

<p>Colorado Supreme Court 101 W. Colfax Ave., Suite 800 Denver, CO 80202</p>	
<p>Certiorari to the Court of Appeals, 2010CA2408 Denver Juvenile Court, City and County of Denver, 2008JV2939</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Petitioners:</p> <p>L.A.N. a/k/a L.A.C., by and through her Guardian as Litem and The People of the State of Colorado,</p> <p>In the Interest of Minor Child:</p> <p>L.A.N. a/k/a L.A.C., Child,</p> <p>v.</p> <p>Respondent:</p> <p>L.M.B.</p>	<p>Supreme Court Case No: 2011 SC 529</p>
<p>Attorney for Petitioner, The People of the State of Colorado in the Interest of L.A.N. a/k/a L.A.C: Douglas J. Friednash, Denver City Attorney By: Laura Grzetic Eibsen, Assistant City Attorney Address: c/o Denver Department of Human Services 1200 Federal Boulevard Denver, CO 80204 Telephone Number: (720) 944-2361 Fax Number: (720) 944-2990 E-Mail: laura.eibsen@denvergov.org Atty. Reg. # for Douglas J. Friednash: #18128 Atty. Reg. # for Laura Grzetic Eibsen: #14599</p>	
<p>REPLY BRIEF OF PETITIONER, THE PEOPLE OF THE STATE OF COLORADO</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner's Reply Brief complies with all requirements of [C.A.R. 28\(km\)](#) and [C.A.R. 32\(km\)](#), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with [C.A.R. 28\(g\)\(km\)](#) and [C.A.R. 28\(k\)\(km\)](#). It does not exceed 5,700 words. The brief contains 1,847 words.

Laura Grzetic Eibsen

In response to the matters raised in the Respondent Mother's Answer Brief, and in addition to the arguments and authorities presented in its opening brief, Petitioner, the People of the State of Colorado in the Interest of L.A.N., submits the following Reply Brief.

ARGUMENT

The Court of Appeals erred in holding that the GAL, by providing the juvenile court with a copy of the child's therapist's progress report thereby impliedly or expressly waived the child's psychotherapist-patient privilege, and further, that mother was deprived of a fundamentally fair opportunity to protect her parental rights.

Mother argues that there is an "implicit waiver of the therapist-client privilege in a dependency and neglect case...when the client-child's mental health status is the crux of the state's case in pursuit of termination of parental rights. (Respondent's brief at 19). The department would take issue with this assertion. While the minor child's mental health status was a concern to the court and parties, it did not form the crux of the state's case in support of termination of mother's parental rights. Rather, the crux of the case was whether mother could meet the minor child's mental health and other needs.

Here, as in every other termination of parental rights proceeding, the state had the burden to establish the Children's Code criteria for termination by clear and convincing evidence. In other words, it had to establish that the child had been

adjudicated dependent or neglected; that an appropriate treatment plan was adopted by the court, but was not reasonably complied with and/or was not successful; that mother was unfit; that mother's conduct or condition rendered her unable or unwilling to provide the child with reasonable parental care; and that mother's conduct or condition was unlikely to change within a reasonable time. [▶ §19-3-604\(1\)\(c\) and \(2\), C.R.S](#)^{km}. (2011); *See* [▶ *People in Interest of A.M.D.*, 648 P.2d 625 \(Colo. 1982\)](#)^{km}.

“Parental rights are personal between each parent and each child.” [● *People in Interest of J.L.M.*, 143 P.3d 1125, 1127 \(Colo. App. 2006\)](#)^{km}. Thus, “[a] parent may be unfit as to one, but not all, of his or her children.” [■ *People in Interest of D.L.C.*, 70 P.3d 584, 588 \(Colo. App. 2003\)](#)^{km}, citing [● *People in Interest of L.D.*, 671 P.2d 940 \(Colo. 1983\)](#)^{km}.

In making its determination of parental unfitness, the juvenile court must assess whether the parent's conduct or condition renders him or her unable to give the child reasonable parental care. In other words, and at a minimum, can the parent provide nurturing and protection adequate to meet the child's physical, mental, and emotional health needs. [▶ §19-3-604 \(2\), C.R.S](#)^{km}. (2011).

Here, the case turned on whether mother could meet the child's not insignificant mental health needs. That is not the same as saying that the child's

mental health status was inserted into the proceedings as a basis for termination and thus there was an implied waiver of the child's §13-90-107 privilege. (*See* Respondent's Answer Brief at 19).

Mother attempts to distinguish the cases of [People v. Sisneros, 55 P.3d 797 \(Colo. 2002\)](#); [People v. District Court, 719 P.2d 722 \(Colo. 1986\)](#); and [People v. Dill, 904 P.2d 1367 \(Colo. App. 1995\)](#), by stating that “the waiver of privilege as to L.A.N. will not be used to challenge her own credibility” and that the child will not be subjected to cross-examination as a result of the waiver of privilege. (Respondent's Answer Brief at 20). However, she does not take into account the impact of the waiver of privilege on the child's continuing ability to make progress in therapy knowing that what she says about mother and their relationship will be shared with mother. Neither does she consider the ramifications of broad disclosure in the event the juvenile court were to deny the motion to terminate the parent-child legal relationship.

The purpose of the psychotherapist-patient privilege is “to enhance the effective diagnosis and treatment of emotional, behavioral, and mental disorders by protecting those seeking treatment from the embarrassment and humiliation that might result from the psychologist's disclosure of information obtained from the client in the course of a professional consultation.” [People v. District Court, 797](#)

[P.2d 1259, 1263 \(Colo. 1990\)](#)^{km}, citing [▶ *Clark v. District Court*, 668 P.2d 3, 8 \(Colo. 1983\)](#)^{km}. This Court has recognized time and again the important private and public interests served by the psychotherapist-patient privilege. *See, e.g.*, [▶ *People v. Sisneros*, 55 P.3d 797, 800 \(Colo. 2002\)](#)^{km}; [▶ *Bond v. District Court*, 682 P.2d 33, 38 \(Colo. 1984\)](#)^{km}; [▶ *Clark v. District Court*, 668 P.2d 3, 8 \(Colo. 1983\)](#)^{km}.

“Effective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” [▶ *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337 \(1996\)](#). “Made public and taken out of context, the disclosure of notes from therapy sessions could have devastating personal consequences for the patient and his or her family....” [▶ *Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556, 584 \(1997\)](#). This is as true in the realm of dependency and neglect cases as it is in custody cases, and perhaps even more so.

In light of the important interests served by the psychotherapist-patient privilege, a finding of implied or express waiver of the privilege should not be lightly made. *See, e.g.*, [▶ *People v. Silva*, 782 P.2d 846, 849 \(Colo. App. 1989\)](#)^{km} (the privilege is personal and belongs to the holder, and thus “should not lightly be deemed waived by the holder’s unwitting responses to questions posed by persons

who have no personal or fiduciary interest in its preservation”). In [H *People v. Pressley*, 804 P.2d 226, 228 \(Colo. App. 1990\)](#)^{km}, a division of the Court of Appeals held that a minor sexual assault victim’s psychologist-patient privilege had not been waived by the fact that the treatment provider had allowed a police detective to observe through a one-way mirror two treatment sessions. In so holding, the court observed that it did not appear that the child-victim’s mother had authorized the detective’s presence, and further that, as the trial court found, while it was certainly possible that the treatment provider had violated the privilege, the privilege did not belong to the provider. [H *People v. Pressley*, 804 P.2d at 228](#)^{km}.

Whenever waiver of a privilege is at issue, the burden is on the party asserting such waiver to establish that a waiver has occurred. [P *Clark v. District Court*, 668 P.2d at 10](#)^{km}. As *amicus curiae*, Office of the Child’s Representative, noted, this Court has held that “[i]n determining waiver, ‘[r]elevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances.’ [H *Johnson v. Trujillo*, 977 P.2d 152, 157 \(Colo. 1999\)](#)^{km}(quotations omitted).” (Brief of *Amicus Curiae* Office of the Child’s Representative at 32).

In order to establish waiver, evidence must be presented that demonstrates that “the privilege holder, by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.” [▶ *Clark v. District Court*, 668 P.2d at 8^{km}.](#)” Here, it does not appear from the record that the GAL, on behalf of the minor child, made a knowing waiver of the child’s psychotherapist-patient privilege. Rather, it appears that the GAL in providing the court and parties with the child’s therapist’s February 2010 letter considered herself to be fulfilling her statutory duties as the child’s GAL in a dependency and neglect proceeding.

Mother’s argument that an implicit waiver of the therapist-client privilege in a dependency and neglect case occurs when the child’s therapist is permitted to proffer an expert opinion to the court supporting termination of parental rights fails to take into account the underlying rationale for the privilege as well as the public policy considerations of the Children’s Code. (Respondent’s Answer Brief at 23). Further, any waiver of the therapist-client privilege must be narrowly construed in order to properly balance the privacy interests of the child with mother’s right to a fundamentally fair opportunity to protect her parental rights against termination.

Mother’s additional assertion that “[a]rguably, Ms. Newland’s file was documentation in the possession or control of the State” is not borne out by the

evidence. (Respondent’s Answer Brief at 31). In addition, mother was given the opportunity to depose Ms. Newland and cross-examine her thoroughly regarding her purported bias against mother as well as the basis of her opinions relevant to termination.

In a civil action, where waiver of the therapist-patient privilege was conceded, this Court has held that such waiver does not mean that the other parties are entitled to complete and total access to the therapist’s records. ▶ [Bond v. District Court, 682 P.2d 33, 38 \(Colo. 1984\)](#)^{km}. Rather, the trial court must balance the privilege holder’s interest in protecting the confidentiality of the communications contained in the records against the other parties’ need to obtain “sufficient evidence to contest the...claims” or defenses. ▶ [Bond v. District Court, 682 P.2d at 40](#)^{km}.

Ordinarily, this balancing of interests is conducted pursuant to [C.R.C.P. 26\(c\)](#)^{km}, which authorizes a trial court, “for good cause shown,” to enter orders “to protect a party from annoyance, embarrassment, oppression, or under burden or expense.” ▶ [Bond v. District Court, 682 P.2d at 40](#)^{km}. However, as acknowledged by mother, [C.R.C.P. 26](#)^{km} does not apply to dependency and neglect proceedings unless the trial court exercises its discretion to do so, (Respondent’s Answer Brief at 24), or the parties stipulate to its applicability. [C.R.C.P. 26\(a\)](#)^{km}.

Nonetheless, application of the kind of balancing test recognized by this Court in *Bond* would be appropriate in a dependency and neglect proceeding, especially since, as was pointed out by *amicus curiae*, the child is not a party to the action and is “not the person who made the decision to bring the matter of her protection and best interests before the court. See [C §19-1-111\(3\), C.R.S.](#) (2011)(GAL is party to the action); [C § 19-3-502\(1\), \(2\), C.R.S.](#).” (Brief of *Amicus Curiae* Office of the Child’s Representative at 36).

The trial court correctly balanced the child’s interest in maintaining her therapist-patient privilege against mother’s need for the kind of information required for effective representation in the termination of parental rights proceeding. Its finding of a limited waiver of the child’s privilege and entry of protective orders related to discovery of the therapist’s file were not an abuse of discretion, and thus should have been deferred to by the Court of Appeals.

CONCLUSION

WHEREFORE, for the foregoing reasons and authorities as well as those contained in its Opening Brief, the People of the State of Colorado in the Interest of L.A.N. respectfully request that this Court affirm the Court of Appeals’ decision as related to the issue of which party to a dependency and neglect action may assert

the psychotherapist-patient privilege on behalf of a minor child, but reverse the Court of Appeals' decision finding error on the part of the juvenile court in denying mother's request for production of the child's therapist's file.

Dated this 21st day of May, 2012.

Respectfully submitted,

Laura Grzetic Eibsen #14599
Assistant City Attorney
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on May 21, 2012, the original and ten copies of the REPLY BRIEF OF PETITIONER, THE PEOPLE OF THE STATE OF COLORADO were filed with the Colorado Supreme Court; and a true and accurate copy of PETITIONER’S OPENING BRIEF was served on the other parties placing it in the United States Mail, first class, postage pre-paid and properly addressed to the following persons:

Amy Packer
PACKER LAW FIRM
P.O. box 658
Littleton, CO 80160-0658

Kerry Simpson
PICKARD & ASSOCIATES
10146 W. San Juan Way, Ste. 200
Littleton, CO 80127

Susan P. Halloran
P.O. Box 620939
Littleton, CO 80162-0939

Sheri M. Danz
Amanda G. Donnelly
OFFICE OF THE CHILD’S REPRESENTATIVE
1580 Logan St., Suite 340
Denver, CO 80203

A copy of the REPLY BRIEF OF PETITIONER, THE PEOPLE OF THE STATE OF COLORADO was also hand-delivered to:

Clerk of the Denver Juvenile Court
Attn: Division 2E
520 W. Colfax Ave.
Denver CO 80204
