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<tr><td>SUPREME COURT, STATE OF COLORADO

101 W. Colfax Ave., #800, Denver, CO 80203</td><td rowspan="3">∆COURT USE ONLY ∆</td></tr>
<tr><td>Certiorari to the Court of Appeals, 2010CA2408
Denver Juvenile Court, City and County of Denver
Case No. 2008JV2939</td></tr>
<tr><td>Petitioners:
L.A.N. a/k/a L.A.C. by and through her Guardian ad Litem and The People of the State of Colorado,

In the Interest of Minor Child:
L.A.N. a/k/a L.A.C.

v.

Respondent:
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Atty. Reg.#: 12476/35514/38573</td><td>Case No. 2011SC529</td></tr>
<tr><td colspan="2" align="center">RESPONDENT’S ANSWER BRIEF</td></tr>
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Certiorari to the Court of Appeals, 2010CA2408 Denver Juvenile Court, City and County of Denver Case No. 2008JV2939	
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Attorneys for Respondent: Pickard & Associates, P.C. Joe Pickard/Kerry Simpson/Justin Ross 10146 W. San Juan Way, #200 Littleton, Colorado 80127 Phone Number: (303) 989-6655 E-Mail: law@lawpickard.com Fax Number: (303) 989-6773 Atty. Reg.#: 12476/35514/38573	Case No. 2011SC529
CERTIFICATE OF COMPLIANCE	

I hereby certify that this Answer Brief complies with all requirements of C.A.R. 28, 32, and 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Answer Brief complies with C.A.R. 28(g). It contains 6186 words.

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STATEMENT OF THE ISSUES

1. Whether a guardian ad litem in a dependency and neglect proceeding can waive the child's psychotherapist-patient privilege.
2. Whether the court of appeals erred in determining that the child's psychotherapist-patient privilege was waived with respect to certain materials in the psychotherapist's file.

STATEMENT OF THE CASE

On November 18, 2008, Respondent Mother (hereinafter "Mother") brought her daughter, L.A.N. to Children's Hospital (hereinafter "Children's") for help. (Transcript of December 15, 2008 Hearing, p25, ll. 11-16). L.A.N. was acting out violently, engaging in aggressive behavior, and making suicidal statements. (V. I, p. 3). Children's refused treatment and sent Mother and L.A.N. away. (Transcript of December 15, 2008 Hearing, p.25, ll. 19-20). Mother returned to Children's on November 21, 2008, imploring them to help. L.A.N. was admitted. (Transcript of December 15, 2008 Hearing, p.26 ll. 18).

During this time, Mother was actively concerned for the mental health and well-being of her child. (Transcript of December 15, 2008 Hearing, p.46, ll. 9-13). She visited L.A.N. regularly even though Children's became tired of "dealing with" her when she challenged their professional recommendations or ignored restrictions on visitation hours. (V. I, pp. 17-18). She supported L.A.N.'s continued treatment through Children's even when Children's proposed L.A.N.'s premature release. (Transcript of December 15, 2008 Hearing, p.46, ll. 9-13). L.A.N. participated in day treatment for several weeks; however ultimately Children's recommended her transport to Ft. Logan. (Transcript of December 15, 2008 Hearing, p. 46, ll. 21-23; p. 47, ll. 15-22). It was at that point Mother panicked and attempted to flee with L.A.N. (V. I , p. 3).

When the Denver Department of Human Services intervened, Mother was homeless but cooperative . (Transcript of December 15, 2008 Hearing, p. 48, ll. 17-19; p.21, ll.16-19). Mother identified that she did not react appropriately by attempting to abscond with the child from Children's. (V. I, p. 103). She wanted her daughter to get better. (V. I, p. 103). After meeting with Mother, the intake social worker did not have concerns that Mother was hurting L.A.N.; rather her concerns were about family stability

and L.A.N.'s precarious emotional state. (Transcript of December 15, 2008 Hearing, p.22, ll. 15-18). Mother entered an admission and a treatment plan was ordered. (V. I, p. 72).

When the parties appeared in court for dispositional hearing on April 7, 2009, the caseworker reported a family strength: "London loves her parents a lot. She feels safe with them and the parents love her very much as well..." (V. I, p. 69). Mother was expected to maintain a legal lifestyle, legal employment, suitable housing, and a budget as part of her treatment plan. (V. I, p. 69). Mother was also ordered to do a mental health evaluation, therapy, domestic violence classes and parenting classes. Initially, the instability of Mother's lifestyle due to homelessness was a large concern. (V. I, p. 113).

When L.A.N. was released from Children's she was placed in the care of her maternal aunt, Kristi New. (V. I, p. 57). At this juncture in the case, L.A.N. missed her Mother very much. (V. VI, p. 381). L.A.N. had regular supervised and therapeutic visitation with Mother which continued during the course of the case. (V. I, pp. 120-123; V. V, p. 213). During the initial visits, London asked about returning home. (V. I, p. 122).

In late April, 2009, Ms. Newland began seeing L.A.N. weekly for therapy. (V. IV, p 156-157). Ms. Newland has a bachelor degree in business administration and a masters of arts in transpersonal counseling psychology from Naropa Institute. (V. IV, p. 95-96). L.A.N's behavior continued to be extreme. (V. I, p 120-122). On May 8, 2009, Mother had a second child not subject to this action. (V. I, p.114). L.A.N appeared to express some jealousy over Mother's newborn infant and stated, "mommy why don't we throw the baby in the sewer drain?" (V. I, p.123).

According to Ms. Newland's own statement, it took her weeks to get L.A.N. to open up to her in therapy. (V. II, p. 387). It took Ms. Newland four to six one-hour weekly sessions to begin engaging in "good therapy" session with L.A.N. (V. II, p. 387). Ms. Newland diagnosed trauma and pointed to Mother as source within weeks because her Mother's homelessness. ("I knew she [L.A.N.] was in a shelter.") (V.V, p. 105). Ms. Newland declared L.A.N. did not have bipolar; and offered an opinion that "The therapist believes that [Mother] has mental health issues." (V.I, p. 115). Ms. Newland had never met with or spoken with Mother at that time. By June 1, 2009, Ms. Newland recommended the child not return home. (V. II, p. 158). L.A.N. remained in out of home placement.

In the summer of 2009, L.A.N. was placed with the maternal grandparents Sharon and Clint New. (V.I, pp. 159-160). Ms. Sharon New was herself sexually abused as a child by her own stepfather, Mr. Walker. (V. VI, pp. 466-467). Ms. New testified that when Mother was a child, Ms. New left Mother in the overnight care of Mr. Walker. (V. VI, p. 467). Mother was sexually assaulted by Mr. Walker. (V. VI, pp. 466-467). Mother reported this abuse to her mother, Ms. New. Ms. New did not report the incident nor engage Mother in therapy. (V. VI, pp. 466-467). Ms. New continued to include Mr. Walker in family gatherings but told Mother she "didn't have to be around him." (V. VI, p. 467). Relations between Mother and Ms. New were naturally strained and "very tense." (V. 5, p.233, 234). Ms. New believed Mother was malicious and vindictive. (V. VI, p.282, 283).

Ms. New reported on a regular basis to the caseworker, GAL, and Ms. Newland regarding L.A.N. (V. V, pp. 274-276). In January, 2010, Mother requested in-home therapeutic visits and/or any visits in an effort to move the case toward reunification. (V. II, p. 412-420). On January 25, 2010, and over the objection of Ms. Newland, the Court ordered in-home therapeutic visits between Mother and L.A.N. (V.II, p. 537). Ms. Newland later revealed at the termination hearing that she opposed in-home visits because

the parents were not making progress on their treatment plan. (V. V, p. 271). When asked if there was "anything else that led you on January 25th or before to oppose in-home therapeutic visits?", Ms. Newland's answered "No." (V. V, p. 273). Three visits occurred.

On or about February 22, 2010, The GAL motioned the trial court to stop in-home therapeutic visits alleging that LAN's behavior had deteriorated significantly during this period, specifically at school. (Vol. I, pp. 287-291; and Transcript of February 23, 2010 hearing, p. 4-5). Ms. Newland had also apparently gathered information from Ms. New that L.A.N. had not been doing well at school. (V. IV, p. 151). Months later at the termination trial, teacher Barbara Eckert would contradict this assertion: She saw L.A.N's behavior escalate during the course of the year with no special spikes in January-February, 2010. (V. V, p. 332). Furthermore, Ms. Eckert testified to specific instances of L.A.N.'s egregious behavior both before and well after in-home visits had stopped. (V. V, p. 333; V. V, p. 339). One extreme incident on March 31, 2010 had threatened L.A.N.'s suspension from school.

In support of terminating in-home visits, the GAL tendered a 5 page letter authored by Ns. Newland opposing L.A.N.'s return home (and

therefore in-home visits) (V. I, p. 269; V. III, pp. 23-27). It should be noted that neither Ms. Newland's report nor anything else in the record indicates that Ms. Newland's basis for recommending against in-home visits between Mother and child was the "trauma bond" opinion which surfaced months prior to termination hearing.

The assigned caseworker did not take a strong position (recommended visits "at DDHS, In-Home, or within the community." (Vol. I, p. 279)); and the family therapist recommended more intensive in-home therapy. (Transcript of February 23, 2010, p. 9). The Court considered the reports of Ms. Newland, Ms. Eccles, the caseworker, and information from the GAL and ended in-home visits. (Transcript of February 23, 2010, p. 15).

On June 19, 2010, Mother began meeting with Dr. Curry at the request of the Department. (V. V, p. 63). The goal was to stabilize relations between Mother and her own mother, Ms. New, to make way for the possibility of APR (shared time with L.A.N. between Mother and Ms. New). The caseworker saw Mother as controlling; and was concerned that Mother acted "frustrated" when she was told L.A.N. was not returning home. (V. V, p. 258). Despite the history, the caseworker was troubled at Mother's "rage" toward Ms. New for minimizing Mother's experience of sexual abuse

as a child. (V. V, p. 259). There was one meeting with Dr. Curry between Mother and Ms. New. (V. V, p. 68).

During the course of the case, the caseworker met with and considered Ms. Newland's position against returning home during the case. (V. VI, p. 421-422). The GAL also obtained information about L.A.N. from Ms. Newland; and relied on her expertise. (V. I, p. 269). Ms. Newland gave input to Dr. Wind, a psychologist with recommendations of termination aligned with Ms. Newland. (V. IV, p. 137). On June 17, 2010, the State filed a Motion to Terminate Parental Rights. (V. II, p. 350). The GAL endorsed Ms. Newland as an expert witness. (V. I, p. 322; V. II, p. 426). The State called Ms. Newland as a witness at termination trial. (V. IV, p. 95).

At the time of termination, Mother had completed her psychological evaluation; was engaged in anger management and therapy; (V. V, p. 305); was on TANF and had maintained housing during case. (V. V, p. 309). She was continuing in therapeutic and supervised visits with L.A.N. (V. V, p. 168).

Ms. Newland offered some conflicting and confusing testimony. Ms. Newland testified that L.A.N.'s trauma bond with Mother made contact

between the two so damaging to L.A.N. that complete cessation of contact between Mother and child via termination of parental rights was the only answer. (V. V, pp. 281-282, 296-297). She conceded that L.A.N. “likes the visits” with Mother. (V. V, p. 278). She testified that after weekly one-hour sessions over a period of three to four weeks in April and May of 2009, she developed the opinion that L.A.N. had post-traumatic stress disorder. (V. V, p. 265). Ms. Newland based this opinion, she said, on conversations with the child. Id. However in her written report and deposition, Ms. Newland avowed that L.A.N. had refused to participate in “good therapy” for numerous weeks (V. V, p. 266); and Ms. Newland herself defined “good therapy” as “when I asked a question and she answered.” (V. V, p. 269).

Ms. Newland knew that Mother had manipulated SSI by “convincing” them to diagnose L.A.N. as bipolar; and testified that she had reviewed an SSI report to support her conclusion. (V. IV, p. 143). She could not recall specifics about this SSI report. (V IV, p. 145). She could not explain why Dr. Wind had noted symptoms suggestive of bipolar. (V. V, p. 278). Ms. Newland had reported L.A.N. as “thriving” in her grandmother’s care; yet had to acknowledge that after a year of therapy, L.A.N. presented to Dr. Wind

sucking her toes. (V. IV, p. 154). Lastly, Ms. Newland insisted that she did not speak with Dr. Wind until after Dr. Wind's report had been authored (V. IV, p. 137); however Dr. Wind testified to speaking to Ms. Newland in order to formulate an opinion and report (V. IV, pp. 68-69).

Ms. Newland had some selective recall in her testimony. She recalled negative statements made by L.A.N. about Mother in therapy. She could not recall one positive thing L.A.N. stated about Mother. (V. V, p. 278). She could not state specific observations she had made of L.A.N. in early therapy; only that she knew she was homeless. (V. V, p. 269-270). Ms. Newland could not recall how L.A.N. was doing in school during the in-home visits. (V. IV, p. 151). Ms. Newland did not have "any firsthand memory" of prior conversations with the caseworker. (V. IV, p. 159).

Ultimately, although the caseworker acknowledged that L.A.N. did want some contact with Mother ("spend the night at least once a week." (V. V, p. 377)), she agreed with Ms. Newland's opinion. (V. VI, p. 416). With opinions from Ms. Newland, Dr. Wind, and the caseworker that termination was the only option to protect L.A.N., the trial court terminated Mother's parental rights.

STANDARD OF REVIEW

Respondent agrees that questions of law, such as whether a guardian ad litem (hereinafter "GAL") holds a minor child's therapist-client privilege in the context of a dependency and neglect case, are reviewed *de novo*. *Romero v. People*, 179 P.3d 984, 986 (Colo. 2007). Respondent further agrees that questions of mixed law and fact are reviewed *de novo*. *People v. Algengi*, 148 P.3d 154, 159 (Colo. 2006). Whether a waiver of the privilege occurred in this matter when the GAL and State proffered expert testimony and reports in support of termination that included privileged communications; and where Respondent Parent needed complete access to information in the therapist file for a fundamentally fair termination proceeding; is a question of mixed fact and law.

SUMMARY OF THE ARGUMENT

Dependency and Neglect cases arise when there is a concern for the health and welfare of a child. A treatment plan is a necessary component of every Dependency and Neglect case. Since the statutory goal is to preserve the family whenever possible, parents are ordered to successfully participate in treatment plans to rehabilitate themselves and reunite their family. Children frequently need treatment as well; and sometimes participate in mental-health treatment. Therefore, therapist-client

relationships protected by the privileges codified in C.R.S. §13-90-107(1)(g) are established in a many D&Ns.

When the State and/or GAL offer to the Court expert opinion from a child's therapist based on privileged communications; and this expert opinion is proffered for the purpose of limiting or terminating parental rights, the privilege is implicitly waived. It is waived because the issue of the child's mental health becomes of paramount importance to the Court in deciding termination. Due process requires that an expert opinion offered in support of termination must be subjected to scrutiny by the defending parent. Without the parent's ability to fully explore the basis for that opinion, a fundamentally fair proceeding is impossible. The parent's constitutionally-protected liberty interest in the care and custody of their child evaporates with no procedural protections against expert bias or error.

When a therapist-client privilege is waived, a parent is entitled to privileged information in proportion to scope of the waiver. In this case, the child's therapist offered an opinion that L.A.N. should not return home. The opinion was based upon privileged communications by L.A.N. and other privileged information obtained during the course of the therapist's treatment of L.A.N. Due process requires that Mother have access to the therapist's

complete file insofar as it relates to, supports, or contradicts the basis of the expert opinion. The Colorado Rules of Procedure and the Colorado Rules of Evidence lend support to this conclusion.

ARGUMENT

I. Every Dependency and Neglect proceeding requires the Court to preserve the best interest of the child and the fundamental rights of the Respondent Parents.

It is well established that parents have a fundamental liberty interest in the care, custody and management of their children. *People ex rel. A.M.*, Colo. App. No. 10CA0522, Dec. 23, 2010 citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *People in Interest of A.M.D.*, 648 P.2d 625, 632 (Colo. 1982). "This interest 'does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.'" *Id.* quoting *Santosky v. Kramer*, 455 U.S. 753 (1982). See also, *In re D.I.S.*, 249 P.3d 775 (Colo. 2011) The right of "natural parents" are "intrinsic human rights" and have been fossilized in our "Nation's history and tradition." *Id*. citing *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977) quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

A Dependency and Neglect action was filed in this case, as in others, because the family was in distress. When filed, the parallel statutory goals are to preserve and reunify the family and to effectuate the best interest of the child. C.R.S. §19-3-100.5. If the case progresses to termination, as this case did, the court may *then* be asked to make a finding of "unfitness" to support a termination of parental rights. C.R.S. §19-3-604. "Termination is an unfortunate but necessary remedy when all reasonable means of establishing a satisfactory parent-child relationship have been tried and found wanting. It is not a desired outcome for which the state should strive from the inception of a dependency or neglect proceeding." *In the Interest of A.M.D.*, 648 P.2d 625, 640 (Colo. 1982).

Any analysis of a waiver of privilege in this Dependency and Neglect proceeding should be considered in light of the fundamental liberty interest vested in Mother by virtue of the United States Constitution. In *Dill,* the Court of Appeals considered whether disclosure of the privileged communications was "necessary for the effective exercise of the right to confrontation." *People v. Dill*, 904 P.2d 1367, 1371 (Colo.App. 1995) citing *People v. District Court*, 719 P.2d 722 (Colo. 1986). KC

Respondent parents should be afforded a fair opportunity to defend against

claims arising from privileged communications offered to a court to support the termination of their parental rights. *Bittaker v. Woodford*, 331 P.3d 715 (9th Cir. 2003).

II. The Guardian Ad Litem is likely in the best position to waive the child's privilege with respect to disclosure of the child's therapist.

C.R.S. §13-90-107(1)(g) provides "A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor shall not be examined without the consent of the ...client as to any communication made by the client to the [professional] or the [professional's] advice given in the course of professional employment." In the instant matter, L.A.N. participated in therapy with Ms. Newland, who is a child therapist with a master's degree in transpersonal counseling psychology. (V. IV, p. 95-96).

A minor child cannot exert his own privilege; typically a parent may claim or waive privilege on behalf of her child. See, e.g. *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990); *Lindsey v. People*, 181 P. 531 (1919). In a Dependency and Neglect proceeding where the parent has neither physical nor legal custody; and *may* have interests divergent

from the child's, the authority to waive the privilege does not lie with the Respondent parent. See, *People v. Marsh*, Colo.App. No. 08CA1884, Dec. 22, 2011.

Within the context of a Dependency and Neglect proceeding, someone must hold the privilege on behalf of the child. If there were no holder of the privilege, the child's privilege would either evaporate entirely or be altogether impenetrable. Neither of those circumstances conform with the law. The GAL, who is not the child's attorney but rather an attorney representing the child's best interest, is likely in the best position to claim or waive the privilege on behalf of the child. See, *Id.*; *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

III. Where Expert Opinion Is Offered To A Court In A Dependency and Neglect Case As A Basis For Termination of Parental Rights, And There Is Either Support From or Failure To Object By The Privilege Holder, The Therapist-Client Privilege Is Pierced.

A. An Implicit Waiver Of The Therapist-Client Privilege In A Dependency And Neglect Case Occurs When The Client-Child's Mental Health Status Is the Crux Of The State's Case In Pursuit of Termination Of Parental Rights.

A C.R.S. §13-90-107 privilege may be impliedly waived where a legal claim resting on the communications is raised. *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005). That L.A.N. could not waive her own privilege is irrelevant. The insertion of her mental state as a basis for termination of Mother's rights constitutes a waiver. This court has recognized that where a privilege holder inserts the substance of the privileged communications into litigation, the privilege may be waived. *People v. District Court*, 719 P.2d 722, 725; *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002). If the fact that the privilege holder is someone other that the treating child prevents waiver, an impenetrable privilege exists that defies the constitutional right of cross-examination and the due process right to a fundamentally fair proceeding.

In contrast to *Sisneros*, *District Court*, and *Dill*, the waiver of privilege as to L.A.N. will not be used to challenge her own credibility. The treating child will not be subjected to cross-examination as a result of the waiver of

privilege. The concern expressed in *People v. District Court* that victims are placed "in the untenable position of requiring them to choose whether to testify against an assailant or retain the statutory right of confidentiality in post-assault psychotherapy records" is not applicable. *Id.* at 727. Additionally, a trial court in a D&N may enter protective orders preventing disclosure of information to the public and/or by the parties in the case. *See*, e.g. C.R.S. §19-1-106.

Waiver of privilege does not occur when there is a mere possibility that the privileged information might impact veracity of a non-expert witness; or a tangential part of litigation. *Sisneros*, 55 P.3d at 800. Nor will a court permit a "fishing expedition" where a party seeks to uncover "exculpatory information that he had no reason to believe would be found." *Id*. citing *Dill*, 927 P.2d at 1324.

Ms. Newland's expert opinion is central, not tangential. Her expert opinion that L.A.N. should not go home permeated this case in its early stages. (V. VI, p. 421-422); (V. II, p. 158). Ms. Newland reported her opinions against reunification to the caseworker and the family therapist after having "treated" the child for approximately 5 hours. (V. II, p. 387). Her opinion was instrumental in the direction of the case from an early stage.

(V. V, pp. 274-276; V. VI, p. 421; V. IV, p. 137). Her opinion was instrumental is stopping in-home visits and the child's return home. (V. II, p. 387). Her opinion became a basis upon which the State's expert, Dr. Wind, testified in favor of termination of parental rights. (Vol. III, p. 4 (Pet. Exh. 1))

Furthermore, Mother's request for privileged information is based on demonstrable facts that point to the bias and inaccuracy of Ms. Newland's opinion. Ms. Newland informed the Court via her February 18, 2010 letter and her trial testimony that she was unable to have any "good therapy" with L.A.N. for weeks; yet before any "good therapy" she was urging that the child not return home. (Vol. II, p. 158). She maintained this belief throughout the case.

Her letter maintains that Mother "convinced the SSI division" that L.A.N. was bipolar. (Vol. II, p. 390). It is questionable, if not astonishing, that the State would offer an SSI subsidy based solely on the advocacy of the applicant and over the contrary opinions of a state-retained psychiatrist. Such an implication by a child's therapist who is neither psychologist nor psychiatrist and who has had virtually no contact with Mother is inappropriate and evidences bias.

Furthermore, although Ms. Newland insists, "I do not see any evidence of bi-polar for [L.A.N.]," (Vol. III, p25 (Resp. Exh. "E")), Dr. Wind's brief examination revealed, "symptoms suggestive of bipolar disorder and psychosis" Ms. Newland expressed "concern" that Mother "want[ed] L.A.N. medicated." (Vol III, p. 26 (Resp. Exh. E)); yet many months later Dr. Wind recommended medication. (Vol. III, p.9 (Pet. Exh. 1)). It is not a logical leap to presume that medication may have assisted the child in making progress therapeutically. Had necessary medication for L.A.N. been administered, Mother's supervised and therapeutic visits with L.A.N. could have been substantially improved.

Lastly, in her letter Ms. Newland makes an assessment of the parent's progress in treatment and her prognosis for their success. (V. II, pp. 387-391). She was not the caseworker nor was she in an investigatory role. She simply had no basis upon which to offer that opinion nor was it her job to offer it. Ms. Newland's dislike and distrust of Mother led to recommendations adopted by the State that inhibited Mother's treatment.

B. An Implicit Waiver Of The Therapist-Client (Child) Privilege In A Dependency And Neglect Case Occurs When The Child's

Therapist Is Permitted To Proffer Expert Opinion To The Court Supporting Termination of Parental Rights.

For a waiver to exist, not only must privileged communications be crucial to a central issue in the case, the privileged communications must also be proffered to the Court by a party in order to support one side of the case. See, *Sisneros*, 55 P.3d at 800; *Dill*, 927 P.2d at 1324. When the Court is given privileged communications to consider in making findings as to termination of parental rights, due process requires a waiver of the privilege in order to level the playing field to ensure a fair game. Where there is a "showing of specific facts which support an assertion that access to...privileged communications ...is necessary for the effective exercise of the right to confrontation, a privilege may be infringed upon. *People v. Dill*, 904 P.2d 1367, 1371 (Colo.App. 1995) citing *People v. District Court*, 719 P.2d 722 (Colo. 1986).

Rules of Procedure are the enactment of due process. In *Dill*, the Defendant accused of sexual assault of a minor sought complete records of treatment from the psychologist of the minor victim. The defendant in *Dill* had already been provided a copy of the psychologist's formal report (that the victim suffered from post-traumatic distress disorder as a result of being

sexually assaulted) and the notes used to prepare it pursuant to Crim.P. 16. *Id.* at 1371. The *Dill* court determined that the defendant had received the necessary information to exercise his right to confrontation; and was not entitled to the victim's ongoing treatment records. *Id.*

The instant case is governed by part two of the Colorado Rules of Juvenile Procedure. Part two of the Colorado Rules of Juvenile Procedure contains four rules total which span a little more than one-half page in the Colorado Court Rules book. Neither the rules of procedure nor the children's code contain any direction regarding discovery of information upon which an expert opinion is based.

Rule 1 of the Colorado Rules of Juvenile Procedure provides as to D&Ns, "[p]roceedings are civil in nature and where not governed by these rules or the procedures set forth in Title 19, 8B C.R.S. (1987 Supp.) shall be conducted according to the Colorado Rules of Civil Procedure." See, *People ex. rel. C.Z.*, 262 P.3d 895, 900 (Colo.App. 2010). Rules 26(a)(2) and (b)(4) of the Colorado Rules of Civil Procedure govern disclosures and discovery of expert witnesses in civil cases. These rules mandate the timely submission of expert reports and the basis therefore; and permit depositions and other discovery mechanisms. Although C.R.C.P 26

limits itself to exclude D&Ns and other expedited proceedings, it specifically confers upon a D&N trial court the discretion to apply the rule in certain cases. C.R.C.P. 26(a); and see C.R.C.P. Committee Comment Scope ("However, the Court in those [D&N] proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful in the case."); *People ex. rel. Z.P.* 167 P.3d 211, 214 (Colo.App. 2007)

A trial court must apply C.R.C.P in cases where it is necessary to ensure a fundamentally fair D&N proceeding. See, e.g. *In re Petition of Taylor for Adoption of M.R.D.*, 134 P.3d 579, 582 (Colo.App.Div.2 2006) citing *In re I.R.D. 971 P.2d 702* (Colo.App. 1998). ("Because of the harsh effect of a decree permanently terminating parental rights, there must be strict compliance with [statutory procedure]) In the instant case, Ms. Newland was proffered as a witness by both the State and GAL. (V. I, p. 322; V. II, p. 426; V. IV, p. 95). Because Mother was not permitted complete discovery under shield of privilege, Mother was unable to effectively inquire into Ms. Newland's opinion. When a court is presented only with the facts that support an expert's opinion, without the opportunity to review facts that challenge the validity of that opinion, a fundamentally fair proceeding cannot occur.

Mother's right to confront Ms. Newland as to her expert opinion necessitated a waiver of the privilege existing between Ms. Newland and L.A.N. As an example, Ms. Newland had a somewhat selective recall of the facts supporting her expert opinion. She could recall and had apparently documented negative statements made by L.A.N. about Mother. (V. V, p. 278). Although she acknowledged, when asked, that L.A.N. had spoken positively about Mother, she could not recall any specifics. (V. V, p. 278). Mother was unable to question Ms. Newland effectively as to the context of the negative statements by L.A.N. about Mother; the nature and number of positive statements by L.A.N. about Mother; and a comparison of the two which might upset her conclusions because Ms. Newland could not or would not recall this information.

IV. When Privilege is Waived, Access To The Therapists File Must Be In Proportion To The Scope Of The Waiver And In A Manner to Promote Due Process Of Law.

A. Access To The Therapist's File Is In Correlation To The Breadth Of The Waiver Of Privilege.

"The nature and scope of an implied waiver depends on the context in which it arises." *People v. Madera*, 112 P.3d 688 (Colo. 2005). In

Madera, a Defendant sought relief from a plea agreement claiming ineffective assistance of counsel. The *Madera* Court, held that the attorney-client privilege of §13-90-107 was impliedly waived to the "extent necessary to provide [the other party] with a fair opportunity to defend against it." *Id*. citing *Bittaker v. Woodford* ,331 F.3d 715 (9th Cir. 2003).

In the instant matter, Ms. Newland authored a letter explaining her unyielding position against Mother's reunification with L.A.N. (V. II, pp. 387-392). In the letter Ms. Newland disclosed, among other things, a vague description of her own observations of L.A.N.'s trauma; her own observations and opinions regarding Mother's veracity; her own observations and opinions regarding Mother's progress in treatment; and (negative) statements made by L.A.N. to her regarding Mother. (V. II, pp. 387-392). Ms. Newland provided the trial court a very broad view (opinion) from a very narrow window.

Given the breadth of Ms. Newland's disclosure to the court, Mother must be provided the entirety of Ms. Newland's file as it relates to, supports, and/or contradicts her various statements and opinions presented to the court. The Colorado Rules of Procedure and the Colorado Rules of

Evidence give some direction as to what must be disclosed; as will be discussed....

B. Access To The Therapist's File Must Be Sufficient To Ensure A Fundamentally Fair Proceeding.

In *Dill*, a Defendant accused of sexual assault of a minor sought complete records of treatment from the psychologist of the victim. *People v. Dill*, 904 P.2d at 1367. As stated previously, the defendant in *Dill* had already been provided a copy of the psychologist's formal report and the notes used to prepare it pursuant to Crim.P. 16. *Id.* at 1371. The *Dill* court determined that the defendant had received the necessary information to exercise his right to confrontation; and was not entitled to the victim's ongoing treatment records. *Id.*

A defendant in a criminal action must defend as to a criminal act or actions that have a specific point in time. Therefore, ongoing treatment is generally irrelevant. *Dill* recognized that, in a criminal case-context, C.R.S. §13-90-107(1)(g) was established "as a means, *inter alia*, of protecting sexual assault victims from disclosure of *post-assault treatment records*." *Id.* at 1371 (emphasis added).

Ongoing treatment is the essence of a D&N. In the instant case, L.A.N.'s progress in therapy was outcome-determinative. Ms. Newland's opinion was that L.A.N.'s ongoing behavioral problems stemmed from trauma caused by Mother; and that L.A.N. must have no contact with Mother whatsoever in order to heal. (V. V, pp. 281-282; 296-297). Ms. Newland based her opinion on her ongoing observations and treatment of L.A.N. during the course of the case. The breadth of the waiver in the instant matter opens the scope of disclosure to include all treatment records of L.A.N. kept by Ms. Newland.

The *Dill* court implicitly acknowledged that the denial of the defendant's request for the entirety of the psychologist's file was not a bright-line "rule" and held that the presence "of specific facts which support an assertion that access to the privileged communications of the victim is necessary for the effective exercise of confrontation [abrogates the psychologist-patient privilege of C.R.S. §13-90-107(1)(g)]." *Id.*

Ms. Newland offered on several occasions over the span of the case her relentless opinion that L.A.N. must not return home. (V. II, pp. 387-392; V. II, p. 158; V. V, pp. 281-282; 296-297) Her opinions extended to evaluation of and recommendations for respondent parents never met. (V.

III, p. 25 (Pet. Exh. E)). She made an assessment of the parent's progress in treatment having never had a single session with Mother and having never spoken to Mother's therapist. (V. III, p. 27 (Pet. Exh. E)). After minimal contact with Mother, she described Mother as manipulative and untruthful. (Vol. III, pp. 26-27 (Pet. Exh. E)).

Ms. Newland's opinion was weighed by the trial court as a basis for denying parental visitation. (Transcript of February 23, 2010, p. 15). Ms. Newland's opinion was considered by the caseworker and GAL in limiting Mother's time with L.A.N. and ultimately proceeding with termination. (V. II, p. 158; V. VI, p. 421-422; V. I, p. 269). Ms. Newland's opinion was considered by the expert child psychologist. (V. IV, p. 137). Access to documentation of L.A.N.'s ongoing treatment was patently necessary for the effective exercise of confrontation; and for a fundamentally fair termination proceeding.

The breadth of the waiver in this matter requires disclosure of Ms. Newland's entire file as it relates to the basis of her opinion regarding L.A.N.'s condition and the need for termination of parental rights; including observations and statements that undermine her opinion. We may look to the Colorado Rules of Civil Procedure and the Colorado Rules of Evidence

for guidance. Mother is entitled, minimally, to discovery pursuant to the Rules of Civil Procedure. She is entitled to depose Ms. Newland and receive a comprehensive statement regarding Ms. Newland's proposed testimony and the basis for any and all opinions offered. C.R.C.P. 26.
This would include access to any written report or documentation reviewed to formulate her opinion; as well as the identification of those persons who gave information to her that impacted her opinion.

Additionally, Mother is entitled to information that can be obtained pursuant to C.R.C.P. 33 and 34. Civil rules governing Interrogatories and Requests for Production of Documents pertain to the parties and information and/or documentation in their possession or control. C.R.C.P. 33, 34. In the instant matter, Ms. Newland is contracted with the State. She regularly and voluntarily provided information to the caseworker and GAL to support her opinion for termination. At least some of this information was kept in the caseworkers file; and some of it was included in caseworker reports. (Vol. III, p. 20-21 (Pet. Exh. 2)). Arguably, Ms. Newland's file was documentation in the possession or control of the State. The State cannot purport to control only the portions of Ms.

Newland's file which support its termination case; and deny control over the portions that contradict.

The scope of the waiver of privilege must be in proportion to the privileged information disclosed by Ms. Newland both prior to and during her testimony at Mother's termination trial. Although the rules of evidence are relaxed in juvenile proceedings, they are not altogether ignored. *People in Interest of B.L.M. v. B.L.M.*, 500 P.2d 146 (1972). Objectionable or unreliable testimony can easily be identified by the trial court; and such evidence will be disregarded. *Id.*

Ms. Newland reviewed her file in preparation for her testimony. (V. V, pp. 98). Rule 612 of the Colorado Rules of Evidence permits an adverse party to view any writings used by a witness (either during or prior to their testimony) to refresh their memory as to their testimony. Where a witness fails to recall important

facts that may support or undermine her expert conclusions, writings used prior to

testimony to refresh this witness' memory must be disclosed to all parties to ensure

a fundamentally fair proceeding.

CONCLUSION

A fundamentally fair dependency and neglect proceeding requires

disclosure

of all information in a privileged file that relates to, supports, or contradicts the basis for an expert opinion put forward by the GAL and/or State in support of termination of parental rights. Case law, the Colorado Rules of Procedure, and the Colorado Rules of Evidence all support this notion.

Respectfully submitted this ____ day of _______________, 2012

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CERTIFICATE OF SERVICE

I certify that on this __________ day of ____________________, 2012, a true and complete copy of the foregoing *RESPONDENT'S ANSWER BRIEF* was served on the following via United States mail, first-class postage prepaid, addressed as indicated:

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