

FALL 2007

OCR updates serve to inform OCR attorneys and other interested professionals of recent court decisions, studies, and current events relating to child advocacy, OCR activities, GAL activities, and resources and events that may be beneficial to you or your clients. Please feel free to email the OCR with any feedback or information that you wish to have posted in the next update.

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OCR NEWSLETTER

Court Opinions

The summaries below highlight aspects of cases relevant to child representation, but they are neither official nor complete court opinions. Decisions may be subject to multiple interpretations, and attorneys should consult with the original decision prior to citing it. The full text of many of the following decisions can be accessed on the Colorado Court of Appeals website, <http://www.courts.state.co.us/coa/coaindex.htm>, or the Colorado Supreme Court website, <http://www.courts.state.co.us/subct/subpctcaseannctsindex.htm>. If you are not able to access a decision online, please feel free to contact the OCR's Staff Attorney, Sarah Ehrlich, (303-860-1517, ext. 1), for assistance.

In re Zamer G, 153 Cal. App. 4th 1253 (2007). This is a conflict of interest case involving the Children's Law Center of Los Angeles. The court of appeals affirms the juvenile courts order disqualifying the CLC unit 1 from representing four of five siblings because of an actual conflict among the siblings. The center is a publicly funded non profit that represents children in dependency and neglect proceedings. The center is comprised of three units in order to provide representation to multiple children in D&N proceedings. The case involves five children, with three different fathers. The children are Joshua, Justin, (father Joshua Sr), Zamer, (father Zack) Naes and Nay (father Nah). The department detained all of the children because the petition alleged Zamer was hospitalized because of physical abuse by mother and Nah. One attorney from Unit 1 of the CLC was appointed for all the children except Zamer, who was represented by an attorney from Unit 2. The juvenile court then disqualified Unit 1 and Unit 2 from the case. The rule in California is that the court may appoint a single attorney to represent a group of siblings involved in the same dependency proceeding, but the attorney has a duty to assess whether an actual conflict of interest exists. If a conflict exists, the court must relieve the attorney from representing some or all of the siblings. It is not necessary for counsel to withdraw if there is a reasonable likelihood that an actual conflict of interest will develop. The juvenile court's disqualification of the Center is only proper if an actual conflict existed between two or more of the children. The juvenile court found an actual conflict between Joshua and Justin, and also between Naes and Nay, because Joshua and Justin were victims of abuse perpetrated by Nah, the father of Naes and Nay. The attorney for Unit 1 was disqualified because the interests of Joshua and Justin were inconsistent with those of Naes and Nay.

Colorado Supreme Court Cases— Coming in the next edition *In re J.C.T.*, No. 06SC780
Colorado Court of Appeals Cases

Paternity/Grandparent Intervention

In the Interest of K.L.O.V - No. 05CA2214, November 16, 2007 - In this paternity action, grandmother appeals the order denying her motion to intervene. The court agreed the grandmother had standing to seek visitation, and concluded they did not err in denying intervention. Grandparents may seek an order granting visitation rights with a grandchild when there is child custody case. See § 19-1-117(1). The court disagrees that grandmother should be allowed to intervene as a matter of right under C.R.C.P. 24. The underlying action was paternity, and under the Uniform Parentage Act, there is not a provision for intervention by a grandparent or grandparent's visitation rights. § 19-1-117 does not vest an absolute right to visitation with a grandparent, and because grandparent visitation is not inherent in a paternity action, the court concludes the statutes do not confer an unconditional right to intervene. Grandmother also argues the district court abused its discretion in denying permissive intervention. The court found no error because unless the trial court abuses its discretion, the denial of a motion for permissive intervention is not a final order. Here, the court found no abuse of discretion because different proof is required

Summary Judgment in D&N

depending on whether the court is determining parenting time or visitation with grandparent, and the issue of grandparent visitation is a new factual question for the paternity action. The district court judgment is affirmed and the permissive intervention issue is dismissed.

Summary Judgment in D&N action

In the Interest of A.C. III, ____P.3d____, No. 06JV138, September 20, 2007 - Mother appeals the court's summary judgment adjudicating her son A.C. to be dependent and neglected. The motion for summary judgment was filed twenty-one days before the adjudicatory hearing. C.R.C.P. R. 56 provides that a motion for summary judgment shall be filed no later than 85 days prior to trial. § 19-3-505(3) requires adjudicatory hearings to be held no later than 60 days after the service of the petition for children under six. The issue in this case is the conflict between the statute and the rule of civil procedure, because a social services department cannot comply with both the statute and the rule. Under C.R.C.P. R. 81, when there is a conflict between a statute and a rule, the rules "do not govern practice and procedure in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute." *Id.* at ____ Under R. 81, the court properly allowed the department to file its summary judgment motion. Mother contends the trial court erred in granting summary judgment because a genuine issue of material fact existed as to whether A.C. was a failure to thrive child. Summary judgment is permitted in dependency and neglect actions, and the party seeking summary judgment must show there is no genuine issue of material fact and all doubts must be resolved against that party. Once this burden is met, the burden shifts to the opposing party to establish there is a genuine issue of fact. The department's motion for summary judgment alleged A.C. should be adjudicated dependent and neglected because he was diagnosed as a nonorganic failure to thrive child, mother had not provided adequate food or shelter, mother's paternal rights to another child were terminated because the child failed to thrive, and mother fed water to both children in contradiction of medical advice. This was supported by the treating physician's affidavit. The department met its burden of showing there was no genuine issue of material fact, and the burden shifted to mother. Mother did not have supporting documentation to disprove the department's motion. The court rejects mother's argument and the judgment is affirmed.

"Stepmother contends ICWA does not apply to stepparent adoption proceedings, or where a child remains with a biological child after adoption."

ICWA CASES

Stepparent adoption proceeding/ICWA

In the matter of N.B., NO. 06CA1325, September 6, 2007 - Stepmother appeals the order dismissing her petition to adopt B.S.B., who is an Indian child. B.S.B. has remained in Father's custody since birth. Mother moved out of state in 2001, and only visited the child three times in three years. Stepmother petitioned to terminate mother's rights and to adopt the child. The Assiniboinne and Sioux tribes intervened as child is an "Indian Child" for the purposes of ICWA. Stepmother contends ICWA does not apply to stepparent adoption proceedings, or where a child remains with a biological child after adoption. The court held ICWA applies to stepparent adoptions because it was not specifically included as an exclusion to the broad definition of a child custody proceeding under ICWA. Stepmother's argument that ICWA does not apply if the child remains in father's custody fails because ICWA does not except custody disputes within an extended family or draw distinctions on the post-adoption parents of the Indian child. The court also declined to accept the existing Indian family exception. This exception was created by the Kansas Supreme Court by holding ICWA should apply only to the removal of Indian children who were members of an Indian home and participated in Indian culture. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). The court of appeals declined to adopt this exception because applying the exception would result in each state court using its own value system to decide whether an Indian child is "Indian enough" for the ICWA to apply which would chill the tribes' efforts to reclaim members. *Id.* at ____ . Stepmother's final argument is that it is unreasonable to for her to establish active efforts to provide remedial services and programs to prevent the breakup of the family because she is a private petitioner. Active efforts are required by the petitioning party under ICWA to prevent the breakup of the Indian Family. See 25 USC § 1912(d). While stepmother was required to provide these services she did not make efforts to do so. The court of appeals holds the burden of proving fulfillment of the active efforts requirement applies to private petitioners such as stepmother, because Congress did not choose to differentiate stepparent adoptions. The court of appeals affirms the trial courts holding that the

More Cases....

stepmother's failure to show active efforts as required by 25 U.S.C § 1912 9(d) prevents termination of mother's parental rights through this stepparent adoption.

In the Interest of J.O., ___P.3d.____, No. 07CA0643, September 20, 2007 – Mother appeals from the judgment terminating her parental rights and asserts the notice requirements of ICWA were not met. Father claimed to be ¼ Apache, even though he was not registered with a tribe. He was advised by the court to verify his heritage within two weeks. The Department sent an ICWA notice to the BIA on December 4, 2006. The trial court held father indicated he had some native American heritage, but the BIA did not respond to the notice and father did not supply additional information about his heritage to the court, thus the child was not an Indian child subject to ICWA. Mother argues the notice provided to the BIA was late, the notice was deficient and identification of the relevant tribe was almost impossible. Proper notice under ICWA is by registered mail with return receipt requested of the pending proceedings with the tribe's right to intervene. 25 U.S.C. § 1912(a) (2001) and § 19-1-126(1)(a)-(b) (2006). If the identity or the location of the tribe cannot be determined, the notice is sent to the BIA, at least 10 days before the hearing in involuntary proceedings or termination of parental rights. *B.H. v. People in Interest of X.H.*, 138 P.3d at 302. In order for notice to be proper, notice must be sent via registered mail with return receipt requested, of the proceedings and the tribe's right to intervene. If the tribal affiliation is unknown, the notice is sent to the BIA. Notice must be received at least ten days prior to the hearing in involuntary proceedings. The court of appeals agrees with mother that notice did not comply with ICWA because the notice was not sent via registered mail, the motion to terminate was not attached, and the notice did not acknowledge father's specific identification of the Apache tribe nor did it not contain the advisement of the tribe's right to intervene. While the burden is on the parents to show that ICWA applies, the Department must still comply with the mandatory notice requirements of ICWA. The judgment is vacated and the case is remanded with instructions to ensure notice is provide in accordance with ICWA and the Children's Code.

Service of Process in D&N cases

People in the Interest of S.M.A.M.A., ___P.3d____, No. 07CA0933, October 18, 2007 – Mother appeals from the judgment terminating the parent child legal relationship. The issue was whether the three - day mailing rule applies to the computation of time in which to file a notice of appeal pursuant to C.A.R. 3.4 and whether mother's notice of appeal was timely filed. In D&N cases, the Colorado Rules of Civil Procedure govern methods of service, unless otherwise noted in the Children's Code or Rule of Juvenile Procedure. But, the deadline for filing an appeal in a dependency and neglect matter is governed by C.A.R. 3.4 (b), and is twenty-one days. The court entered the order and deposited it in respondent mother's attorney's court mailbox. C.R.C.P. 5(b)(2)(D) allows service to an attorney via courthouse mailbox. The notice of appeal was filed twenty-two days later, which was outside of the twenty-one day rule set forth in CAR 3.4(b), when the notice of entry of order is mailed to the parties, the time for filing the notice of appeal begins to run on the date of mailing. Mother argued the service to an attorney's mailbox is equivalent to service by mail, thus three days must be added to the time in which to file an appeal under C.R.C.P. R. 6(e). The counterpart to R. 6(e) for appeals is C.A.R. 26(c). This rule ensures that mail delivery will not shorten any deadlines in a case. Neither C.A.R. 3.4 nor 26(c) prohibits the application of the three-day mailing rule to notices of appeal filed in D&N cases. Instead of extending existing deadlines, the three-day mailing rule changes how the filing deadline is determined. Thus, the notice of appeal was timely filed.

In the Interest of C.T.G., ___P.3d.____ No. 05CA0783, Prior opinion announced Feb. 8, 2007, Withdrawn. New Opinion announced August 9, 2007. The court of appeals concluded the trial court erred in not granting the parent's motion to terminate stepfather visitation. Father and mother appeal from the trial court's orders denying their request to terminate the parenting time awarded to stepfather for the minor child. While mother and stepfather were married she had relations with father and became pregnant. The child was born in 1998. Stepfather was not aware he was not the father until 2001, when father filed a paternity action. In 2002, a court in Minnesota decreed father was the biological father of C.T.G., and awarded joint legal custody of child to father and mother. The stepfather would have visitation as established by the parties and the GAL pending agreement by the court. *Id.* In 2003, mother and stepfather divorced. Mother and father were cohabitating and relocated to Colorado, where stepfather visited one weekend per month. In 2005, jurisdiction was transferred to Colorado and parents filed a motion to terminate stepfather's rights. The trial court found stepfather was a "psychological parent", and to eliminate contact with the child would hinder the



“Proper notice under ICWA is by registered mail with return receipt requested of the pending proceedings with the tribe's right to intervene.”



Book Suggestion: *Beyond the Foster Care System: The Future For Teens*, By Betsy Krebs and Paul Pitcoff.

Termination of Stepfather Visitation

emotional development of the child, and the court ordered the stepfather visits to continue. The court of appeals first addressed the standing of the stepfather and found he had standing based on the Minnesota court's judgment. In the original opinion, the court of appeals found that stepfather had standing, but reversed the order related to stepfather's parenting time. In most recent opinion, the court of appeals concluded that stepfather lacked standing to seek parenting time, and again reversed the orders granting parenting time. Stepfather asserted he was a "psychological parent," thus he should have standing. Stepfather does not have standing because 1) the General Assembly has promulgated limited instances where a person other than a parent may be awarded visitation rights, and this includes a person other than a parent only if the child is not in the physical care of one of the parents or by a person other than a parent who has cared for the child for a period of six months or more. See C.R.S § 14-10-123(1) 2006. Stepfather did not have physical custody of the child since he and mother separated in 2002. Stepfather's argument that status as the "psychological parent" grants him standing fails because he did not meet the limited requirements of set forth in § 14-10-123(1)(c). He failed to show he had physical care of the child for six months and commenced the action within six months of the termination of care. Stepfather relies on *In re E.L.M.C.*, 100 P. 3d 546 (Colo. App. 2004), where a same sex couple sought joint adoption of a child but because same-sex adoption was not possible, the papers included only one woman's name. When the relationship dissolved, there was a dispute over parenting time and the co-parent had standing because both women were found to be psychological parents, and the co-parent had been living with the child for years. This distinction is found in all cases relying on *In re E.L.M.C.*, *supra*. Even if stepfather was a "psychological parent" of the child when he resided with her in Minnesota, he did not live with the child when he filed his motion for visitation in Colorado and had not lived with the child for three years. The orders are reversed and the case is remanded with directions to grant the parent's motion to terminate visitation.

Training

The Office of the Child's Representative is hosting week-long brown bag trainings on the implementation of SB 226 (right of youth to have a say in their permanency plan). RPC, CASAs, County Attorneys, and Judges are welcome and encouraged to attend. The sessions will take place in the regional courthouse during the lunch hour (12:00–1:30) throughout the following weeks in each of the front range metro locations:

- *Jefferson County*: November 26-30
- *Boulder County*: December 3-7
- *Arapahoe County*: December 10-14
- *Denver County*: January 7-11
- *Adams County*: January 14-18

Details are available on the OCR's website: <http://www.coloradochildrep.org/Training/training.html>. We will provide this training in other areas of the state during 2008, and we will also hold a Saturday training on the Front Range in early 2008.

If you have any questions about this training, please Contact Ryan Burke, OCR's Training and Media Coordinator, at 303-860-1517, extension 3 or RyanBurke@coloradochildrep.org.

Blueprints Conference March 18-19, 2008 at the University of Colorado

The goal of the conference is to disseminate science-based information on youth violence, delinquency, and drug prevention programs that are effective. This conference will motivate the prevention field to adopt evidence-based programs and provide support, guidance, and tools by program experts to help practitioners implement these programs successfully in their own communities. To register please go to <http://www.blueprintsconference.com/registration/>

AFCC Annual Conference – May 28-31, 2008, Westin Bayshore Resort, Vancouver BC, Canada, www.afccnet.org for more information

FEDERAL LEGISLATION

Information on Federal Legislation can be found at <http://thomas.loc.gov/>

S. 1956 – The Tribal Foster Care and Adoption Access Act of 2007 was introduced on August 2, 2007 and would amend the Soc. Sec. Title IV-E to enable tribes to receive IV-E payments.

STATE LEGISLATION

For more information on the 1st Regular Session of the 67th General Assembly see <http://www.leg.state.co.us/>. The 2008 session will begin on January 9. As always, OCR will be monitoring legislation. If you have any questions or concerns regarding legislation, please contact Sarah Ehrlich at sarahehrlich@coloradochildrep.org

Resources

New Web Site Spotlights Domestic Violence

In recognition of Domestic Violence Awareness Month, the Office on Violence Against Women presents www.enditnow.gov. This online tool contains information and resources for both victims and those seeking to help them. All content, including a public service announcement, is available in both English and Spanish. For more information, visit www.usdoj.gov/ovw. (OVW)

New Web Site Spotlights Domestic Violence

National Institute on Drug Abuse for Teens - <http://teens.drugabuse.gov>

The following websites were compiled by Mile High United Way:

211 - <http://unitedwaydenver.org>

College in Colorado - <http://collegeincolorado.org/home.aspx>

College Invest - <http://collegeinvest.org>

Education and Training Vouchers - <http://www.statevoucher.org/>

FORGES - <http://exdoc.state.co.us/secure/combo/frontend/index.php/contents/view/343>—Aftercare programs for offenders

FYI 3 - <http://FYI3.com>. This is the national network for foster children—this is a site for youth in care.

It's My Life- <http://www.casey.org/Resources/Publications/ItsMyLifeFramework.htm>—A resource for social workers, GALs or anyone who works with youth. This publication provides a holistic approach to aging out.



Don't forget about the OCR Brown Bag Trainings!

BLOGS

OCR does not endorse any of the following blogs, and we cannot guarantee the accuracy of the legal information found on the blogs.

www.legalethics.com

Myshingle.com

<http://legaltimes.typepad.com/>

Articles

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Foster Care Financial Activities Performance Audit, September 2007 available at the Auditor website at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/E06E325373026C1A8725735D0064DCF5/\\$FILE/1770%20Foster%20Care%20Perf%20Sept%202007.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/E06E325373026C1A8725735D0064DCF5/$FILE/1770%20Foster%20Care%20Perf%20Sept%202007.pdf)

Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process, by Judge Leonard P. Edwards from the *Juvenile and Family Court Journal*, Spring 2007, Vol. 58, No. 2. (OCR Library)

Resource for Judges in Making Child Custody and Visitation Evaluations from the NCJFCJ's Family Violence Department: *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*. For a free copy, call 1-800-527-3223

Campaign for Youth Justice Report, *The Consequences Aren't Minor: the Impact of Prosecuting Youth as Adults and Strategies for Reform*. Found at: <http://www.campaignforyouthjustice.org>

Awards and Recognition



Please feel free to stop in and borrow books or publications from the OCR Library. It is a resource for YOU! Please call Melanie if there is a specific topic or journal that you are looking to use.

Congratulations to Jenna Reulbach! The 1st Judicial District recognized Jenna's outstanding contribution to the practice of law by awarding her with the George Holley Young Lawyer of the Year award. Great job Jenna!

Congratulations to the CASA award winners:

Judge Lowenbach - Judge of the Year

Bill DeLisio - Advocate of the Year

Howard Bartlett - GAL of the Year

Congratulations to Judge Roxanne Bailin and Magistrate Dinsmore Tuttle on receiving the 2007 CJI Judicial Excellence Awards.