

## RECENT MEETINGS AND EVENTS

On **September 14, 2011**, the JLS held a **CLE Luncheon Meeting** at the **Colorado Bar Association Office**. **Kristin Petri** presented on "**Issues, Risks and Options for Immigrant and Non-Documented Families and Children in the Dependency & Neglect and Delinquency Courts**," for 1 hour CLE credit.

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## SCHEDULE OF FUTURE JLS EVENTS

Meetings are held at noon on the second Wednesday of all odd numbered months. Please put these dates on your calendar now and send in your RSVP when you get the meeting notice from Andrea Mueller. Notices about CLE topics, speakers and any special locations for the meetings will be sent separately by email.

**\*November 9, 2011**

**January 11, 2011**

**March 14, 2011**

**\*May 9, 2011**

Unless otherwise noted, all meetings are held at the **Colorado Bar Association Office**, 1900 Grant Street, 3<sup>rd</sup> Floor, Denver, CO 80203. The meetings are available by **audio conference** for members who are unable to travel to Denver. Please contact Andrea Mueller, our CBA Liaison, to arrange for audio conferencing at [amueller@cobar.org](mailto:amueller@cobar.org).

**\*Please note: The Summer Newsletter posted these two dates incorrectly.**

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

The **2011 Fall Road Show**, presented by the Colorado Criminal Defense Bar and The Office of the Alternate Defense Counsel will present two sessions: **Criminal Law Update** (10:00 to 12:00) and **Juvenile Direct File Training** (12:30-3:30) on the following dates and at the following locations:  
**October 3, 2011** - Spice of Life, Boulder, CO

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**October 5, 2011** - Larimer County Justice Center, Jury Room, Ft. Collins, CO  
**October 6, 2011** - Douglas County Justice Center, Jury Room, Castle Rock, CO  
**October 11, 2011** - Union Depot Loft, Pueblo, CO  
**October 12, 2011** - Public Defender's Office, Colorado Springs, CO  
**October 14, 2011** - DU Sturm College of Law, Denver, CO  
For information, Call Janna at 303 915-0257 (cell) or 303-758-2454 or register online at: <http://ccdb.org/CLE>.

**October 12, 2011 - Ralston House** will present **Eleanor Odom, J.D.**, on **Investigative and Prosecutorial Issues in the Investigation of Child Abuse**, from 8:30 to 4:00, at the Lakewood Police Department City Training Room, 445 S. Allison Parkway, Lakewood. RSVP by 10/8/11 to: Tricia Kelly at [patricia@arvada.org](mailto:patricia@arvada.org).

**August 14-16, 2012** - The **NACC** will present the **35th National Child Welfare, Juvenile, and Family Law Conference** at the Historic Palmer House Hilton, in Chicago, IL. For information, contact the NACC at 1 888-828-NACC or [www.NACCchildlaw.org](http://www.NACCchildlaw.org).

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## JUVENILE LAW SECTION EXECUTIVE COUNCIL REPORTS

The Executive Council has a conference call meeting at 7:30 a.m. on Wednesday, one week prior to each scheduled meeting of the section. The Executive Council is made up of the officers (Current Chair, Immediate Past Chair, Chair-elect, and Secretary) and the current JLS committee Heads.

Now is a great time to get involved with one of the committees for the remainder of this fiscal year. **The Membership committee has gone without a Head and without a representative on the Executive Council for the past several years. The Membership committee is responsible for promoting membership in the Section, not only to members of the Colorado Bar Association, but also to those persons from other disciplines actively involved with children in the Colorado judicial system.** If you have any interest in serving on any of the committees, please contact one of the officers or committee heads. The Committees are:

**Legislative** - Bonnie Saltzman, (303) 333-3554, [Saltzmanlaw@aol.com](mailto:Saltzmanlaw@aol.com)

**Membership** - (Vacant)

**Newsletter** - Sue Thibault, (303) 679-2432, [sthibault@co.clear-creek.co.us](mailto:sthibault@co.clear-creek.co.us)

**Website** - Lyn Stewart-Hunter (720) 862-7712, [lynstewarhunter@gmail.com](mailto:lynstewarhunter@gmail.com)

**Program** - Pax Moultrie, (303) 271-8900 , [pmoultri@co.jefferson.co.us](mailto:pmoultri@co.jefferson.co.us)

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## **LEGISLATIVE SUBCOMMITTEE REPORT**

The first regular session of the General Assembly will begin on January 11, 2012 and will adjourn sine die on May 9, 2012. The JLS looks forward to having **Bonnie Saltzman** continue to represent us and report on the status of all of the bills that relate to the work we do. After the session begins in January, Bonnie will begin holding weekly conference calls with JLS members to report on the bills and their status throughout the legislative session.

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## **COLORADO LAWYER – JUVENILE LAW ARTICLES AND OTHER ARTICLES OF INTEREST**

No articles directly relating to Juvenile Law practitioners have appeared this period.

Barbara Shaklee and Linda Weirnerman, both past Chairs 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@denvergov.org](mailto:barbara.shaklee@denvergov.org) or Linda Weirnerman at (303) 860-1517 or [lindaweirnerman@coloradochildrep.org](mailto:lindaweirnerman@coloradochildrep.org).

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## **PUBLICATIONS OF INTEREST**

The 2011 version of the **Juvenile Law Benchbook** is now available online at <http://www.cobenchbook.com>.

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## **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. 10CA2070. **People in the Interest of R.D., and Concerning M.D.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8143&courtid=1>

Dependency and Neglect—Ineffective Notice of Appeal Under C.A.R. 3.4(d)—Jurisdiction.

In this dependency and neglect proceeding, mother appealed the trial court's judgment terminating her parent-child legal relationship with R.D. The appeal was dismissed for lack of jurisdiction.

R.D. was approximately 8 months old when he was removed from mother's care; therefore, the case fell under the expedited permanency planning statutes. If mother's parental rights were terminated, the permanency plan was for the maternal grandparents, who had custody of the child, to adopt. On August 30, 2010, mother's parental rights were terminated in a written order that was served on the parties by mail on September 2, 2010. Based on that date, mother's notice of appeal was due on or before September 27, 2010.

On October 8, 2010 (eleven days late), mother's counsel filed a notice of appeal. As good cause for the untimely filing, counsel alleged she had not heard from mother since the termination hearing on August 4, and needed to confirm that mother intended to appeal, because it would delay the adoption by the grandparents. Counsel attached a certificate documenting her efforts to locate mother.

Rather than ruling on the motion, the Court of Appeals ordered counsel to show cause why the appeal should not be dismissed for failure to secure mother's signature or specific authorization to appeal. Counsel did not respond, and the appeal was dismissed on January 11, 2011.

On January 19, 2011 (114 days late), mother's counsel filed a motion requesting the Court to reconsider the dismissal of appeal. The motion stated that mother had contacted counsel on January 3, but did not explain why she failed to contact counsel sooner. Counsel attached an amended notice of appeal with mother's signature. On April 20, 2011, a motions division of the Court of Appeals granted the motion and noted an opinion would issue in due course. The Court dismissed the appeal for failure to timely appeal.

The Court reviewed C.A.R. 3.4(d) and determined that the initial notice of appeal was noncompliant because it lacked mother's signature or a statement from counsel that mother had authorized the appeal. The notice therefore was ineffective and did not invoke the Court's jurisdiction.

The Court then considered whether the amended notice of appeal invoked the Court's jurisdiction. It concluded that it did not. The delay was attributable solely to mother and no explanation was given for her conduct; therefore, no good cause under either C.A.R. 2 or C.A.R. 26(b) was shown for the untimely filing of the amended notice of appeal.

**No. 10CA2408. People in the Interest of L.A.N., and Concerning L.M.B.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8144&courtid=1>

Dependency and Neglect—Indian Child Welfare Act Notice Requirements—  
Psychotherapist—Patient Privilege.

In this dependency and neglect (D&N) proceeding, mother appealed from the judgment terminating her parent–child legal relationship with L.A.N. The judgment was vacated and the case was remanded with directions.

On December 9, 2008, the Denver Department of Human Services (DDHS) received a referral regarding L.A.N., then 7 years old. Staff members at Children's Hospital reported that the child had been brought to the hospital because of out-of-control behavior and suicidal statements; that mother had refused the hospital's treatment recommendations; and that mother had attempted to flee with the child when told that the hospital was considering transferring the child to a mental health facility.

On December 12, DDHS filed a D&N petition. After the child's release from the hospital, she was placed in the custody of her maternal aunt. The aunt hired a therapist to treat the child. On March 11, 2009, based on mother's no-fault admission, the child was adjudicated dependent and neglected as to mother, and a treatment plan was adopted. In November 2010, the court found mother had not achieved many of the plan's objectives and terminated her parental rights.

On appeal, mother argued that the juvenile court erred in failing to ensure that the notice requirements of the Indian Child Welfare Act (ICWA) were met. Specifically, she contended that no notice was sent to the Cherokee Nation of Oklahoma after the court was informed that she was affiliated with that tribe, and no determination was made as to whether the child's biological father had Indian heritage. The Court of Appeals agreed.

When mother appeared before a magistrate, it was determined that notice needed to be sent to the Cherokee Nation; however, DDHS did not comply with that order. Instead, eight months after the order, DDHS filed a motion requesting a finding that the case was not subject to the ICWA. The record did not reflect whether the motion was ruled on. Accordingly, the Court vacated the judgment and remanded the case to give notice to the Cherokee Nation and for an inquiry as to possible Indian heritage on the child's paternal side.

Mother also argued it was error for the juvenile court to deny her request for production of the therapist's file. The Court found she was entitled to at least a portion of the file and remanded for further proceedings.

During the course of treatment, the therapist submitted a letter to the guardian ad litem (GAL) to "share some of [her] observations" regarding the case. The GAL provided the letter to the court and the other parties without attempting to reserve the privilege between the child and the therapist. In June 2010, mother's attorney subpoenaed the therapist for a deposition and to produce her entire case file. The therapist moved to quash the subpoena, arguing that the information and documents were privileged under CRS § 13-90-107(1)(g).

Following a hearing, the court ordered the therapist to participate in a deposition or a "chat" with mother's attorney, but not to produce any record. Following the deposition, mother's counsel renewed the request for the release of the therapist's file, citing C.R.E. 612. The juvenile court affirmed its earlier order.

The Court concluded that because DDHS and the GAL had disclosed privileged information that was adverse to mother in seeking to terminate her parental rights, the privilege was waived; therefore, it was an abuse of discretion to deny mother access to the therapist's file because it deprived her of a fundamentally fair opportunity to protect her rights. The case was remanded for the court to conduct an in-camera review of the therapist's file and to identify the portions of the file that are discoverable.

No. 10SC104. **D.P.H. v. J.L.B., and Concerning A.B.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8208&courtid=2>

Abandonment Determination—CRS § 19-15-203—Delay of Adoption Proceeding—Totality of the Circumstances—Parenting-Time Motion.

The abandonment inquiry focuses on whether, under the totality of the circumstances, the parent's intent during the twelve months preceding the commencement of the adoption proceeding was to abandon the child. It is the trial court's responsibility to consider the totality of the circumstances and to make this factual determination, which is to be disturbed only if it is clearly erroneous. Here, the evidence before the juvenile court of the father's intent during the twelve-month period was conflicting. Therefore, it was error for the court of appeals to determine that a single circumstance—father's filing of a parenting-time motion—precluded a finding of intent to abandon, essentially as a matter of law.

In addition, it is unnecessary for a trial court to delay adoption proceedings until a parenting-time motion in another court is resolved, as long as the trial court adequately considers the parenting-time motion in making its abandonment determination. Here, the court of appeals erred in holding that the juvenile court

should have delayed the adoption proceedings until the father's parenting-time motion was resolved. The court of appeals' judgment was reversed and the case was remanded for further proceedings.

No. 10CA2536. **People in the Interest of A.C., and Concerning M.S.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8217&courtid=1>

Post-Termination of Parental Rights—Foster Child Placement.

M.S. and S.S. (foster parents) appealed from the order changing the placement of A.C., a foster child formerly in their care, to another foster home. The judgment was affirmed in part and the case was remanded with directions.

The juvenile court placed A.C. in foster care days after he was born and terminated the parent-child legal relationship between A.C. and his mother less than a year later. The Denver Department of Human Services (Department) moved A.C. from his first foster home to his second foster home before his first birthday. The Department placed A.C. in a third respite home with the appellant foster parents shortly after he turned one. The Department certified foster parents' home as a "24-hour foster home" for the term of one year.

After seven months with foster parents, the Department reported to the juvenile court that (1) A.C. had made positive progress; (2) the placement was appropriate; (3) foster parents were meeting A.C.'s needs; and (4) the Department had no safety concerns. The Department recommended that A.C. remain with foster parents until his adoption was finalized. The court adopted these recommendations.

The following week, A.C.'s therapist reported concerns about foster mother. Based on the report, a Department Certification Review Committee concluded it needed to remove A.C. from foster parents' care. The Department did not notify or consult A.C.'s guardian ad litem (GAL) or the juvenile court before removing A.C. from foster parents' home.

The GAL filed a motion for a forthwith hearing. At that hearing, the juvenile court stated it was "appalled" by the removal. It found that the removal was "extremely unusual" and that the Department had violated CRS § 19-3-203(2) because it had not kept the GAL informed of any significant developments in the case.

At a subsequent hearing, a psychologist testified about her concerns with foster mother and recommended A.C. not be returned to foster parents. The juvenile court adopted that recommendation. Foster parents appealed.

Foster parents argued that their due process rights were violated because they had a constitutionally protected liberty interest in a continued relationship with A.C. The Court of Appeals disagreed. Foster parents' rights are derived from a

contractual relationship with the state of Colorado to act as *parens patriae* to safeguard the interests of vulnerable children within the state. These rights are not those from which a protected liberty interest might be derived.

Foster parents also argued that the juvenile court erred in its application of the best interests standard at the removal hearing. Under the Colorado Children's Code, the best interests of a removed child is: (1) to be placed in a stable and secure environment; (2) not to be indiscriminately moved from foster home to foster home; and (3) to have assurance of long-term permanency planning. Children under the age of 6 should be placed in permanent homes as expeditiously as possible. Any delay in placement to a permanent home must be in the child's best interests. To make such a finding, the court must be shown, by clear and convincing evidence, that either (1) reasonable efforts were made to find the child an appropriate permanent home and such a home was not currently available; or (2) the child's mental or physical needs or conditions deem it improbable that such child would have a successful permanent placement.

The Court concluded that the Department did not make either of the required showings by clear and convincing evidence. On remand, the juvenile court must determine whether A.C. is now in a permanent home; if so, he may not be removed absent the Department showing one of the foregoing conditions by clear and convincing evidence. If the juvenile court determines that A.C. is not in a permanent home, it must determine whether foster parents' home is still available as a foster home and, if so, must return him to that home unless the Department shows, by clear and convincing evidence, that concerns about foster mother rendered the home "not currently available."

**No. 11CA0032. In re the Parental Responsibilities Concerning G.E.R., and Concerning Terrell.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8218&courtid=1>

Petition for Paternity—Uniform Parentage Act—Uniform Dissolution of Marriage Act—Recovery of Birth-Related Costs.

Mother appealed from the district court's judgment adopting a magistrate's order that dismissed her petition for paternity. The judgment was vacated and the case was remanded with directions.

Mother and father are natural parents of a child, G.E.R., born out of wedlock. In November 2009, mother petitioned for allocation of parental responsibilities under the Uniform Dissolution of Marriage Act (UDMA) and for child support. The magistrate entered a child support order and determined the allocation of parental responsibilities.

In June 2010, mother moved for modification of child support and filed a petition for paternity under the Uniform Parentage Act (UPA), seeking birth-related costs,

court costs, and attorney fees. In her brief, mother contended that paternity was not an issue. In a minute order, the magistrate dismissed mother's petition for paternity, finding that there was no question of paternity. Mother petitioned for district court review and the court adopted the magistrate's order. Mother appealed.

The issue on appeal was whether the magistrate could consider a request for birth-related costs under § 19-4-116 of the UPA after it had determined the allocation of parental responsibilities and awarded child support under the UDMA. The Court of Appeals held it could and therefore dismissal was error.

Under mother's UDMA action for allocation of parental responsibilities, mother's birth-related costs could not be awarded as a debt of the marriage because the parties were never married. To recover those costs, mother was required to file a petition for paternity under the UPA. Such an action under § 19-4-107(1)(a) may be brought at any time. Therefore, mother was not precluded from seeking birth-related costs in connection with an action to determine paternity under the UPA, even if father's paternity was uncontested in the action for allocation of parental responsibilities under the UDMA. The Court also awarded mother attorney fees under § 19-4-117, because it is mandatory.

No. 11CA0398. **People in the Interest of S.X.M, and Concerning T.M.**

<http://www.cobar.org/opinions/opinion.cfm?opinionid=8219&courtid=1>

Dependency and Neglect—Child Testimony Viewed by Television—Right to Confront and Due Process—Jury Instructions.

In this dependency and neglect proceeding, father appealed from the order adjudicating his child S.X.M. dependent and neglected. The order was affirmed.

In June 2010, S.X.M., then 6 years old, was removed from father's care after the Larimer County Department of Human Services (LCDHS) received a report that the child had disclosed that father had sex with her and that other inappropriate sexual actions had take place between father and the child. A jury trial was scheduled for February 2011.

Before trial, LCDHS filed a motion in limine requesting that the child be permitted to testify in front of the jury but not in the presence of father. The trial court granted the motion over father's objection, but ordered that father should have the opportunity to view the child's testimony via closed-circuit television. The child testified according to this procedure and the jury adjudicated the child dependent and neglected.

On appeal, father contended that he had a right to confront the child in the courtroom, and that the procedure adopted denied him that right and the fundamental fairness required by the Due Process Clause of the Fourteenth

Amendment. The Court of Appeals disagreed. Father argued he had a right to confront the child that should not have been denied absent evidence that the child would have been traumatized if required to testify in his presence. His argument regarding his right to confront in a non-criminal case was based on his right to “fundamentally fair procedures” in a dependency and neglect proceeding.

The Court first noted that Colorado has rejected the argument that the Sixth Amendment right of confrontation should be extended to a parent in a dependency and neglect proceeding. The Court then rejected any further contention that fundamental fairness required he be allowed to confront the child in court.

Father argued that because the jury instructions used the past tense and therefore focused the jury’s attention on the child’s status “at some moment in the past when some abuse was alleged to have occurred,” rather than on the child’s status at the time of the hearing, the jury’s findings were not in compliance with CRS § 19-3-102. The Court disagreed. The Court noted that a jury instruction that misleads or confuses a jury amounts to error, but such error is not a ground for reversal unless it prejudices a party’s substantial rights. Review is for abuse of discretion, which is found only when the ruling is manifestly arbitrary, unreasonable, or unfair.

The Court reviewed the statute, which uses the present tense: a child is deemed neglected or dependent if he or she “lacks” proper parental care or if his or her environment “is” injurious to his or her welfare. The trial court noted that the use of the present tense in the jury instructions could cause “massive confusion” if, at the time of the hearing, the jury was informed that the child had been removed from harm and was doing well in foster care. This could lead to the child not being adjudicated dependent and neglected while in his or her parent’s care, which would not be in the best interests of the child and not consistent with the purposes of the Children’s Code. Although the trial court’s instructions were not what the Court considered the best solution to this issue, it concluded that they were not misleading and were not an abuse of discretion.

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## **WINTER NEWSLETTER**

The Winter 2012 Newsletter is scheduled to go out by December 21, 2011. The deadline for submitting cases, articles and events is December 14, 2011. Please send any submission requests to [sthibault@co.clear-creek.co.us](mailto:sthibault@co.clear-creek.co.us), or call (303) 679-2432 (phone) or by fax at (303) 679-2444.

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