SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari Colorado Court of Appeals, Division II, Case No. 10 CA2408 Denver Juvenile Court, the Honorable Donna Schmalberger, Case No. 08 JV 2939 _____ **PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF:** **L.A.N., CHILD,** **Petitioner: L.A.N. by and through her Guardian ad Litem** **Respondent: L.M.B** **And concerning: The Denver Department of Human Services**	**COURT USE ONLY**
Guardian *ad litem* Amy J. Packer PACKER LAW FIRM, LLC P.O. Box 658 Littleton, CO 80160-0658 Phone #: (303) 734-7149 FAX #: (303) 734-7197 Atty. Reg. # 33116	Case Number: 11SC529
GUARDIAN AD LITEM'S AMENDED OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) because it contains 7,144 words.

The brief complies with C.A.R. 28(k) because, for each issue, it contains under a separate heading (1) a concise statement of the applicable standard of review with citation authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

_____

Amy J. Packer
Attorney for Petitioner

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COMES NOW, the Guardian ad Litem (hereinafter "GAL"), Amy J. Packer, and respectfully submits her Opening Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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 FACTS OF THE CASE

This is a case filed pursuant to the Dependency and Neglect provisions of the Colorado Children's Code. The matter was before the Court of Appeals for review of the Trial Court's Order terminating the parent-child legal relationship between Respondent (hereinafter "Mother") and her minor child (hereinafter "child"). On December 12, 2008, the Denver Department of Human Services (hereinafter "DHS") filed a Petition in Dependency and Neglect. DHS alleged that the child was exhibiting out of control and aggressive behaviors as well as making suicidal statements. (Official Record, p. 003). DHS further alleged that Mother

was not following treatment recommendations, and had refused treatment, for the child. *Id.* DHS also had concerns about Mother's stability. *Id.* This was evidenced by Mother trying to flee with the minor child from the emergency department at The Children's Hospital. *Id.* While there were concerns about the child's mental health, there were also concerns about the Mother's mental health and its effect on the child. *Id.* Mother had previously been diagnosed with Histrionic Personality Disorder with Narcissistic Traits. (Official Record, pp. 011-014).

The child was diagnosed as bipolar at the six years of age, prior to this case opening. The record contains medical records from the Children's Hospital, (Official Record, pp. 015-020). The GAL is uncertain as to how the child's medical records became part of the court file. The records state that the child was admitted on November 21, 2008 because of threats to hurt herself and concerns that Mother was angry with the treatment staff and would want to take the child out of the hospital against medical advice. (Official Record, p. 015). The records reflect that Mother's complaints started the first day and that she refused to consider that she had a role to play in the child's treatment. (Official Record, p. 015). Mother believed that medicating the child was the only answer. (Official Record, p. 015).

Of note is the fact that DHS filed two Amended Petitions, both to change the child's legal name. (Official Record, pp. 023-024 and 092-093). By the time the child was seven years old, she had been known by three different last names.

The child was removed from the home on December 12, 2008. The court gave legal and physical custody to DHS. The child has never returned with the exception of a handful of in-home visits in January and February, 2010, the child's reactions to which give rise to this action.

The trial court heard this matter on multiple occasions. Mother was resistant throughout the case. Mother requested a jury trial but later entered an admission on *March 11, 2009*. On April 7, 2009, the trial court ordered a treatment plan. Mother failed to successfully complete the treatment plan. Ultimately, DHS filed a Motion to Terminate the Parent-Child Legal Relationship.

Because of the concerns that opened the case, and the minor child's previous diagnosis of bipolar, the child's mental stated was addressed throughout this case.

On February 25, 2009, DHS named Dr. Susan Lurie and Terry Casey from the Children's Hospital as witnesses. (Official Record, pp. 030-033). Dr. Lurie and Ms. Casey treated the child before and after the Petition was filed in this matter. They were called to provide testimony regarding the child's mental state.

On February 27, 2009, the GAL named Terrie Casey, LCSW, Celeste V. St. John-Larkin, M.D., and Susan Lurie, M.D., all providers at the Children's Hospital, as witnesses. (Official Record, pp. 036-040). Again, they were named to provide testimony regarding the child's mental state.

Because of the concerns, the child began therapy with Ms. Heather Guthrie shortly after the case opened. On March 3, 2009, DHS named Ms. Heather Guthrie, the child's original therapist, as a witness. (Official Record, pp. 041-042).

On May 7, 2009, DHS again named Terrie Casey as a witness. (Official Record, pp. 087-089).

On June 10, 2009, the caseworker filed a report for the Permanency Plan Review Hearing scheduled for June 16, 2009. In that the report, the caseworker stated:

> [Child]'s therapist (KN) has seen [child] at least five times since her services have been retained. The therapist feels that [child] has been severely traumatized and suffers from PTSD. The therapist doesn't believe that [child] is Bi-polar. She feels that [child] likes to be in control and likes to control things as this gives her a sense of security. If [child] has too much stimulation [child] feels she can't control

things. This therapist is opposed to [child] returning home to her mother [mother] but is in support of [child] being allowed to live with her grandparents instead of being placed in foster care. The therapist feels that [child]'s behavior is a result or a reaction of mother's instability while [child] was in her care.

(Official record, p. 105).

On September 3, 2009, the caseworker filed a report for the Review Hearing on September 8, 2009. The caseworker stated:

The private therapist reports that [child] is beginning to open up more and express her feelings. . . The GAL has spoken to both the caregiver and the therapist to have [child] reevaluated in about a month.

(Official Record, p. 142).

A minute order from the hearing on October 1, 2009 states, "Court notes, per the GAL's report, that the individual therapist for the child is not recommending in-home visits at this time." (Official Record, p. 511).

On November 15, 2009, the caseworker filed a report for the Permanency Planning Hearing on November 19, 2008. It states:

> Kris Newland also reported that, "going home looks really scare for [child] at this time," and that [child] does not want to return home.
>
> (Official Record, p. 184).
>
> ***
>
> [Child] just recently began to open up and participate with her therapist and is just now starting to trust her. Ms. Newland reports that [child] does not have a lot of social skills, and that she does not know how to engage. Ms. Newland also reported that [child] is doing better due to her structured schedule as to when bedtime is, when to brush her teeth, and when to do homework.
>
> (Official Record, p. 185)

On December 23, 2009, DDHS named Ms. Newland as a witness. (Official Record, pp. 215-217).

On January 15, 2010, Mother named Ms. Newland as a witness stating that she would testify regarding [child]'s progress in therapy. (Official Record, p. 233).

On January 25, 2010, Mother requested in-home visitation. Ms. Newland attended the hearing and made statements to the court. The court ordered that visits could begin in the home. The minute order on January 25, 2010 states:

> Court also heard from Kris Newland, therapist for the child, indicating that the child expresses fear of the respondent mother and SR, and that the child may perceive having family therapy in a more neutral setting as safer. Parties are authorized to request a FW hearing if situations change, or [child] appears to be having any difficulties.
>
> (Official Record, p. 516).

In response to the court's allowance for a forthwith hearing, the GAL filed the report from Ms. Newland on February 19, 2010. (Official Record, pp. 248-249, 260-264). The GAL filed a *Motion for Forthwith Hearing* on February 22, 2010 because the child was having difficulty at school since the inception of the in-home visits. (Official Record, p. 265-269).

On May 17, 2010, DHS filed the psychological evaluation of the child with the Court. (Official Record, pp. 304-313).

On June 28, 2010, Mother's attorney subpoenaed Ms. Newland's entire case file. On July 2, 2010, Ms. Newland moved to quash the subpoena. The court addressed the subpoena on July 15, 2010, making the following findings and orders:

> Court has allowed and encouraged Ms. Newland to make statements in court. Due to this, the Court has authorized a limited waiver of [child]'s privilege or extend it for Ms. Newland to update the Court. Orders: Court continues the limited waiver. Ms. Newland to participate in a deposition with Ms. Simpson or in the very least chat with Ms. Simpson so Ms. Simpson can prepare for trial. Court orders Ms. Newland is not to bring notes, video tapes, personal records - that is clearly beyond the scope of any limited waiver. Court finds it entirely too invasive to [child]'s privilege to be authorized. Ms. Newland is not to provide her notes to Ms. Simpson. If Ms. Simpson wishes to depose Ms. Newland she is to cooperate.
>
> (Official Record, p. 519).

Mother's attorney deposed Ms. Newland on August 13, 2010. The Assistant City Attorney and GAL were also present for the deposition. Mother's attorney was able to explore, in depth, any statements made by the child.

In addition to treating the child, Ms. Newland attended court hearings in response to the court's request for information about how the child was progressing in therapy. For example, Ms. Newland appeared on November 19, 2009. Ms. Newland testified at the contested visitation hearing on December 11, 2009. Ms. Newland provided an update to the court on July 27, 2010. (Transcript from July 27, 2010 hearing, p. 24, l. 20 to p.30, l. 18). During those hearings, Ms. Newland heard information about the parents' progress on their treatment plans. After at least one hearing, Ms. Newland observed interactions between Mother and S.N. As noted above, Ms. Newland made verbal recommendations to the court on January 25, 2012. That same day, Ms. Newland witnessed Mother accost S.N. and threaten to sue her. She referenced this exchange in her report of February 18, 2010. In addition, Ms. Newland was in contact with Laura Eccles, the family therapist who worked with Mother and child.

After a three-day trial in October, 2010, the trial court terminated that parent-child legal relationship on November 3, 2010 based upon findings that

Mother had not completed her treatment plan and was not fit. The trial court further found that it was in the child's best interests to terminate.

Court of Appeals Proceedings and Opinion:

On appeal, Mother challenged the district court's ruling denying discovery of the therapist's file. The Court of Appeals agreed. The Court of Appeals held that mother was entitled to at least a portion of the therapist's file. In re the Interest of L.A.N., slip op. at p. 8. The Court of Appeals held that DHS and the GAL had disclosed privileged information which was adverse to Mother in seeking to terminate her parental rights. (Slip op. at 13).

However, the Court of Appeals recognized that the Colorado Children's Code requires that the court consider the mental and emotional condition of the child, as well as the role of the parent in causing the same, when determining whether parental rights should be terminated. (Slip op. at 16). At the same time, the Division held that §13-90-107(1)(g) prohibited any disclosure of communication between a child and his or her therapist. (Slip op. at 20). The Court of Appeals held that the GAL waived the child's psychotherapist-patient privilege by disclosing a letter from the child's therapist. (Slip op. at 22).

SUMMARY OF ARGUMENT

Without a court order giving the GAL the privilege, a GAL in a dependency and neglect case cannot waive the child's psychotherapist-patient privilege. The GAL did not waive the child's psychotherapist-patient privilege in this case because the GAL did not hold the privilege. Additionally, the Colorado Children's Code requires that the court be given information about the physical and mental condition of children in order to make its decisions. In this case, the child's mental condition was one of the primary concerns. To hold that a professional's disclosure of information pertaining to the child's physical or mental condition in the course of his or her duties under the statute waives the child's privilege is contrary to the purpose of the Colorado Children's Code and the protection of children.

ARGUMENT

I. A Guardian ad Litem in a Dependency and Neglect case cannot waive the child's psychotherapist-patient privilege

A. STANDARD OF REVIEW

This Court reviews *de novo* any issue of statutory construction. *Bostelman v. People*, 162 P.3d 686, 689 (Colo. 2007). The Court of Appeals held that a GAL could waive the therapist-patient privilege pursuant to § 13-90-107, C.R.S. (2010).

"In construing a statute involving the best interests of the child, [the court's] objective is to interpret the statute in a manner consistent with its plain language while avoiding constitutional infirmity." *In re Adoption of C.A.*, 137 P.3d 318, at 326 (Colo. 2006). The court may look to its precedent as well as instructive decisions from other jurisdictions. *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005).

B. THE ROLE OF A GUARDIAN AD LITEM

The purpose of the Colorado Children's Code is to protect the welfare and safety of Colorado children and serve their best interests. *L.G. v. People*, 890

P.2d 647 (Colo. 1995). Dependency and neglect proceedings focus primarily on the protection and safety of children, not the custodial interests of parents. *People ex rel. C.M.*, 116 P.3d 1278 (Colo. App. 2005); *People ex rel. B.C.*, 122 P.3d 1067 (Colo. App. 2005).

The Children's Code specifies that GALs are appointed to represent the best interests of children. §19-3-203(3), C.R.S. (2010). The Legislature clearly distinguishes between legal counsel and a GAL. The Children's Code defines a GAL as "a person appointed by a court to act in the *best interests* of a person whom the person appointed is representing in proceedings under this title." § 19-1-103(59), C.R.S. (2010) (emphasis added). The Children's Code defines counsel as an "attorney at law who acts as a person's legal advisor or who represents a person in court." § 19-1-103(31), C.R.S. (2010). Further, this Court recently held that there is no attorney-client privilege between a GAL and the child he represents. *People v. Gabriesheski*, 262 P.3d 653, 655 (Colo. 2011).

In a traditional legal relationship, the client directs the course of the attorney's work. C.R.P.C. 1.2(a). On the other hand, the work of a GAL is guided by statute and case law. *See* *In re Marriage of Hartley*, 886 P.2d 665, 672 n.

9 (Colo. 1994). The GAL is required to not only advocate for the child but his or her best interests. §§ 19-3-203(3), 19-1-103(59); *see also* *In re Marriage of Hartley*, 886 P.2d at 671. In doing so, the GAL must exercise a higher degree of independent objectivity than in other cases. *See* *Hartley*, 886 P.2d at 672, *In re Marriage of Barnthouse*, 765 P.2d 610, 612 (Colo. App. 1988), and *Short v. Short*, 730 F. Supp. 1037, 1038 (D.Colo. 1990).

The General Assembly intended for GALs to hold a different role that that of counsel. Courts in Colorado have recognized that a GAL is "the agent of the court through whom it acts to protect the interests of the minor." *Miller v. Clark*, 144 Colo. 431, 356 P.2d 965, 966 (Colo. 1960); *see also* *Yonker v. Thompson*, 939 P.2d 530, 533 (Colo.App. 1977) (citing Miller). The Chief Justice Directive concerning the appointment of GALs recognizes this reality. See CJD 04-06 §§ I(B), V(C), V(D)(3), V(D)(4)(e), and VI(A). Likewise, the Colorado federal district court found that GALs serve as adjuncts of the court and should present "'all evidence available concerning the child's best interests.'" *Short v. Short*, 730 F.Supp. 1037, 1038 (D.Ct. Colo. 1990) (citing *In re Marriage of Barnthouse*, 765 P.2d 610, 612 (Colo.App. 1988)). The court further found that GALs are "agent[s] of the court." *Id.*, *quoting* *Miller v. Clark*, 144 Colo. 431, 356 P.2d 965, 966 (1960).

In order to represent the best interests of children, GALs are required to independently investigate matters and make recommendations concerning the child's welfare to the court. §19-3-203(3), C.R.S. (2010). This includes: observing the child in his or her placement; observing the child's interaction with parents, proposed custodians or foster parents; interviewing respondent parents; and interviewing other people involved in the child's life, such as school personnel and therapists. C.J.D. 04-06. (Emphasis added.) The GAL must also continue to investigate. *Id.* In addition, "[a] GAL in a dependency and neglect case shall . . . provide accurate and current information directly to the court. *Id.* (Emphasis added.) These are not the duties of traditional legal counsel. A GAL may make recommendations to trial court by presenting opinions based upon an independent investigation or by advocating a specific result based upon the evidence. *People in Interest of J.E.B.*, 854 P.2d 1372, 1375 (Colo. App. 1993).

Additionally, in order to determine a proper disposition for a child, a court may consider written reports and other information relating to the child's mental, physical and social history. § 19-1-107(2), C.R.S. (2010). A party may request that the author of the report appear as a witness and be subject to both direct and cross-examination. *Id.* Alternatively, the court may order the person

who prepared the report to appear if doing so would be in the best interests of the child. *Id.*

The GAL must independently evaluate which decisions are in the best interests of the child. In some states, there are two different attorneys for the child: one to represent what the child wants in a typical attorney-client relationship and one to make best interests recommendations. In Colorado, generally, GALs will advocate for the best interests of the child while disclosing the child's wishes to the Court.

To gather information and not provide it to the court would subvert the purpose of the Children's Code. The C.J.D. recognizes this as did the General Assembly. Like the caseworker and CASA, the GAL has contact with the child as well as others in the child's life. It is crucial that the court knows the status of the child in order to make well-informed, reasoned decisions. Like other areas of law, dependency and neglect cases deal with lives, but here the stakes are even higher because the cases deal with the lives of our most vulnerable children.

C. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN COLORADO

All fifty states have enacted some form of the psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 12, 116 S. Ct. 1923, 1929 (1996). The U.S. Supreme Court characterized the privilege as "rooted in the imperative need for confidence and trust" in the physician-patient relationship. *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906 (1980). The Court explained that physicians must have as much information as possible in order to diagnose and treat a patient. *Id.* Confidentiality is even more important in a therapist-patient relationship. "The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 116 S. Ct. at 1928.

Colorado law provides that a therapist may not testify or disclose information without the consent of the patient. § 13-90-107(g), C.R.S. (2010). There is significant history in Colorado regarding the discovery and disclosure of medical records, including psychotherapy records.

The purpose of the psychotherapist-patient privilege, like the physician-patient privilege, is to "enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the physician's disclosure of information imparted to him by the patient

during the course of a consultation for purposes of medical treatment." *Bond v. District Court*, 682 P.2d 33, 38 (Colo. 1984), *quoting* *Clark v. District Court*, 668 P.2d 3, 8 (Colo. 1983). This is even more important in the psychotherapist-patient relationship because the patient must trust his or her therapist. *Id.*

D. NEITHER THE GAL NOR DHS HELD THE CHILD'S PSYCHOTHERAPIST-PATIENT PRIVILEGE

A parent has a fundamental liberty interest in the care, custody, and management of a child. That interest includes the right to make medical decisions for a child. Under Colorado law, except in circumstances related to emancipation or marriage, a minor may not consent to medical care until the age of eighteen. § 13-22-103, C.R.S. (2010).

Parents ordinarily serve as guardians ad litem for their children. 42 Am. Jur. 2d Infants §174 (1969); *see also* *Stewart v. Superior Court*, 787 P.2d 126, 127 (Ariz. Ct. App. 1989) (stating that without special circumstances parents usually serve as guardians ad litem for their children); *Orr v. Knowles*, 337 N.W.2d 669, 705 (Neb. 1983) (explaining that parents are the natural guardians of their children); *In re Lisa G.*,504 A.2d 1, 5 (N.H. 1986) (providing that unless they

are "unable or unwilling to act in the child's best interests" parents will serve as guardians ad litem for their children).

Further, pursuant to HIPAA, a minor child may have a personal representative who is able to obtain private health information for the child. A personal representative is a parent, guardian, or other person acting *in loco parentis* with legal authority to make health care decisions on behalf of a minor child. 45 C.F.R. 164.502(g)(3)(i) (emphasis added). A personal representative must be treated as the individual. 45 C.F.R. 164.502(g)(1). A parent generally holds the right to make medical decisions for a child unless a court grants authority to make health care decisions for the child to an adult other than the parent. *See HIPAA Facts: Parent and Minor Rights*, Technical Assistance Support Center of the National Association for Rights Protection and Advocacy, Q & A by Susan Stefan, Center for Public Representation.

HIPAA also provides that if the covered entity has a "reasonable belief" that the personal representative may be abusing or neglecting the individual or that treating the parent as the personal representative could endanger the individual, the covered entity may refuse to provide information to the parent in the exercise of its professional judgment. 45 C.F.R. 164.502(g)(5).

Here, neither the GAL nor DHS had the legal authority to make health care decisions for the minor child. That right remained with Mother until the trial court terminated her rights. Neither the GAL nor DHS could have been a personal representative under HIPAA. Neither GAL nor the DHS could have held the child's privilege without a court order giving it to them. Without a court order giving the GAL or DHS the right to make medical decisions, neither the GAL nor DHS could have held the child's privilege. To put the GAL or DHS in the role of the parent without a court order or other statutory or legal basis violates the liberty interest of the parent.

E. WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A waiver is a form of "consent" to disclosure, which may be express or implied. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983). Waiver is established by a showing that the privilege holder has expressly or impliedly "forsaken his claim of confidentiality with respect to the information in question." *Id.* An individual may waive his or her privilege by injecting his or her mental condition into a lawsuit. *Clark*, 668 P.2d at 10.

"Waiver is the intentional relinquishment of a known right and may be implied when a party engages in conduct which manifests an intent to relinquish

the right or privilege, or acts inconsistently with its assertion. To imply a waiver by conduct, the conduct should be free from ambiguity and clearly manifest the intention not to assert the benefit." *Tripp v. Parga*, 847 P.2d 165, 167 (Colo.App. 1992).

"A [party] is entitled to take all legal steps to protect his interests and does not waive or abandon any course of action open to him in the absence of an intentional relinquishment of a known right." *Tripp v. Parga*, 847 P.2d 165, 168 (Colo. App. 1992), *quoting* *Judd v. Queen City Metro*, 31 Ohio App.3d 88, 508 N.E.2d 1034 (1986).

While there may be a waiver of a privilege by injecting ones mental condition into a case, the court may for "good cause" deny or limit the scope of discovery under C.R.C.P. 26(c), based upon a balancing test. *Bond v. District Court*, 682 P.2d 33 (Colo. 1984). The waiver should be no broader than that needed to ensure fairness of the proceedings. *People v. Madera*, 112 P.3d 688, 691-692 (Colo. 2005).

Generally, parents can waive privileges held by their minor children. *See* *People v. Pressley*, 804 P.2d 226, 228 (Colo. App. 1990). This Court has previously held that "the proper inquiry is not whether the information sought may

be relevant. . .[but] . . . whether the victim has injected her physical or mental condition into the case as the basis of a claim or an affirmative defense. *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

In *Dill v. People*, this Court addressed the psychotherapist-patient privilege in the context of a sexual assault. *Dill v. People*, 972 P.2d 1315 (Colo. 1996). There, the therapist met with the child twice before authoring a report. *Id.* 1318. In addition, defense counsel received a copy of the notes used to prepare the report and a partial transcript of the therapist's interview of the child. *Id.* The prosecution also offered the defendant access to the tape recording of the interview. *Id.*

In *Dill*, this Court held that the notes from the ongoing therapeutic sessions were not subject to discovery. *Id.* at 1321. This Court referenced the fact that the Court of Appeals held "that the child did not waive the privilege because it was the prosecution, not the child, that accomplished the acts that injected the child's mental condition into the case." *Id.* at 1325, n. 8. This Court elected not to address implied waiver. *Id.*

This Court has also held that:

> The vague assertion that the victim may have made statements to her therapist that might possibly differ from the victim's anticipated trial testimony does not provide a sufficient basis to justify ignoring the victim's right to rely upon her statutory privilege. In view of the strong policy embodied in the statute [recognizing the psychologist-client privilege], the limitation it imposes on the scope of cross-examination is justified.
>
> *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986).

Recently, in another criminal sexual assault case the Court of Appeals held that the trial court properly asked whether the GAL would waive a minor's privilege. *People v. Marsh*, 08CA1884 (December 21, 2012).

Colorado courts have also held that the physician-patient privilege is not waived simply because an insured party released medical records to his or her insurance carrier. *Devenyns v. Hartig*, 983 P.2d 63, 66 (Colo.App. 1998). In *Devenyns* the insured released her medical information to her insurance carrier pursuant to statute so that the bills would be paid. *Id.* The court found that a person injured in an automobile accident has not choice and is required to submit

medical records to an insurance carrier in order to obtain payment. *Id.* at 67. The court stated:

> Conversely, if the release of medical records to a PIP insurer, without more, could be considered a waiver of the physician-patient privilege, a person otherwise entitled to reimbursement from a PIP insure would be forced to choose between waiving the privilege or forgoing such payment. Indeed, any patient, under these circumstances, could be discouraged from making full disclosure to a medical provider or even, perhaps, from seeking treatment.
>
> *Id.*

In *Clark v. District Court*, this Court considered whether a defendant in an automobile accident case waived the psychotherapist privilege when he responded to deposition questions asking about previous treatment. *Clark v. District Court*, 668 P.2d 3, 11 (Colo. 1983), n. 5. This Court noted that responding to the deposition questions indicated no intent to waive confidentiality. *Id.* Because the plaintiff injected defendant's mental condition into the case, the defendant had not expressly or impliedly waived his privilege. *Id.*

Turning to other jurisdictions, there is a California case in which a teenaged minor appealed the juvenile court's order permitting the child protection agency to receive information from her therapist regarding therapy despite her invocation of the psychotherapist-patient privilege. *In re Kristine W.*, (2001) 114 Cal.Rptr.2d 369, 94 Cal.App.4th 521, 523. The California Court of Appeals concluded that "the psychotherapist-patient privilege protects Kristine's confidential communications and details of therapy, but does not preclude her therapist from giving circumscribed information to accomplish the information-gathering goal of therapy." *Id.* at 528. The court limited disclosure to "matters that reasonably assist the court in evaluating whether further orders are necessary for Kristine's benefit and preserves the confidentiality of the details of her therapy." *Id.*

In the juvenile dependency context, therapy has a dual purpose – treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned recommendations and decisions regarding the child's welfare can be made. *In re Mark L.*, 114 Cal.Rptr.2d 499, 94 Cal.App.4th 573, 584 (2001).

In California, Evidence Code section 1012 permits the disclosure of a confidential communication "to those to whom disclosure is reasonably necessary

for . . . the accomplishment of the purpose for which the psychotherapist was consulted . . .” *In re Pedro M.*, (2000) 81 Cal.App.4th 550, 554 [96 Cal.Rptr.2d 839]. The court held that this included the juvenile court. *Id.* “Without the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or not evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court.” *In re Jasmon O.*, (1994) 8 Cal.4th 398, 430.

The California Court of Appeals has also ruled that the psychotherapist-patient privilege protected the child’s confidential communication and details of the therapy but did not preclude the therapist from providing circumscribed information to accomplish the information-gathering goal of therapy. *In re Mark L.*, (2001) 94 Cal.App.4th 573, 584.

Similarly, in a case involving a custody dispute, the father, as the custodial parent and citing the child’s psychotherapist-patient privilege, objected to the child’s therapist testifying concerning the child’s emotional, mental, and physical wellbeing. *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky.App.1994). The Kentucky Court of Appeals held that there was “no logic in permitting one or both of the parents in a custody battle to assert the psychotherapist-patient privilege on

behalf of their child, especially when the child's mental, emotional, and/or physical well-being is the key issue in the custody dispute." *Id.* The court stated, "[P]arents involved in a custody dispute should not be allowed to assert any privilege on behalf of their child simply because their interests are divergent from the child's interests." *Id.* Arguably, a dependency and neglect action is the ultimate custody dispute.

In Florida, the Fourth District Court of Appeals held that the parents of a 17 year old were not entitled to either assert or waive the psychotherapist-patient privilege on their daughter's behalf in a marital dissolution action. *Attorney at Litem for D.K. v. Parents of D.K.*, 780 So.2d 301, 307 (Fla. 4th DCA). The court held that the child herself was entitled to assert the privilege and the court must appoint a guardian to act. *Id.* The court found that a child less than twelve years old lacked the emotional maturity or capacity to make such a determination. *Id.* at 308. The court determined that the trial court should evaluate whether the child had sufficient emotional and intellectual maturity to make such a decision. *Id.* If the child was sufficiently mature to make the decision, the court should appoint an attorney ad litem to assert the child's position. *Id.*

A guardian ad litem may not claim greater rights than a parent with respect to certain fundamental decisions concerning a child. *See, e.g.,* *In the Interest of J.D.*, 510 So.2d 623, 629 (Fla. 1st DCA 1987) (guardian ad litem may not usurp altogether parent's role in deciding child's educational placement as the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment,'" *quoting Santosky v. Kramer*, 445 U.S. 745 (1982)). "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 children to the State." *Santosky v. Kramer*, 455 U.S. at 753.

The case at bar is a dependency and neglect case, the ultimate custody dispute. Unlike a criminal sexual assault case, a dependency and neglect case necessarily requires information about the child's physical and mental condition. While Colorado does not have a rule of evidence similar to that in California, the GAL submits that that our courts expect similar information in dependency and neglect cases. Indeed, Colorado law requires it. § 19-1-107(2), C.R.S. (2010). Without information from the child's therapist, who sees the child more frequently than the caseworker, GAL, or CASA, the court would be operating in a vacuum.

Here, determining the subject matter of the case was neither the choice of the child nor the choice of the GAL. Neither the GAL nor the child injected the child's mental condition into the case. The GAL is not able to retroactively assert a privilege. As in *Devenyns*, here the child's medical and psychological information has been released to the parties pursuant to statute and in furtherance of protecting her best interests. She had no choice in the matter. Likewise, in order to meet her statutory obligations, the GAL had to investigate and report regarding the child's physical and mental condition. The caseworker, GAL, and CASA were in the unenviable position of providing information to the court in order to protect the best interests of the child or not providing the information and potentially placing the child back in an abusive or neglectful situation.

Because the caseworker and GAL disclosed information to the court, the parties had the exact same information. Mother asserted that the child had made positive statements about her. These are the same vague assertions the Court referred to in *People v. District Court*, *supra.* They were not enough to justify ignoring the child's privilege in this case. Mother's counsel had the opportunity to explore those statements in depth through a deposition of the therapist, as well as through cross-examination of the therapist at various hearings and the termination trial.

In the case at bar, Mother initially raised the child's mental health. It was her primary defense. The report dated February 18, 2010 was drafted and filed in response to the trial court's order that the parties evaluate the child's response to visits in the home. The filing of the report was in no way intended to waive the child's privilege.

Here, and in almost every other dependency and neglect case, the child's physical or mental condition is injected into litigation initially by the acts or omissions of the parent and then by the Department of Human Services. The child's condition then becomes a basis for the ongoing case, which requires investigation by, and reports from, the caseworker, the GAL, and the CASA, among others. To hold that the Department of Human Services, the GAL, or the CASA are waiving the child's privilege to medical or psychological information in performing their duties is absurd. Investigating and reporting to the court are fundamental functions of the GAL, the caseworker, and the CASA.

Should the Court find that GALs hold the child's privilege and have a duty to protect it, even in dependency and neglect cases, the GAL would ask the Court to consider the use of privilege logs. This Court provided guidance on the protection of privileged information in *Alcon v. Spicer*, 113 P.3d 735, 741 (Colo.

2005). The Court applied Rule 26(b)(5) of the Colorado Rules of Civil Procedure, which provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to access the applicability of the privilege or protection.

Id., quoting C.R.C.P. 26(b)(5).

This Court held that a party asserting a privilege should provide a privilege log, describing the privilege with sufficient detail, in order to reduce the need for *in camera* inspections of documents. *Id.* at 742.

However, there are several difficulties with privilege logs in the context of a dependency and neglect action. First, therapists are extremely reluctant to provide their written notes to anyone, even a GAL. Most will provide a written report summarizing treatment, as the therapist did in this case, but they will not provide their notes. Secondarily, because these cases move at a rapid pace compared to

other civil actions, it may be difficult to gather and distribute the information in a timely fashion. This could hamstring the parties and the court, and more importantly delay permanency for a child. Finally, in the event of a contest regarding the disclosure of information, the trial court would have to perform an *in camera* review. In an already overburdened docket, this may be difficult for the court should it occur in more than one case at a time.

F. THE GAL DID NOT WAIVE THE CHILD'S PSYCHOTHERAPIST PATIENT PRIVILEGE IN THIS CASE

The Court of Appeals relied on a New Hampshire decision in determining that the GAL held the child's privilege and waived the privilege by presenting evidence to the court and other parties. *In re Berg*, 886 A.2d 980 (N.H. 2005). In *Berg*, the New Hampshire Supreme Court determined "that parents do not have the exclusive right to assert or waive the privilege on their child's behalf." *Id.* at 987. The court determined that "[t]he trial court ha[d] the authority and discretion to determine whether assertion or waiver of the privilege was in the child's best interests." *Id.*

The New Hampshire Supreme Court went on to hold that the trial court could appoint a GAL to determine whether the privilege should be asserted. Id.

In doing so, the trial court had the discretion to grant a GAL access to the records in order to determine whether assertion or waiver of the privilege was in the child's best interests. Id. If the court was concerned that viewing the therapy records would taint a previously-appointed GAL's recommendation concerning custody or visitation, the court could appoint an independent GAL. Id. The trial court may also, within its sound discretion, appoint a guardian ad litem, regardless of the child's maturity, for the purpose of determining whether the privilege should be asserted. To that end, the court may rely upon the existing guardian ad litem, or appoint an independent guardian ad litem to address only the privilege issue. Id.

Here, notably, the child's psychotherapy information was accessed by multiple individuals in the course of their duties on this case. The child's information was accessed by the intake worker prior to the Petition being filed in court. The information was accessed by ongoing caseworkers, the Guardian ad Litem, the CASA, and Mother. The child's psychotherapy information formed the basis of DHS' petition. It was also filed with the court and made a part of the record.

The GAL obtained information from the child's therapist as a part of her independent investigation. This was in accordance with the GAL's duties under The Children's Code and pursuant to CJD 04-06. This information was disclosed to the court and all parties. The GAL did not have access to the therapist's file. Likewise, DHS did not have access to the therapist's file. All parties had the same access to information from the therapist.

The court must have access to complete information in order to make appropriate decisions regarding the best interests of the child. To hold that a GAL must keep privileged any information he or she obtains from a child's therapist limits the free flow of information necessary in a dependency or neglect proceeding. If a release of any information from a therapist, or other provider or school, for that matter, equates to a waiver of the child's privilege, it will have widespread effects on the handling of dependency and neglect cases.

Further, dependency or neglect proceedings are subject to concurrent planning. § 19-3-508, C.R.S. (2010). In many cases, concurrent planning requires simultaneous planning for the child to return home and not to return home. Effective concurrent planning requires the real-time dissemination of information so that the parties may advise the court of their positions and the court can make

informed rulings. Because of concurrent planning, a conflict between the parent and child may arise early in the case or may not arise for some time. Additionally, conflicts arise suddenly and sometimes without warning.

II. The Court of Appeals erred in determining that the child's therapist privilege was waived with respect to certain materials in the psychotherapist's file.

A. STANDARD OF REVIEW

This Court reviews *de novo* any issue of statutory construction. *Bostelman v. People*, 162 P.3d 686, 689 (Colo. 2007). The Court of Appeals held that a GAL could waive the therapist-patient privilege pursuant to § 13-90-107, C.R.S. (2010).

"In construing a statute involving the best interests of the child, [the court's] objective is to interpret the statute in a manner consistent with its plain language while avoiding constitutional infirmity." *In re Adoption of C.A.*, 137 P.3d 318, at 326 (Colo. 2006). The court may look to its precedent as well as instructive decisions from other jurisdictions. *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005).

B. THE CHILD'S THERAPIST PRIVILEGE WAS NOT WAIVED

In this case, the minor child's mental condition was injected into the lawsuit from the initial Petition. Indeed, it was one of the primary focuses of the investigation by DHS prior to the filing of the Petition. Prior to the Petition being filed, prior to a guardian ad litem being appointed, the minor child's privilege was arguably waived. Pursuant to § 19-3-311(1), C.R.S. (2010), the psychologist-patient privilege does not apply to communications that are a basis of a required report of child abuse. This was the case with the minor child's records from Children's Hospital.

Had the GAL not contacted the therapist, or addressed the reports from the therapist regarding the child's behavior following the visits, the GAL would not have been performing her duties and would have been subject to the argument that she was not adequately representing the child's best interests.

Here, the trial court struck a balance between the child's interests and Mother's interests, similar to that in *In re Christine W.*, (2001) 94 Cal.App.4th 521, *supra*. The GAL urges this Court to uphold the trial court's findings.

CONCLUSION

WHEREFORE, for the above reasons, the Guardian ad Litem respectfully requests that this Court enter an Order reversing the decision of the Court of Appeals and reinstating the termination of parental rights.

DATED this 20th day of April, 2012.

Respectfully submitted,

PACKER LAW FIRM, LLC

s/ Amy J. Packer
Amy J. Packer

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2012, the original and ten (10) copies of the above and foregoing *Guardian ad Litem's Amended Opening Brief* were filed with the Colorado Supreme Court;

And a true and correct copy of the above and foregoing *Guardian ad Litem's Opening Brief* was delivered to the attorney mailboxes located in the Juvenile Clerk's Office at 520 W. Colfax Avenue or via United States Mail, postage pre-paid, and addressed to the following persons:

Denver Juvenile Court, Division 2E

Laura Eibsen, Esq.
Attorney for the Denver Department of Human Services

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Amy J. Packer

ADDENDUM PURSUANT TO C.A.R. 29(f)

§ 13-90-107. Who may not testify without consent.

Archive

Colorado Statutes

Title 13. COURTS AND COURT PROCEDURE

WITNESSES

Article 90. Witnesses

Part 1. GENERAL PROVISIONS

Current through Chapter 5 of the 2012 Legislative Session

§ 13-90-107. Who may not testify without consent

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(a) (I) Except as otherwise provided in section **14-13-310(4)**, C.R.S., a husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent; nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage. However, this exception shall not attach if the otherwise privileged information is communicated after the marriage.

(II) The privilege described in this paragraph (a) does not apply to class 1, 2, or 3 felonies as described in section **18-1.3-401(1)** (a) (IV) and (1) (a) (V), C.R.S. In this instance, during the marriage or afterward, a husband shall not be examined for or against his wife as to any communications intended to be made in confidence and made by one to the other during the marriage without his consent, and a wife shall not be examined for or against her husband as to any communications intended to be made in confidence and made by one to the other without her consent.

(III) Communications between a husband and wife are not privileged pursuant to this paragraph (a) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a marriage for the purposes of this paragraph (a) shall be on the party asserting the claim.

(V) Notice of the assertion of the marital privilege shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.

(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

(c) A clergy member, minister, priest, or rabbi shall not be examined without both his or her consent and also the consent of the person making the confidential communication as to any confidential communication made to him or her in his or her professional capacity in the course of discipline expected by the religious body to which he or she belongs.

(d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:

(I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;

(II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(III) A review of a physician's or registered professional nurse's services by any of the following:

(A) The governing board of a hospital licensed pursuant to part 1 of article **3** of title 25, C.R.S., where said physician or registered professional nurse practices or the medical staff of such hospital if the medical staff operates pursuant to written bylaws approved by the governing board of such hospital;

(B) An organization authorized by federal or state law or contract to review physicians' or registered professional nurses' services or an organization which reviews the cost or quality of physicians' or registered professional nurses' services under a contract with the sponsor of a nongovernment group health care program;

(C) The Colorado medical board, the state board of nursing, or a person or group authorized by such board to make an investigation in its behalf;

(D) A peer review committee of a society or association of physicians or registered professional nurses whose membership includes not less than one-third of the medical doctors or doctors of osteopathy or registered professional nurses licensed to practice in this state and only if the physician or registered professional nurse whose services are the subject of review is a member of such society or association and said physician or registered professional nurse has signed a release authorizing such review;

(E) A committee, board, agency, government official, or court to which appeal may be taken from any of the organizations or groups listed in this subparagraph (III);

(IV) A physician or any health care provider who was in consultation with the physician who may have acquired any information or records relating to the services performed by the physician specified in subparagraph (III) of this paragraph (d);

(V) A registered professional nurse who is subject to any claim or the nurse's employer subject to any claim therein based on a nurse's actions, which claims are required to be defended and indemnified by any insurance company or trust obligated by contract;

(VI) A physician, surgeon, or registered professional nurse who is being examined as a witness as a result of his consultation for medical care or genetic counseling or screening pursuant to section **13-64-502** in connection with a civil action to which section **13-64-502** applies.

(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure.

(f) A certified public accountant shall not be examined without the consent of his or her client as to any
(I) communication made by the client to him or her in person or through the media of books of account and financial records or his or her advice, reports, or working papers given or made thereon in the course of professional employment; nor shall a secretary, stenographer, clerk, or assistant of a certified public accountant be examined without the consent of the client concerned concerning any fact, the knowledge of which he or she has acquired in such capacity.

(II) No certified public accountant in the employ of the state auditor's office shall be examined as to any communication made in the course of professional service to the legislative audit committee either in person or

through the media of books of account and financial records or advice, reports, or working papers given or made thereon; nor shall a secretary, clerk, or assistant of a certified public accountant who is in the employ of the state auditor's office be examined concerning any fact, the knowledge of which such secretary, clerk, or assistant acquired in such capacity, unless such information has been made open to public inspection by a majority vote of the members of the legislative audit committee.

(III) (A) **Subpoena powers for public entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports, working papers, or advice to a public entity that relate to audit or review accounting activities of the certified public accountant or certified public accounting firm being investigated.

(B) For the purposes of this subparagraph (III), a "public entity" shall include a governmental agency or entity; quasi-governmental entity; nonprofit entity; or public company that is considered an "issuer", as defined in section 2 of the federal "Sarbanes-Oxley Act of 2002", **15 U.S.C. sec. 7201**.

(IV) (A) **Subpoena powers for private entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports or working papers of a private entity that is not publicly traded and relate to audit or review attest activities of the certified public accountant or certified public accounting firm being investigated. This subparagraph (IV) shall not be construed to authorize the Colorado state board of accountancy or its agent to subpoena or examine income tax returns.

(B) At the request of either the client of the certified public accountant or certified public accounting firm or the certified public accountant or certified public accounting firm subject to the subpoena pursuant to this subparagraph (IV), a second certified public accounting firm or certified public accountant with no interest in the matter may review the report or working papers for compliance with the provisions of article **2** of title **12**, C.R.S. The second certified public accounting firm or certified public accountant conducting the review must be approved by the board prior to beginning its review. The approval of the second certified public accounting firm or certified public accountant shall be in good faith. The written report issued by a second certified public accounting firm or certified public accountant shall be in lieu of a review by the board. Such report shall be limited to matters directly related to the work performed by the certified public accountant or certified public accounting firm being investigated and should exclude specific references to client financial information. The party requesting that a second certified public accounting firm or certified public accountant review the reports and working papers shall pay any additional expenses related to retaining the second certified public accounting firm or certified public accountant by the party who made the request. The written report of the second certified public accounting firm or certified public accountant shall be submitted to the board. The board may use the findings of the second certified public accounting firm or certified public accountant as grounds for discipline pursuant to article **2** of title **12**, C.R.S.

(V) Disclosure of information under subparagraph (III) or (IV) of this paragraph (f) shall not waive or otherwise limit the confidentiality and privilege of such information nor relieve any certified public accountant, any certified public accounting firm, the Colorado state board of accountancy, or a person or group authorized by such board of the obligation of confidentiality. Disclosure which is not in good faith of such information shall subject the board, a member thereof, or its agent to civil liability pursuant to section **12-2-103(6)**, C.R.S.

(VI) Any certified public accountant or certified public accounting firm that receives a subpoena for reports or accountant's working papers related to the audit or review attest activities of the accountant or accounting firm pursuant to subparagraph (III) or (IV) of this paragraph (f) shall notify his or her client of the subpoena within three business days after the date of service of the subpoena.

(VII) Subparagraph (III) or (IV) of this paragraph (f) shall not operate as a waiver, on behalf of any third party or the certified public accountant or certified public accounting firm, of due process remedies available under the "State Administrative Procedure Act", article **4** of title **24**, C.R.S., the open records laws, article 72 of title **24**, C.R.S., or any other provision of law.

(VIII) Prior to the disclosure of information pursuant to subparagraph (III) or (IV) of this paragraph (f), the certified public accountant, certified public accounting firm, or client thereof shall have the opportunity to designate reports or working papers related to the attest function under subpoena as privileged and confidential

pursuant to this paragraph (f) or the open records laws, article 72 of title **24**, C.R.S., in order to assure that the report or working papers shall not be disseminated or otherwise republished and shall only be reviewed pursuant to limited authority granted to the board under subparagraph (III) or (IV) of this paragraph (f).

(IX) No later than thirty days after the board of accountancy completes the investigation for which records or working papers are subpoenaed pursuant to subparagraph (III) or (IV) of this paragraph (f), the board shall return all original records, working papers, or copies thereof to the certified public accountant or certified public accounting firm.

(X) Nothing in subparagraphs (III) and (IV) of this paragraph (f) shall cause the accountant-client privilege to be waived as to customer financial and account information of depository institutions or to the regulatory examinations and other regulatory information relating to depository institutions.

(XI) For the purposes of subparagraphs (III) to (X) of this paragraph (f), "entity" shall have the same meaning as in section **7-90-102(20)**, C.R.S.

(g) 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 licensee's, certificate holder's, or registrant's client as to any communication made by the client to the licensee, certificate holder, or registrant or the licensee's, certificate holder's, or registrant's advice given in the course of professional employment; nor shall any secretary, stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.

(h) A qualified interpreter, pursuant to section **13-90-202**, who is called upon to testify concerning the communications he interpreted between a hearing-impaired person and another person, one of whom holds a privilege pursuant to this subsection (1), shall not be examined without the written consent of the person who holds the privilege.

(i) A confidential intermediary, as defined in section **19-1-103(26)**, C.R.S., shall not be examined as to communications made to him or her in official confidence when the public interests, in the judgment of the court, would suffer by the disclosure of such communications.

(j) (I) (A) If any person or entity performs a voluntary self-evaluation, the person, any officer or employee of the entity or person involved with the voluntary self-evaluation, if a specific responsibility of such employee was the performance of or participation in the voluntary self-evaluation or the preparation of the environmental audit report, or any consultant who is hired for the purpose of performing the voluntary self-evaluation for the person or entity may not be examined as to the voluntary self-evaluation or environmental audit report without the consent of the person or entity or unless ordered to do so by any court of record, or, pursuant to section **24-4-105**, C.R.S., by an administrative law judge. For the purposes of this paragraph (j), "voluntary self-evaluation" and "environmental audit report" have the meanings provided for the terms in section **13-25-126.5(2)**.

(B) This paragraph (j) does not apply if the voluntary self-evaluation is subject to an exception allowing admission into evidence or discovery pursuant to the provisions of section **13-25-126.5(3) or (4)**.

(II) This paragraph (j) applies to voluntary self-evaluations that are performed on or after June 1, 1994.

(k) (I) A victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence, as defined in section **18-6-800.3(1)**, C.R.S., or a victim of sexual assault, as described in sections **18-3-401** to **18-3-405.5**, **18-6-301**, and **18-6-302**, C.R.S., in person or through the media of written records or reports without the consent of the victim.

(II) For purposes of this paragraph (k), a "victim's advocate" means a person at a battered women's shelter or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence or

sexual assault and does not include an advocate employed by any law enforcement agency:

(A) Whose primary function is to render advice, counsel, or assist victims of domestic or family violence or sexual assault; and

(B) Who has undergone not less than fifteen hours of training as a victim's advocate or, with respect to an advocate who assists victims of sexual assault, not less than thirty hours of training as a sexual assault victim's advocate; and

(C) Who supervises employees of the program, administers the program, or works under the direction of a supervisor of the program.

(I) A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1). The exception may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded. This exception does not relieve any physician, mental health professional, or clergy member, minister, priest, or rabbi from any statutory reporting requirements.

(II) This exception does not apply to:

(A) Any civil action or proceeding by one parent against the other or by a parent or minor child against the other;

(B) Any proceeding to commit either the minor child or parent, pursuant to title 27, C.R.S., to whom the communication was made;

(C) Any guardianship or conservatorship action to place the person or property or both under the control of another because of an alleged mental or physical condition of the minor child or the minor child's parent;

(D) Any criminal action or proceeding in which a minor's parent is charged with a crime committed against the communicating minor child, the parent's spouse, or a minor child of either the parent or the parent's spouse;

(E) Any action or proceeding for termination of the parent-child legal relationship;

(F) Any action or proceeding for voluntary relinquishment of the parent-child legal relationship; or

(G) Any action or proceeding on a petition alleging child abuse, dependency or neglect, abandonment, or non-support by a parent.

(III) For purposes of this paragraph (l):

(A) "Minor child" means any person under the age of eighteen years.

(B) "Parent" includes the legal guardian or legal custodian of a minor child as well as adoptive parents.

(m) (I) A law enforcement or firefighter peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subparagraph (III) of this paragraph (m); nor shall a recipient of individual peer support services be examined as to any such communication without the recipient's consent.

(II) For purposes of this paragraph (m):

(A) "Communication" means an oral statement, written statement, note, record, report, or document, made during,

or arising out of, a meeting with a peer support team member.

(B) "Law enforcement or firefighter peer support team member" means a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills and who is officially designated by a police chief, the chief of the Colorado state patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

(III) The provisions of this paragraph (m) shall apply only to communications made during individual interactions conducted by a peer support team member:

(A) Acting in the person's official capacity as a law enforcement or firefighter peer support team member; and

(B) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency or fire department.

(IV) This paragraph (m) shall not apply in cases in which:

(A) A law enforcement or firefighter peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;

(B) Information received by a peer support team member is indicative of actual or suspected child abuse, as described in section **18-6-401**, C.R.S., or actual or suspected child neglect, as described in section **19-3-102**, C.R.S.;

(C) Due to alcohol or other substance intoxication or abuse, as described in sections **27-81-111** and **27-82-107**, C.R.S., the person receiving peer support is a clear and immediate danger to the person's self or others;

(D) There is reasonable cause to believe that the person receiving peer support has a mental illness and, due to the mental illness, is an imminent threat to himself or herself or others or is gravely disabled as defined in section **27-65-102**, C.R.S.; or

(E) There is information indicative of any criminal conduct.

(2) The medical records produced for use in the review provided for in subparagraphs (III), (IV), and (V) of paragraph (d) of subsection (1) of this section shall not become public records by virtue of such use. The identity of any patient whose records are so reviewed shall not be disclosed to any person not directly involved in such review process, and procedures shall be adopted by the Colorado medical board or state board of nursing to ensure that the identity of the patient shall be concealed during the review process itself.

(3) The provisions of paragraph (d) of subsection (1) of this section shall not apply to physicians required to make reports in accordance with section **12-36-135**, C.R.S. In addition, the provisions of paragraphs (d) and (g) of subsection (1) of this section shall not apply to physicians or psychologists eligible to testify concerning a criminal defendant's mental condition pursuant to section **16-8-103.6**, C.R.S. Physicians and psychologists testifying concerning a criminal defendant's mental condition pursuant to section **16-8-103.6**, C.R.S., do not fall under the attorney-client privilege in paragraph (b) of subsection (1) of this section.

History. L. 1883: p. 290, § 3. G.S. § 3649. R.S. 08: § 7274. L. 11: p. 679, § 1. C.L. § 6563. L. 29: p. 642, § 1. CSA: C. 177, § 9. CRS 53: §153-1-7. L. 61: p. 603, § 16. C.R.S. 1963: § 154-1-7. L. 67: p. 809, § 12. L. 76: (1)(d) R&RE and (2) added, pp. 525, 526, §§ 2, 3, effective July 1. L. 81: (1)(b) amended, p. 900, § 1, effective May 26. L. 83: (1)(d) and (2) amended, p. 636, § 1, effective May 25; (1)(a) amended, p. 663, § 1, effective July 1. L. 84: (1)(g) amended, p. 1118, § 8, effective June 7. L. 87: (1)(h) added, p. 572, § 2, effective April 23; (3) added, p. 623, § 5, effective July 1. L. 88: (1)(a) and (1)(c) amended, pp. 708, 630, §§ 3, 1, effective July 1. L. 89: (1)(i) added, p. 943, § 2, effective March 27; (1)(d)(VI) added, p. 763, § 5, effective July 1. L. 93: (1)(f) amended, p. 15, § 3, effective March 2; (1)(g) amended, p. 363, § 1, effective April 12. L. 94: (1)(j) added, p. 1869, § 2, effective June 1; (1)(k) added, p. 2031, § 7, effective July 1. L. 95: (1)(k) amended, p. 948, § 4, effective July 1; (3) amended, p. 1249, § 2, effective July 1. L. 96: (1)(a)(II) amended, p. 1842, § 6, effective July 1. L. 98: (1)(g) amended, p. 1158, § 29, effective July 1; (1)(i)

amended, p. 819, § 16, effective August 5. L. 99: (1)(j)(II) amended, p. 301, § 2, effective April 14. L. 2000: (1)(a)(I) amended, p. 1537, § 3, effective July 1. L. 2002: (1)(c) and (1)(l)(I) amended, pp. 1146, 1145, §§ 3, 2, effective June 3; (1)(l) added, p. 399, § 1, effective August 7; (1)(a)(II) amended, p. 1489, § 127, effective October 1. L. 2003: (1)(f) amended, p. 1391, § 1, effective August 6. L. 2004: (1)(g) amended, p. 919, § 25, effective July 1. L. 2005: (1)(m) added, p. 89, § 1, effective July 1. L. 2006: (1)(m)(IV)(D) amended, p. 1396, § 38, effective August 7. L. 2010: (1)(m)(IV)(C) and (1)(m)(IV)(D) amended, (SB 10-175), ch. 188, p. 782, § 18, effective April 29; IP(1)(d), (1)(d)(III)(C), and (2) amended, (HB 10-1260), ch. 403, p. 1985, § 72, effective July 1. L. 2011: (1)(g) amended, (SB 11-187), ch. 285, p. 1327, § 68, effective July 1.

§ 19-1-111. Appointment of guardian ad litem.

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Colorado Statutes

Title 19. CHILDREN'S CODE

Article 1. General Provisions

Part 1. GENERAL PROVISIONS

Current through Chapter 5 of the 2012 Legislative Session

§ 19-1-111. Appointment of guardian ad litem

(1) The court shall appoint a guardian ad litem for the child in all dependency or neglect cases under this title.

(2) The court may appoint a guardian ad litem in the following cases:

(a) For a child in a delinquency proceeding where:

(I) No parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent appears at the first or any subsequent hearing in the case;

(II) The court finds that a conflict of interest exists between the child and parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent; or

(III) The court makes specific findings that the appointment of a guardian ad litem is necessary to serve the best interests of the child and such specific findings are included in the court's order of appointment.

(b) For a child in proceedings under the "School Attendance Law of 1963", article 33 of title **22**, C.R.S., when the court finds that the appointment is necessary due to exceptional and extraordinary circumstances.

(c) For a parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, stepparent, or spousal equivalent in dependency or neglect proceedings who has been determined to have a mental illness or developmental disability by a court of competent jurisdiction; except that, if a conservator has been appointed, the conservator shall serve as the guardian ad litem. If the conservator does not serve as guardian ad litem, the conservator shall be informed that a guardian ad litem has been appointed.

(3) The guardian ad litem for the child shall have the right to participate in all proceedings as a party, except in delinquency cases.

(4) (a) Except as provided in paragraphs (b) and (c) of this subsection (4), the appointment of a guardian ad litem pursuant to this section shall continue until such time as the court's jurisdiction is terminated.

(b) The appointment of the guardian ad litem shall terminate in a delinquency proceeding:

(I) At the time sentence is imposed, unless the court continues the appointment because the child is sentenced to residential or community out-of-home placement as a condition of probation; or

(II) When the child reaches eighteen years of age, unless the child has a developmental disability.

(c) The court may terminate the appointment of a guardian ad litem in a delinquency proceeding on its own motion or on the motion of the guardian ad litem when the appointment is no longer necessary due to any of the

following reasons:

(I) The child's parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent appears at a hearing in the case;

(II) The conflict of interest described in subparagraph (II) of paragraph (a) of subsection (2) of this section no longer exists; or

(III) The appointment no longer serves the best interests of the child.

(5) The guardian ad litem shall cooperate with any CASA volunteer appointed pursuant to section **19-1-206**.

(6) Any person appointed to serve as a guardian ad litem pursuant to this section shall comply with the provisions set forth in the chief justice directive 97-02, concerning the court appointment of guardians ad litem and other representatives and of counsel for children and indigent persons in titles 14, 15, 19 (dependency and neglect only), 22, and 27, C.R.S., and any subsequent chief justice directive or other practice standards established by rule or directive of the chief justice pursuant to section **13-91-105**, C.R.S., concerning the duties or responsibilities of guardians ad litem in legal matters affecting children.

History. L. 87: Entire title R&RE, p. 702, § 1, effective October 1. L. 92: (1) amended, p. 221, § 4, effective July 1. L. 96: (5) added, p. 1089, § 2, effective May 23. L. 98: (2)(a)(I), (2)(a)(II), and (2)(c) amended, p. 1405, § 62, effective February 1, 1999. L. 2000: (6) added, p. 1774, § 4, effective July 1. L. 2006: (2)(c) amended, p. 1400, § 52, effective August 7. L. 2009: (2)(a)(III), (2)(b), and (4) amended, (SB 09-268), ch. 207, p. 942, § 3, effective May 1.

Editor's Note:

This section was contained in a title that was repealed and reenacted in 1987. Provisions of this section, as it existed in 1987, are similar to those contained in 19-3-105 as said section existed in 1986, the year prior to the repeal and reenactment of this title.

§ 19-3-203. Guardian ad litem.

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Colorado Statutes

Title 19. CHILDREN'S CODE

Article 3. Dependency and Neglect

Part 2. GENERAL PROVISIONS

Current through Chapter 5 of the 2012 Legislative Session

§ 19-3-203. Guardian ad litem

(1) Upon the filing of a petition under section **19-3-502** that alleges abuse or neglect of a minor child, the court shall appoint a guardian ad litem. Nothing in this section shall limit the power of the court to appoint a guardian ad litem prior to the filing of a petition for good cause.

(2) The guardian ad litem shall be provided with all reports relevant to a case submitted to or made by any agency or person pursuant to this article, including reports of examination of the child or persons responsible for the neglect or dependency of the child. The court and social workers assigned to the case shall keep the guardian ad litem apprised of significant developments in the case, particularly prior to further neglect or dependency court appearances.

(3) The guardian ad litem shall be charged in general with the representation of the child's interests. To that end, the guardian ad litem shall make such further investigations as the guardian ad litem deems necessary to ascertain the facts and shall talk with or observe the child involved, examine and cross-examine witnesses in both the adjudicatory and dispositional hearings, introduce and examine the guardian ad litem's own witnesses, make recommendations to the court concerning the child's welfare, appeal matters to the court of appeals or the supreme court, and participate further in the proceedings to the degree necessary to adequately represent the child. In addition, the guardian ad litem, if in the best interest of the child, shall seek to assure that reasonable efforts are being made to prevent unnecessary placement of the child out of the home and to facilitate reunification of the child with the child's family or, if reunification is not possible, to find another safe and permanent living arrangement for the child. In determining whether said reasonable efforts are made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.

History. L. 87: Entire title R&RE, p. 761, § 1, effective October 1. L. 92: (1) amended, p. 224, § 9, effective July 1. L. 93: (3) amended, p. 2013, § 3, effective July 1. L. 98: (3) amended, p. 1417, § 3, effective July 1. L. 2001: (3) amended, p. 846, § 7, effective June 1.

Editor's Note:

This section was contained in a title that was repealed and reenacted in 1987. Provisions of this section, as it existed in 1987, are similar to those contained in 19-3-105 and 19-10-113 as said sections existed in 1986, the year prior to the repeal and reenactment of this title.

§ 19-3-206. Representation of petitioner.

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Colorado Statutes

Title 19. CHILDREN'S CODE

Article 3. Dependency and Neglect

Part 2. GENERAL PROVISIONS

Current through Chapter 5 of the 2012 Legislative Session

§ 19-3-206. Representation of petitioner

In all proceedings brought under this article, the petitioner shall be represented by a county attorney, special county attorney, or city attorney of a city and county.

History. L. 87: Entire title R&RE, p. 762, § 1, effective October 1.

Editor's Note:

This section was contained in a title that was repealed and reenacted in 1987. Provisions of this section, as it existed in 1987, are similar to those contained in 19-1-106 as said section existed in 1986, the year prior to the repeal and reenactment of this title.

§ 19-3-311. Evidence not privileged.

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Title 19. CHILDREN'S CODE

Article 3. Dependency and Neglect

Part 3. CHILD ABUSE OR NEGLECT

Current through Chapter 5 of the 2012 Legislative Session

§ 19-3-311. Evidence not privileged

(1) The incident of privileged communication between patient and physician, between patient and registered professional nurse, or between any person licensed pursuant to article **43** of title **12**, C.R.S., or certified or licensed school psychologist and client, which is the basis for a report pursuant to section **19-3-304**, shall not be a ground for excluding evidence in any judicial proceeding resulting from a report pursuant to this part 3. In addition, privileged communication shall not apply to any discussion of any future misconduct or of any other past misconduct which could be the basis for any other report under section **19-3-304**.

(2) The privileged communication between husband and wife shall not be a ground for excluding evidence in any judicial proceeding resulting from a report pursuant to this part 3.

History. L. 87: Entire title R&RE, p. 771, § 1, effective October 1. L. 89: Entire section amended, p. 699, § 6, effective June 7. L. 90: Entire section amended, p. 1024, § 3, effective July 1. L. 2008: (1) amended, p. 1893, § 65, effective August 5.

Editor's Note:

This section was contained in a title that was repealed and reenacted in 1987. Provisions of this section, as it existed in 1987, are similar to those contained in § 19-10-112 as said section existed in 1986, the year prior to the repeal and reenactment of this title.