the relevant caselaw cited in this fact sheet, 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)). The combined holdings of *People in Interest of E.S.*, 494 P.3d 1142 (Colo. App. 2021), and *People in Interest of A.A.*, 479 P.3d 57 (Colo. App. 2020), direct GALs to ensure that any suspension or restriction of visits is grounded in findings related to harm to the child, as opposed to the parent's behavior.

TIP RPC should advocate for orders that allow the parties to agree on increasing visitation and reducing the level of supervision without further court order. RPC should object to orders that allow visits to subsequently be reduced without a court order in violation of C.R.S. § 19-3-217.

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 and great-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 nonparent, as well as D&N proceedings. § 19-1-117(1)(b). In situations where a parent has either been determined to be fit or not yet found unfit, courts must apply the Troxel presumption in that the parent is acting in the child's best interests when evaluating requests for grandparent visitation. *See People in Interest of N.G.G.*, 459 P.3d 664, 669 (Colo. App. 2019). In such circumstances, grandparents carry the burden of showing, by clear and convincing evidence, that the parent's decision should not be afforded the Troxel presumption and that the visitation requested is in the best interests of the children. *Id.* A grandparent's statutory standing to seek visitation pursuant to § 19-1-117 terminates when parental rights are terminated. *See People in the Interest of J.W.W.*, 936 P.2d 599, 601 (Colo. App. 1997); *People in the Interest of C.N.*, 2018 COA 165. Conditions on visits are within the sound discretion of the trial court, taking the best interests of the child into consideration. *See In re Oswald*, 847 P.2d 251, 254 (Colo. App. 1993).

TIP The *J.W.W.* holding that a grandparent may no longer have standing to seek visits with the child pursuant to the grandparent visitation statute after termination of parental rights 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**.