

2009 COLORADO SUMMIT ON CHILDREN, YOUTH & FAMILIES

Survey of Case Law Pertaining to the
Colorado Children's Code

January 1, 2008 to May 29, 2009

In the little world in which children have their existence, whosoever brings them up, there is nothing so finely perceived and so finely felt, as injustice.

Charles Dickens, **Great Expectations** (1861)

Does the exclusionary rule apply in D&N cases?

- “No”. A court must weigh the deterrent benefits of applying the rule against the societal cost of excluding relevant evidence.
- People ex rel. A.E.L and K.C-M., 181 P.3d 1186 (Colo. App. 2008)

What due process rights apply to parents in a D&N case?

- Notice of the proceedings
- Opportunity to be heard by presenting evidence and cross-examining witnesses
- Effective assistance of counsel
- People ex rel A.E.L. and K.C-M., 181 P.3d 1186 (Colo. App. 2008)

Is the deadline for TPR hearings jurisdictional?

- “No”. Although CRS 19-3-602(1) requires the court to conduct a termination hearing in EPP cases within 120 after filing of the motion, failure to comply is not jurisdictional.
- People ex rel. T.E.H., 168 P.3d 5 (Colo. App. 2007); People ex rel. D.M., 186 P.3d 101 (Colo. App. 2008)

Does noncompliance with the UCCJEA invalidate TPR?

- “Not necessarily.”
- The mandatory record may be “a memorandum or an electronic record made by [either] court after the communication.”
- Allowing a law clerk to conduct the conference may be harmless error.
- People ex rel. D.P., 181 P.3d 403 (Colo. App. 2008)

May courts rely on polygraph tests to terminate parental rights?

- “No.” Furthermore, a court may not accept the opinion of an expert based, in whole or in part, on the results of polygraph testing.
- People ex rel. M.M., Jr., ___ P.3d ___, 2009 WL 1012910 (Colo. App. 2009).

Under ICWA is DHS excused from giving tribal notice based on a previous waiver?

- “No.” A previous waiver for an older sibling does not excuse tribal notice for a younger sibling, even though both children were born of the same parents. Tribes are free to change enrollment criteria at any time.
- People ex rel. T.M.W., ___ P.3d ___, 2009 WL 888263 (Colo. App. 2009)

What must be included in an ICWA notice to a tribe?

- Practically speaking, everything DHS knows or could have reasonably known about the child, parents, grandparents, etc.
- People ex rel N.D.C., ____ P.3d ____, 2009 WL 1152176 (Colo. App. 2009)

What should Respondent's counsel do if there are no viable grounds for appeal?

- Either think of something or file an Anders brief.
- People ex rel. D.M., 186 P.3d 101 (Colo. App. 2008).

In termination hearings, what is the proper burden of proof?

- Clear and convincing evidence for all cases except ICWA.
- Beyond a reasonable doubt for ICWA cases.
- People ex rel. L.O.L., 197 P.3d 291 (Colo. App. 2008).

Does an indigent parent have the right to court appointed counsel in a stepparent adoption?

- “Maybe.” A court must consider (1) the importance of the parent's interest; (2) the State’s interest in a correct decision; (3) the State’s pecuniary interest; (4) the State’s interest in informal procedures; (5) the complexity of the proceedings; (6) the ability of a *pro se* parent to defend; and (7) the risk of an erroneous result.”
- In re Petition of C.A.O., 192 P.3d 508 (Colo. App. 2008)

In a stepparent adoption, what is the meaning of “abandonment”?

- “Abandonment is primarily a question of intent [T]he court may not find abandonment unless the totality of the circumstances shows the natural parent has left the child willfully without an intent to return.” Compliance with restrictive parenting time orders is not abandonment.
- In re J.A.V., ___ P.3d ___, 2009 WL 540657 (Colo. App. 2009)

Can the prosecution compel a caseworker to testify in a related criminal case?

- “No”. The caseworker’s testimony is barred unless the defendant consents. See, CRS 19-3-207(2) (treating professionals) and 13-90-107(1)(g) (social workers).
- People v. Gabriesheski, 205 P.3d 441 (Colo. App. 2008), *cert. granted* 2009 WL 1111429 (Colo. 2009)

Can the prosecution compel a GAL to testify in a related criminal case?

- “No”. Unless the child consents, the GAL’s testimony is barred by the attorney-client privilege. See, CRS 13-90-107(1)(b), CJD 04-06, CRPC 1.14, 1.6.
- People v. Gabriesheski, 205 P.3d 441 (Colo. App. 2008), *cert. granted* 2009 WL 1111429 (Colo. 2009)

Can a defendant obtain abuse & neglect records from DHS?

- “No”. A CR defendant is not entitled to receive child abuse or neglect records directly from DHS. The defendant must file an appropriate motion identifying the type of information sought, explaining why disclosure of the information is necessary, and requesting the trial court to conduct an *in camera* review of the records to determine if public disclosure is necessary to resolve a material issue in the case. People v. Jowell, 199 P.3d 38 (Colo. App. 2008) (applying CRS 19-1-307).

Is a fetus a “person” for purposes of the Colorado Criminal Code?

- If the crime is homicide, the answer is “no” because of the statutory definition of “person”. CRS 18-3-101(2).
- For non-homicide crimes to which no definition applies, the answer is “yes”.
- People v. Lage, ___ P.3d ___, 2009 WL 1477215 (Colo. App. 2009) (applying common law “born alive” doctrine)

Is a fetus a “person” for purposes of the Colorado Wrongful Death Statute?

- “Yes”. A child who is born alive, but who dies shortly thereafter from prenatal injuries, is a “person” within the meaning of the wrongful death statute, regardless of whether the child was viable at the time of injury or viable at the time of birth.
- Gonzales v. Mascarenas, 190 P.3d 826 (Colo. App. 2008)

Does parental preference apply to a motion to terminate a guardianship?

- “No”. Where a mother moved to terminate grandparent guardianship and modify APR, the applicable standard was best interests and endangerment. A parent’s fundamental due process right does not apply in post-decree proceedings.
- In re MJK, 200 P.3d 1106 (Colo. App. 2008)

Can a juvenile court in child support proceedings decide APR and PTR?

- “Yes”. If no other related cases are pending in district court or juvenile court, a juvenile court in a child support case brought by CSEU has subject matter jurisdiction over APR and PTR as well as CS.
- People ex rel S.E.G., ____ P.3d ____, 2009 WL 1332089 (Colo. App. 2009)