

RECENT MEETINGS AND EVENTS

At the **May 20, 2009** JLS meeting, **Diane Baird** from the Kempe Children's Center, presented on "Effective Visitation Decisions. At this meeting, the JLS also held its annual election to elect the Chair-elect for the 2010-2011 year and the Secretary for the 2009-2010 year.

The summer JLS meeting was held on **July 15, 2009** at the CBA Office. **Bonnie Saltzman**, legislative liaison for the JLS section, presented a Legislation Update.

The most recent JLS meeting was held on **September 9, 2009** at the CBA Office. Chairperson, **Barbara Shaklee**, set the dates for future meetings and discussed topics of interest for future CLE presentations during the meetings.

SCHEDULE OF FUTURE JLS EVENTS

Please put these dates on your calendar now and send in your RSVP when you get the meeting notice from Andrea Mueller.

October 26, 2009 – Terri James Banks, with the Kempe Children's Center will present on "Effects of Internet Pornography by caregivers on children – consideration for parenting and /or placement" from noon to 1:30 p.m. at the **Colorado Bar Association Office**, 1900 Grant Street, 9th Floor, Denver, CO 80203

January 13, 2010 – CLE topic and location of the meeting to be decided.

March 12, 2010 – All day JLS CLE Annual Update – "Effective Advocacy During the Current Budget Crisis" - at the **Colorado Bar Association Office**, 1900 Grant Street, 9th Floor, Denver, CO 80203

May 12, 2010 – **JLS Annual Election meeting**. CLE topic and location of the meeting to be decided.

July 14, 2010 – First meeting of the 2010-2011 fiscal year with new officers. CLE topic and location of the meeting to be decided.

All meetings held at the **Colorado Bar Association Office**, 1900 Grant Street, 9th Floor, Denver, CO 80203, are available by **audio conference** for members who are unable to travel to Denver for the meetings.

OTHER EVENTS OF INTEREST – MANY OF THESE CONFERENCES OFFER SPECIAL DISCOUNTS FOR JUVENILE LAW SECTION MEMBERS – BE SURE TO ASK WHEN REGISTERING FOR AN EVENT

No additional events have been reported.

NEW OFFICERS FOR THE 2009-2010 FISCAL YEAR

Chair-elect: Sheri Danz, Office of the Child's Representative

Secretary: Kris Ward, The Ward Law Firm, PC

JUVENILE LAW SECTION EXECUTIVE COUNCIL REPORTS

The Executive Council meets between 11:30 and noon just prior to each scheduled meeting of the section. If you have any interest in serving on any of the subcommittees, please contact one of the officers, Barbara Shaklee, Chair, Sheri Danz, Chair-elect, or Kris Ward, Secretary. The subcommittees are: Legislative, Membership, Newsletter, Web, and Program.

LEGISLATIVE SUBCOMMITTEE REPORT

The first regular session of the General Assembly will begin in January 2010. **Bonnie Saltzman**, JLS Legislative Subcommittee Chair, will be reporting on the status of bills that she feels are important for the JLS to follow. Please contact Bonnie at 303-333-3554 or Saltzmanlaw@aol.com to notify her of additional bills that should be followed. To check updated and current status of bills go to: <http://www.leg.state.co.us>.

HIGH SCHOOL MOCK TRIAL COMPETITION EXPERIENCE

by Barry Meinster

Last year was my first as a coach for the Evergreen High School Mock Trial Team. My involvement began with Judge Moore in Jeffco asking me if I could help out. I had no idea how rewarding it would be. You don't have to be an

educator to know that all the cheers and press go to the star athletes and rarely are students acknowledged for intellectual achievements. One of the things I hoped to do was affirm their worth as humans even though they never scored a touchdown.

Mock Trial is a valuable experience regardless of whether they want to become attorneys. In fact, on my team I think only two actually wanted to pursue law as a career. Through their interaction in the classroom, performing before the attorney coaches and especially before the judges and audiences during the competition, it was not hard to see how their self confidence and self esteem grew and matured. The level of comfort and presence they gained by presenting the case they worked for months will be with them long after the glow of their sports counterparts has faded.

There are a lot of tutorials on how to present yourself at a job interview, but I'd stack these kids up against anyone who read them all. I'm very glad I took the time to be a part of this growth and development. I'm glad I was a part of teaching them that there is value in using your mind. It would be of immense value to have attorney coaches with a background involving children. I think they would enjoy it as much as me.

COLORADO LAWYER – JUVENILE LAW ARTICLES AND OTHER ARTICLES OF INTEREST

Barbara Shaklee, Chair of the JLS, and Linda Weinerman, a former Chair of the JLS are Co-editors of the Juvenile Law articles that appear in *The Colorado Lawyer*. For information about submitting articles please contact Barbara Shaklee at (720) 944-2965 or barbara.shaklee@dhs.co.denver.cu.us or Linda Weinerman at (303) 860-1517 or lindaweinerman@coloradochildrep.org.

CASE LAW UPDATE

Please note, Colorado Court of Appeal Summaries and links to the full opinions for are also available online by going to <http://www.cobar.org/opinions/index.cfm?CourtID=1> and clicking the appropriate case date.

The Court of Appeals summaries are written for the Colorado Bar Association by licensed attorneys Teresa Wilkins (Denver) and Paul Sachs (Steamboat Springs). Please note that the summaries of Opinions of the Colorado Court of Appeals are provided as a service by the Colorado Bar Association and are not the official language of the Court. The Colorado Bar Association cannot guarantee the accuracy or completeness of the summaries.

No. 08CA0119. People in the Interest of M.M., Jr., Upon the Petition of the El Paso County Dept. of Human Services, and Concerning M.M.
Dependency and Neglect—Polygraph Examination—Evidence—Experts.

Father appealed from the judgment terminating the parent–child legal relationship between him and his son, M.M., Jr., and daughter, A.M. The Court of Appeals reversed the judgment terminating father’s parental rights and remanded the case for further proceedings

Father contended that the trial court erred by improperly admitting the results of two polygraph examinations, which formed the basis of the opinions and decisions of the caseworker and therapists to deny unsupervised visitation and to terminate efforts to reunite the family in this dependency and neglect action. The Court agreed.

The polygraph evidence and the reaction of the treatment professionals to it (1) consumed most of the trial; (2) supplanted father’s treatment plan; (3) controlled or significantly influenced every recommendation by the treating and supervising professionals concerning unsupervised visitation and father’s fitness as a member of a reunited family; and (4) essentially eliminated any chance father had to retain a parent–child relationship with his children. Due to the lack of a scientific basis and reliability, it is inappropriate for polygraph results to be admitted in court or for an expert witness to rely on polygraph results to form or render any opinions.

Therefore, the evidence of the polygraph examinations should not have been admitted, and the trial court should not have considered the opinions of any experts based, in whole or in part, on the polygraphs. Under these circumstances, one cannot conclude that father was not prejudiced by the use of the polygraphs and the admission into evidence of the results of the polygraphs or the opinions based on those results. The judgment terminating father’s parental rights was vacated and the case was remanded for further proceedings.

No. 08CA0840. People in the Interest of H.W. III.
Juvenile Delinquency Adjudication—Variance Between Charge and Conviction—Double Jeopardy.

Defendant, a juvenile, appealed a judgment adjudicating him delinquent based on acts that, if committed by an adult, would constitute a class 4 felony of accessory to the crime of attempted murder. The Court of Appeals reversed the judgment.

At trial, the prosecution presented evidence that defendant helped Norris flee the scene after Norris had shot the victim five times. The juvenile court found that

defendant "knew that [Norris] had committed a crime" when he offered him assistance. The juvenile court adjudicated defendant a delinquent and ordered him placed in the Youth Offender System for two years.

On appeal, defendant argued that there was a "fatal variance" between the petition that charged him with rendering assistance to Norris knowing that Norris was charged with a crime, and the theory on which defendant was adjudicated, which was that he rendered assistance to Norris knowing Norris had committed a crime. The Court agreed and reversed the adjudication.

The Court found that the People effected a constructive amendment by charging defendant under CRS § 18-8-105(1) and (3) but presenting no evidence on the theory underlying the charge. When the prosecution fails to present proof of the offense charged, double jeopardy prevents it from availing itself of a second opportunity to try the accused on that charge. Where there is insufficient evidence to sustain a conviction for an offense, but the evidence is sufficient to uphold a conviction on a lesser-included offense, the appropriate remedy is to remand to the trial court with directions to enter judgment on the lesser-included offense. Here, the Court found that the prosecution proved an offense it did not charge and charged an offense it did not prove. Moreover, the proof the prosecution did provide would not sustain any lesser-included offense of the charged offense. Consequently, the Court reversed defendant's adjudication and dismissed the case against him.

No. 08CA2304. People in the Interest of N.D.C., Upon the Petition of the Denver Department of Human Services, and Concerning P.R.D.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7139&courtid=1>

Termination of Parent–Child Legal Relationship—Indian Child Welfare Act of 1978.

Mother appealed the judgment terminating her parent–child legal relationship with her daughter, N.D.C. The Court of Appeals vacated the judgment and remanded the case with directions.

The Denver Department of Human Services (Department) filed a petition on N.D.C.'s behalf because her living situation was unsafe. At the shelter hearing, mother stated she was enrolled in the Oglala Sioux tribe, but did not have her enrollment number. The Department asserted proper notice was sent to the tribe, but conceded it did not file any notices or return receipt cards with the court.

At the termination hearing, the caseworker testified she spoke with the tribe's enrollment director, who indicated N.D.C. was not eligible to enroll. Based on that statement and the fact that the tribe had not sought to intervene, the court found this was not a case involving the Indian Child Welfare Act of 1978 (ICWA).

The Court of Appeals issued an order to show cause, requiring that the Department file copies of any notices, return receipt cards, and correspondence from the tribe with the Court of Appeals and the juvenile court. The Court also required briefing on whether the failure to file the notices and return receipt cards constituted reversible error. Only the Department responded. It filed four copies of notices sent to the tribe, but no correspondence from the tribe.

On appeal, the Court agreed with mother that the Department violated the ICWA by not filing copies of the notices and the return receipt cards with the court. It held that the error was not harmless and vacated the judgment, also noting that the content of the notices was deficient in not providing the statutorily required information.

No. 08CA0617. People v. Lage.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7174&courtid=1>

Unborn Child—Live Birth—Death—"Person"—CRS § 18-3-101(2)—Extreme Indifference First-Degree Murder—Reckless Vehicular Homicide—Under the Influence Vehicular Homicide—Child Abuse Involving Death—Vehicular Eluding Involving Death—Careless Driving Resulting in Death—Under the Influence Vehicular Assault.

The People appealed the trial court's order dismissing homicide and other charges against defendant that arose out of the injury to an unborn child who, following a live birth, died from the injury. The Court of Appeals affirmed the order in part, vacated it in part, and remanded the case with directions.

While defendant was being pursued at a high rate of speed by a police officer, he switched into the oncoming traffic lane to pass another vehicle, resulting in a head-on collision with a vehicle driven by a woman who was eight and one-half months pregnant. There was an 80 percent abruption of the placenta, which required an emergency cesarean section. The child was delivered alive, but died one hour and nine minutes later.

For a child to be a "person" under CRS § 18-3-101(2), he or she must have been born and alive at the time of the homicidal act. Here, although the child was alive at the time of defendant's alleged criminal acts, she had not been born. Therefore, the trial court did not err in dismissing the charges of extreme indifference first-degree murder, reckless vehicular homicide, and under the influence vehicular homicide.

However, the trial court wrongfully applied the definition of "person" to the charges of child abuse involving death, vehicular eluding involving death, careless driving resulting in death, and under the influence vehicular assault. A child who is in utero at the time of the offense, is subsequently born alive, and dies as a result of the offense can be a victim of reckless vehicular eluding resulting in death and careless driving resulting in death. Therefore, because the

underlying offense was complete prior to the birth and later death of the child, dismissal was not appropriate as to these offenses. Further, a fetus unborn at the time of the infliction of injury, but who later was born and survived for a period of time, can be a victim of reckless child abuse resulting in death and under the influence vehicular assault. Therefore, dismissal of these charges was error.

No.09SA22. In re People in the Interest of A.H., and Concerning A.P.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7311&courtid=2>

Adequacy of C.A.R. 3.4 Review in Dependency and Neglect Cases.

The Supreme Court held that, absent a showing of special circumstances, C.A.R. 3.4 provides adequate process for appellants to the Court of Appeals in dependency and neglect cases. In this case, appellant asserted no circumstances that would render C.A.R. 3.4 review inadequate. Because C.A.R. 21 petitions may not serve as a substitute for an available appellate remedy that a party fails to exercise, the Supreme Court discharged the rule to show cause.

No. 08CA2223. People in the Interest of D.W.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7304&courtid=1>

Juvenile Delinquency Restitution— Sexual Assault on a Child.

D.W., a juvenile, appealed the restitution order entered in a juvenile delinquency adjudication based on his guilty plea admitting that he committed acts which, if committed by an adult, would constitute the offense of sexual assault on a child. The order was vacated and the case was remanded with directions.

In January 2007, the victim, who was 14 years old, told his parents that on approximately four occasions in 2000, D.W.—who lived on the same street as the victim—had forced him to perform and receive oral sex. The victim also told his parents that in 2002, D.W. had threatened to beat him up if he disclosed what had occurred.

As part of a police investigation, the victim called D.W. and asked him to apologize. D.W. apologized to the victim for having made him perform oral sex. After D.W. was contacted by the police, he admitted that he had engaged in oral sex with the victim. He pled guilty pursuant to a plea bargain in which other delinquency charges were dismissed. In May 2008, the magistrate held a hearing to address D.W.'s objection to the amount of restitution sought by the victim's family.

The victim's mother testified that the family moved because of "the threat and intimidation that [they] were under living next to the perpetrator." She sought restitution for expenses related to preparing the house for sale and the real estate commission. The father testified that he had missed several days of work after learning of the abuse. The magistrate ordered D.W. to pay \$6,694.30 for the materials purchased to prepare the house for sale; \$15,157 for the real estate

agent's commission; \$2,943.20 for the father's lost wages; and \$500 for the victim's counseling services (this last amount was not appealed).

On district court review, the court acknowledged the absence of any evidence at the restitution hearing that D.W. had threatened the victim or his family after the filing of the delinquency petition. Nonetheless, it upheld the restitution order.

The Court of Appeals looked to whether the offender's unlawful conduct was the proximate cause of losses related to the mitigation of the victim's fear. It followed the reasoning of cases that hold if a victim incurs expenses to avoid or mitigate the consequences of a specific and ongoing threat related to the offender's unlawful conduct, such expenditures qualify as compensable restitution. However, expenditures resulting from a generalized feeling of insecurity are too attenuated from the offender's conduct to qualify as compensable restitution.

Here, the court abused its discretion in ordering D.W. to pay for expenses related to the home sale, because the People did not carry their burden of proving the victim faced a specific and ongoing threat sufficient to necessitate the family's relocation. Similarly, it was error to award restitution for lost wages based on the days the victim's father missed work in to ready the house for sale.

No. 07CA2107. People v. Mantos.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7265&courtid=1>

**Felony Sexual Exploitation of a Child—CRS § 18-6-403(3)(b)—Evidence—
"Prepares."**

Defendant appealed the judgment of conviction entered on a jury verdict finding him guilty of felony sexual exploitation of a child. The judgment of conviction on this count was vacated and the case was remanded to the district court.

Defendant contended that his conviction for felony sexual exploitation of a child was invalid. He asserted that the court misconstrued the meaning of the word "prepares" in CRS § 18-6-403(3)(b) to encompass the conduct of possessing with the potential to distribute sexually exploitative material, and thereby submitted the case to the jury on an erroneous legal theory.

Reading the plain language of the statute, "prepares" as used in § 18-6-403(3)(b) means engaging in the process of creating any sexually exploitative material. Therefore, downloading and saving sexually exploitative material in a share-capable computer file does not constitute the felony offense of sexual exploitation of a child, as defined in § 18-6-403(3)(b).

Here, the evidence indicated only that defendant downloaded existing material in a share-capable computer file. The evidence therefore was insufficient to support a conviction under these two terms. Thus, the court erred because it improperly permitted the jury to adopt the prosecutor's and the court's erroneous version of

the law. Further, the error was not harmless. The judgment of conviction for sexual exploitation of a child under CRS § 18-6-403(3)(b) was vacated and the case was remanded to the district court for entry of judgment of acquittal on that count.

No. 06CA0747. People v. Rector.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7232&courtid=1>

Child Abuse—Injuries—Expert Testimony—Shreck Hearing—C.R.E. 403 and 702.

Defendant appealed the judgment of conviction entered on a jury verdict finding her guilty on one count of felony child abuse. The judgment was reversed and the case was remanded for a new trial.

In 2004, defendant and her husband cared for children as foster parents, including T.D., a 3-year-old child. On February 2, 2004, T.D. was in defendant's care when he was severely injured. Defendant was convicted of felony child abuse for causing his injuries.

On appeal, defendant argued that the trial court abused its discretion in admitting expert testimony that T.D.'s injuries resulted from child abuse, because it did not hold a Shreck hearing [People v. Shreck, 22 P.3d 68 (Colo. 2001)] or otherwise determine the reliability and prejudicial effect of Dr. Sirotnak's testimony under C.R.E. 403 and 702. She also argued that the trial court erred in not instructing the jury regarding the definitions of medical and legal child abuse.

The trial court ruled that because shaken baby syndrome is a diagnosis that medical experts can reach, no hearing was necessary in this case to determine the reliability of such evidence. The trial court did not make specific findings to determine the reliability of Dr. Sirotnak's anticipated testimony that T.D.'s injuries were caused by an intentional act of abuse, nor did it determine that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court abused its discretion in admitting the expert testimony without making an adequate inquiry and specific findings. Further, the trial court failed to instruct the jury on the different definitions of medical and legal child abuse. Accordingly, the conviction was reversed and the case was remanded for a new trial.

No. 06CA2229. People v. Simon.

<http://www.cobar.org/opinions/opinion.cfm?opinionid=7233&courtid=1>

Sexual Assault on a Child—Pattern of Abuse—Sentence Enhancement—Double Jeopardy.

Defendant appealed his conviction of ten counts of sexual assault on a child by one in a position of trust as part of a pattern of abuse. Defendant also appealed the enhanced sentences of ten years per count, consecutive to each other and to

a twelve-year sentence on a related count of patronizing a prostituted child—for a total sentence of 112 years in prison. The sentences were vacated and the case was remanded with directions.

From 1997 through 1999, defendant had multiple incidents of sexual contact with a troubled teenage boy whom he had taken into his house. The abuse began with acts of prostitution when the boy was 15 years old and continued until the boy was 17 years old.

Defendant argued that one pattern of abuse of one victim may not support multiple pattern convictions. The Court of Appeals agreed. Colorado statutes do not allow, and double jeopardy bars, more than one pattern conviction for a single pattern of abuse against one victim. This holding precludes defendant's ten pattern convictions and his sentence to a century in prison, but does not preclude sentencing defendant to many decades in prison. The case was remanded for resentencing.

WINTER NEWSLETTER

The Winter Newsletter is scheduled to go out by December 21, 2009. The deadline for submitting cases, articles and events is December 14, 2009. Please send any submission requests to sthibault@co.clear-creek.co.us, or call (303) 679-2432 (phone) or by fax at (303) 679-2444.