Association of Family and Conciliation Courts
Colorado Chapter

Spring News

President's Message

Beth Lieberman, LCSW

Happy Spring! By the time you read this, I hope you will have enjoyed a relaxing Spring Break, and are back to focusing on the challenging but gratifying work we all do!

Many of you attended this year's Annual Meeting on February 8, 2017, featuring Marsha Kline Pruett, Ph.D., M.S.L., Maconda Brown O'Connor Professor at the Smith College School for Social Work, and current President of AFCC. She presented a child development refresher entitled "Child Development in the Context of Separation and Divorce," focusing on children's developmental tasks and hallmarks, developmental risks relevant to separation and divorce, red flags for child stress, and tips for co-parenting at each developmental stage. Film clips were used to highlight what children struggling with parental separation look like at several developmental eras. It was such an outstanding opportunity for us to have her present at our meeting!

Also at our Annual Meeting, we held our election of our Board for the coming year (July 1, 2017 through June 30, 2018), and in honor of the tenth anniversary of our chapter, we presented Kathleen (Kate) McNamara, Ph.D. with a plaque thanking her for her professionalism, support, and creativity on behalf of our chapter. Then in addition, just several weeks later, Kate was elected to a two-year term as AFCC's Chapter Liaison. Please join us in congratulating Kate in her new position on the AFCC Board!

Regarding membership in COAFCC, Dr. Pruett offered us a deep discount on her fee if we were able to meet her challenge of ten new members joining COAFCC prior to and shortly after her presentation. Thanks to all of your efforts, we surpassed this goal and have a number of new members to welcome to our ranks!

Looking ahead, please save the weekend of October 13-15, 2017, for COAFCC's THIRD annual conference!

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We will again be meeting at Beaver Run Resort and Conference Center, and the title of this year's conference is "Seeing is Believing: Best Practices in Divorce Cases." Among our speakers will be Bill Austin, Ph.D., and Bud Dale, J.D., Ph.D., and we will also be featuring several panels addressing issues such as ethical challenges, the endangerment standard, and gatekeeping. Also at our conference we will be holding our third annual Silent Auction. Please consider donating at least one item or service…or possibly making a cash donation. To make a donation (and it is NOT too early!), please contact Bob Smith at rmsfamilylaw@igc.org.

Speaking of conferences, there is still time to sign up for and attend AFCC's 54th Annual Conference from May 31 - June 3, 2017, in Boston. The title for this conference is *Turning the Kaleidoscope of Family Conflict into a Prism of Harmony.* This promises to be an outstanding conference and will be a fabulous resource for cutting edge ideas and methodologies to help us with our challenging work. Please think about attending and including your family on a vacation to a city so rich in history and culture!

AFCC COLORADO

Dedicated to improving the lives of children and families through the resolution of family conflict

Join Today!

Benefits of Membership:

- Be part of a vibrant network of Colorado family law professionals
- The COAFCC semi-annual newsletter is packed with local news, articles, links to resources, and more
- Discounts for COAFCC conferences & training programs
- All the benefits of AFCC membership: Subscription to Family Court Review; discounts for malpractice insurance & publications; access to the Parenting Coordination Listserv
- Support & advocacy for local community networking
- Representation on COAFCC Board of Directors
- Participation on committees, task forces & projects
- Mentoring and consultation from experts around the state

Upcoming AFCC Trainings

AFCC 54th Annual Conference:
Turning the Kaleidoscope of Family Conflict into a Prism of Harmony

May 31—June 3, 2017
Boston, Massachusetts

AFCC –AAML Conference
Advanced Issues in Child Custody: Evaluation, Litigation and Settlement

September 14-16, 2017
San Diego, California

COAFCC 2016
3rd Annual Conference

Save the weekend of

October 13 - 15, 2017

for a fabulous conference and networking event!

Seeing is Believing: Best Practices in Divorce Cases

Featuring:
Milfred D. "Bud" Dale, JD, Ph.D.

Milfred D. ("Bud") Dale is an attorney and psychologist in independent practice in Topeka, Kansas. He received his Ph.D. from The Ohio State University in 1987 and his J.D. from Washburn University School of Law in 2009. His professional practices focus on children, parents, and families involved in legal systems. He presents and writes on issues in high-conflict divorce and parental separation, expert witness issues, and family legal system reform. He is a reviewing editor for the ABA Family Law Quarterly, is on the editorial board of the Journal of Child Custody, and is a member of the AFCC Board of Directors.

Bring your family and enjoy time in the Colorado mountains!
The conference will be at Beaver Run Resort in Breckenridge, Colorado.

More information and registration details coming soon!

Support COAFCC by Donating to the Silent Auction!

The COAFCC Silent Auction is a fun opportunity to support the association's ongoing efforts to bring national speakers to Colorado at a reasonable cost to attendees and to provide scholarships to members to attend AFCC and COAFCC conferences. The silent auction will be held on Friday evening, October 13th, at the Welcome Reception. Please donate an item and/or attend the auction and bid! You do not need to attend the conference to donate. Wonderful items for the auction include time shares, tickets to special events, gift certificates, jewelry, sports memorabilia, fashion accessories, electronics, collectibles, books, wine, gift baskets, and more! It's a fun time to relax and socialize!

To donate an item to the Silent Auction, please contact Bob Smith at rmsfamilylaw@igc.org.
We would GREATLY appreciate your support!

COAFCC 2017 Annual Meeting & Winter Conference

February 8, 2017

Presented by Marsha Kline Pruett, PhD, MSL, ABPP
Smith College School for Social Work

Reviewed by: Melinda Taylor, MS

The program for the COAFCC's winter conference focused on the interplay between child development and family law, providing participants with valuable information about child development, attachment issues, and considerations to make in developing parent plan agreements. Marsha oriented us to the importance of child development and its implications in family law by starting out her presentation with a quiz. While some of the questions were clearly "easy," others were trickier and, as we learned later, there is far more to child development than ages and stages. The influence of temperament, parental attachment, and the quality of the co-parent relationship have significant effects on a young child's capacity to regulate and express emotions, form close and trusting relationships, and explore the environment and learn.

Marsha's presentation provided practical experience and research to educate attendees about the key developmental needs of children, the basics of communication with children, and red flags for stress on the developing brain. She highlighted the types of stress and protective factors for resilient adaptation to that stress. Film clips were used to highlight children's different responses to stress in various scenarios.

Of interest was the research presented on parental involvement and the importance of father attachment and involvement in co-parenting relationships. Engaged fathers are a significant protective factor, particularly as children transition to adolescence. A key take away is that when mothers and fathers are more supportive of each other through the separation or divorce process, their children are better equipped to transition.

Marsha concluded her presentation with information about various parenting plan structures and highlighted her collaborative work in developing guidelines for determining stages in shared parenting arrangements.

Marsha Kline Pruett
PhD, MSL, ABPP

Marsha Kline Pruett, is the Maconda Brown O'Connor Professor at Smith College School for Social Work. She has been in private practice for over 25 years, specializing in couples counseling and co-parenting consultation, legal case development for attorneys, mediation, as well as intervention design and evaluation. She has a national and international reputation for the development, implementation, and evaluation of preventive interventions in courts and family-focused community agencies and has published numerous articles, books, and curricula on topics pertaining to couple relationships before and after divorce, young children and overnights, and child outcomes. She is currently the President of the Association of Family and Conciliation Courts (AFCC).

Two New Roles for Family Law Professionals

Marlene Bizub, Psy.D., CDC

In the ever-changing landscape of family law, there are two new options for parents and professionals to consider when deciding what path is best for them to take based on the specifics of their case. A relatively new role, the Divorce Coach is recognized by the American Bar Association (ABA) and may be the perfect route to go for the average person going through separation or divorce. The ABA defines the role of divorce coach on their website in this manner: "Divorce coaching is a flexible, goal-oriented process designed to support, motivate, and guide people going through divorce to help them make the best possible decisions for their future, based on their particular interests, needs, and concerns. Divorce coaches have different professional backgrounds and are selected based on the specific needs of the clients."

A divorce coach can assess what is or is not needed in the situation and guide the client accordingly. Clients can include one or both parties, and they are typically people looking for support and guidance through the divorce process. Both during and after a divorce, clients often experience painful emotions and a loss of direction for their life. They often do not feel whole for a period of time. It is the role of the divorce coach to support the client through this difficult time and to assist the client in creating an action plan that is solution-focused. Specifically, coaches can assist clients in establishing effective communications with their former partner and develop an effective co-parenting relationship with the other parent. This serves the needs of the children well, as the greatest threat of harm to the children of divorce is exposure to their parents' conflict. Attorneys may point their client in the direction of a divorce coach and consider them a welcome part of the team. The divorce coach can assist the client in becoming more organized so that their time with the attorney is more productive.

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Another relatively new concept in the divorce arena is Child Inclusive Mediation. This process allows children's feelings and viewpoints about their parents' divorce to be heard without the child actually joining the mediation sessions. In this process, there is a child consultant who first interviews the parents individually to gain their insights on the needs of the child. The child consultant then interviews the child or children in the case and obtains their thoughts, feelings, attitudes, and concerns in regard to their parents' divorce. The primary aspect of gaining the children's opinions often centers around the parenting time plan or schedule. The child consultant then provides input and impressions to the parents and the mediator during the mediation session. This way, the children are not burdened with having to say how they feel in the presence of both parents. Children should not be exposed to parent negotiations, yet this process allows their perspectives to be heard within the mediation process.

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The Child Inclusive Mediation process allows children's feelings and viewpoints about their parents' divorce to be heard without the child actually joining the mediation sessions.

TWO NEW ROLES

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As with any new idea or practice, there are pros and cons to these concepts and the practical application of it, and this is particularly true for child-inclusive mediation. Some children only open up to professionals when they have had the chance to establish rapport with them, and a child consultant may not be able to see a child long enough to really establish the necessary trust and rapport with them. There are other limitations when a professional has not had the time to establish rapport, such as not knowing when the child might be saying all the right things, but what they want is for the wrong reasons. A child consultant is likely not going to be able to spend the kind of time with the child that it takes to ferret out such intricacies. The concept is still a great concept, as long as the child wishes to have input. However, it could cause children to feel as though they are being placed in the middle of the conflict between their parents. But for children who welcome the involvement and *want* to have input, child inclusive mediation offers a reasonable option for allowing their voices to be heard.

Both the divorce coach role and the role of the child consultant in child-inclusive mediation are roles that are designed to lessen conflict, ease the process, and allow children's input to the process. Each, in their own way, serve to improve or enhance the process and are great options to be considered.

CASE LAW UPDATE

Timothy Mehrtens, Esq.

The following are the cases that were decided in the last two years by the Colorado Supreme Court that are relevant for issues in family law.

***T.W. and A.W. v. M.C.*, 363 P.3d 193 (Colo. 2015).**
Colorado Supreme Court determined applicability of *Troxel v. Granville*, 530 U.S. 57 (2000) to parental termination proceeding. The Supreme Court acknowledged that the right "to parent one's children" is a "fundamental liberty interest" and the right to "raise one's own children is" essential under *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). However, a state has the ability to override this presumption and the parenting decisions of unfit biological parents, where doing so serves the children's best interests under the clear and convincing evidentiary stand and § 19-5-105, C.R.S. The Court held that *Troxel's* due process requirements do not necessitate that the state prove both parents lack the availability, ability, and willingness to provide reasonable parental care before a child may be adjudicated dependent or neglected under the injurious environment provisions of the Children's Code.

***E.S.V. v. People in Interest of C.E.M. and M.F.M.*, 370 P.3d 1144**
(Colo. 2016)
Question was whether the trial court could terminate a mother's parental rights due to her continuing relationship with the father who was found to pose a threat to the children's welfare. The Supreme Court found that in order to terminate rights the trial court had to find:

1. The parent has not complied with the plan or the plan has failed;
2. The parent is unfit; and
3. The parent's conduct is unlikely to change within a reasonable time.

In this case the majority found that mother had, in fact, repeatedly violated the treatment plan by failing to report contacts with father. They also found that the record demonstrated ample proof to support the termination of parental rights.

For the Family Law Attorney: Because ACEs High is a Losing Hand ©

Hon. Janice M. Rosa (NY, ret)

Attorneys are regularly trained in legal subjects, but all too often vital information from medicine and social sciences is eliminated or bypassed when choosing CLE courses. The family law attorney often learns of important breakthroughs years after those principles are accepted in their fields. Increasing respect for vulnerable juvenile and adult clients, and the knowledge yielded from these other professions, fuels the current movement for "trauma-informed" practices.

What is "trauma?" Trauma results from an event or series of circumstances that are experienced by an individual as threatening or harmful. Trauma can be acute, caused by one incident, or it can be chronic, caused by repeated negative experiences. Our human biology is set to dispel stress responses to trauma, unless it is overwhelmed. Robin Karr-Morse calls harmful trauma "toxic stress frozen in place" in our bodies and brains, reverberating chemically.[1]

The medical/scientific underpinning for this new focus on a trauma-informed practice began in several fields but most notably is the result of a large study called the Adverse Childhood Experiences (ACE) Study.[2] The ACEs Study began with seventeen thousand plus subjects who have been studied over years (a longitudinal study) conducted by Drs. Felitti and Anda, and replicated in many studies around the world. Both researchers had been previously confounded when trying to treat long-term obesity and addiction issues. As those frustrations led them to question their patients they began to realize there were psychosocial origins to these chronic physical diseases, addictions, and risk-taking behaviors.

Their ACE Study population represented a mainstream, middle–to upper-middle class demographic, of fifty-seven years average age, enrolled with California's Kaiser Permanente health care plan. Nearly 75% were college educated and nearly 70% Caucasian. The study relied on a succinct health history questionnaire completed by each patient (See link below[3]), which inquired about the patient's childhood experiences of maltreatment (physical, emotional, sexual), or living in a household with drug or alcohol abuse, parental incarceration, domestic violence, divorce, adult mental illness or depression. The questions focused on ten risk factors associated with poor health outcomes, such as smoking, obesity, depression, suicide attempts, alcohol or drug abuse, etc. The researchers correlated the answers to the leading causes of death (heart disease, cancer, stroke, chronic bronchitis or emphysema, diabetes, etc).

> *The most surprising finding in the ACE study was the incredible prevalence of adverse childhood experiences in an otherwise low-risk middle-class well-educated white population.*

Patients were not asked to score the number, frequency or intensity of their reported negative childhood experiences. The scoring measured only the category of the adverse experience, not the number of incidents.

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ACES HIGH

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For example, one incident of child sexual abuse would receive the same scoring of "1" as would repeated sexual abuse over many years.

The most surprising finding in the ACE study was the incredible prevalence of adverse childhood experiences in an otherwise low-risk middle-class well-educated white population. An astonishing two-thirds of the patient group had 1 or more ACE indicators. And those experiences tended to occur in clusters – that is, a child with an incarcerated or mentally ill parent often also lived with the chaos of divorce, domestic violence, or child maltreatment.

Another finding confirmed what we in the family law field already know—there is a "dose-response" effect—the higher the ACE score, the higher the degree of lasting damage and distress in the person, and the lowered likelihood of success.

More than 20% of the U.S. population will have 3 ACEs. One out of every 8 people will have 4 or more ACEs. Researchers have replicated the ACEs findings in more problematic populations, including peer violence, community violence, death or forced separation of a caretaker, and exposure to war and results are consistent.

The researchers then linked these ACE scores to early adult disease onset and resulting death. Patients with an ACE score of 6 or higher died nearly *20 years earlier* than those who had a score of zero. Even without any high-risk behavior as an adult (smoking, alcohol or drugs, *etc.*), high childhood ACE scores directly correlated to poor adult health outcomes. Patients with ACE scores of 7 or more who didn't smoke, drink, and weren't overweight, still had a risk of heart disease that was a colossal 360% higher than for patients with a 0 ACE score.

Another finding confirmed what we in the family law field already know –there is a "dose-response" effect – the higher the ACE score, the higher the degree of lasting damage and distress in the person, and the lowered likelihood of success. Dr. Robert Anda says it is "like a *dose of stress poison* that negatively affects how the brain develops and multiple organ systems function." Those individuals with a score of 4 or higher had twice to quadruple the rates of depression, diabetes, and hypertension. They were twice as likely to smoke, seven

times as likely to be alcoholics, and four times as likely to suffer from breathing problems. They were twelve and more times as likely to have attempted suicide as those with a 0 ACE score.

The ACEs Study in preventive medicine parallels the research of pediatricians and neuroscientists who established the physical and chemical changes with adverse child development[4]. For instance, children having 4 or more ACEs have 32 times higher odds of having learning or behavior problems[5]. A 2012 national task force found that 60% of American children will have their lives touched by violence, crime, psychological abuse, or trauma.[6]

Only slowly have these ACEs concepts percolated into legal practice, where we now speak of being "trauma-informed." The science has shown that we can't expect a severely traumatized person to "just get over" a bad upbringing, when he or she has essentially become chained to a neurological chemical process malformed by negative childhood experiences. Asking "why" is no longer helpful. We have to ask "what can we offer."[7]

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The simultaneously exciting and frustrating fact is that we are right now at the frontier of the subject. We now have the answer to why so many life issues seem difficult or impossible to ameliorate but interventions are only slowly developing.[8]

For clients with trauma, they will be more apt to trust, disclose and cooperate with an attorney who has an understanding of trauma. Having a familiarity with the ACEs questions and topics is a good starting point for lawyers. An informed attorney will be more tactful and less judgmental in questioning. ACEs should explain why a client is unable to sustain healthy life habits. An informed attorney will be able to reassure tentative or recalcitrant clients, and refer clients to appropriate trauma-informed mental health services. Understanding ACEs may well shape the way parenting agreements are created. It should make attorneys more vigilant to protect children of divorce who have also experienced domestic violence. Perhaps most importantly, attorneys can now intentionally work to reduce the forensic trauma of protracted litigation, unfair tactics, and litigating "bullies."

As professionals on the frontline of this public health challenge we have the moral imperative to reduce client trauma. We are truly the first responders in this emerging field. Our timing matters, including how swiftly we intervene with our families in crisis to cut off the toxic stress messages and replace them with healing measures.

[1] Karr-Morse, R, with Wiley, M. S. (2012), *Scared Sick: The Role of Childhood Trauma in Adult Disease*, Basic Books, New York.

[2] Felitti, V.J. et al, *Relationships of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am J Prev Med 245 (1998)

[3] http://www.cdc.gov/violenceprevention/acestudy/questionnaires.html

[4] For example, see Child Trauma Academy (Dr. Bruce Perry's work) at http://childtrauma.org/, and Brain Rules at http://www.brainrules.net/;

[5] Dr. Nadine Burke Harris, see Center for Youth Wellness at http://www.centerforyouthwellness.org/

[6] See report at https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf

[7] See excellent discussion, Tough, P., *The Poverty Clinic: Can a Stressful Childhood Make You a Sick Adult?,* New Yorker, March 21, 2011 issue

[8] Jeske & Klas, *Adverse Childhood Experiences: Implications for Family Law Practice & the Family Court System*, 50 Fam LQ 123 (2016)

MEMBERSHIP UPDATES

Welcome New COAFCC Members!

Rebecca Barns
Robyn Bergman
Shawna Bowler
Chief Judge Chantel Cloud
Glenn Crow
Lori Darnel
Judge Paul Dunkelman
Judge Julie Kunce Field
Tanya Greathouse
Jeanie Hackey
Molly Happs
Leonard Higdon
Jane Irvine
Michelle Jensen
Erika Joye
Sarah Landry
Scott Methling
Holly Panetta
Carl Roberts
Kate Sereff
Andrea Shahmardian
Blakely Sjostedt
Kelley Southerland
Judge Mark Thompson

ELECTION UPDATE

This year's annual meeting was held at Regis University. Ballots were distributed to COAFCC members for the current Board of Directors election. The slate, as elected, was as follows:

Director Nominees:

Magistrate John Jostad
Resa Hayes
Dan Mosley
Barbara Shindell
Barbara Pevny

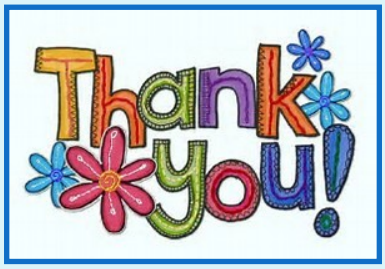
Officer Nominees:

Vice President: Leonard Tanis
Treasurer: Barbara Pevny
Secretary: Laurie Mactavish

Frances Fontana will move from the position of Vice President to the position of President in accordance with our bylaws.

COMMITTEE UPDATES

The **Membership Committee** is looking into advertising our programs to professionals in other organizations who may not hear about them originally but may find the topics to be of interest. Determining how members of COAFCC may wish to participate as resources in this organization or outside of it will be discussed next. As this term year will be ending in June, we are looking for a new chairperson for the committee. Shelley Bresnick has been the chair and will remain on the committee.



A Special Thank You!

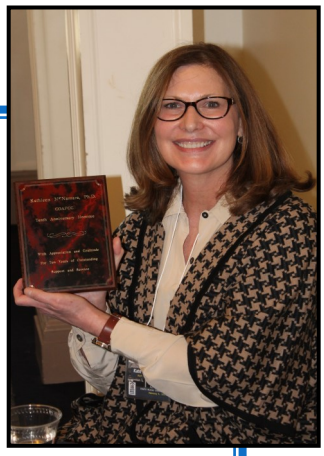
A heart felt thanks to our outgoing board members:

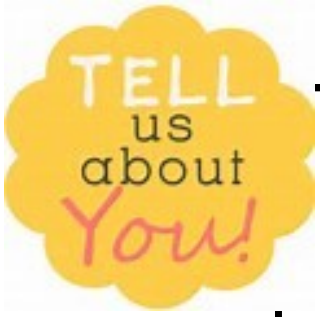
Shelley Bresnick & Sarah Quinlan

Thank you for your service to COAFCC!

MEMBER NEWS

In honor of the tenth anniversary of the Colorado Chapter of AFCC, the Board of Directors presented Kathleen (Kate) McNamara, Ph.D. with a plaque thanking her for her professionalism, support, and creativity on behalf of our chapter. Kate was also elected to a two-year term as AFCC's Chapter Liaison. Please join us in congratulating Kate in her new position on the AFCC Board!





COAFCC members--we want to know when you publish a peer-reviewed paper or a book of relevance to family law practitioners so we can highlight your work in our newsletter! Let us know about awards, promotions and other honors as well.

Send an email to April Freier, our administrative assistant: aprilfreier@hotmail.com.

UPDATE ON CLIENT COMPETENCY ISSUES

David Littman, Esq.

The area that lies at the intersection of mental health and family law is exceptionally complex and fraught with both factual and legal uncertainties. As more people seek to divorce in their 50's, 60's, 70's, and even 80's, issues of client competency are becoming more commonplace. These issues may arise due to a variety of circumstances and conditions ranging from early onset Alzheimer's Disease to complications from alcohol and substance abuse, to severe, persistent, and significant mental conditions ranging from Post-Traumatic Stress Disorder, severe and crippling anxiety, mood disorders, and schizophrenia, as well as certain personality disorders.

In 2007, in the *Sorensen* case (166 P.3d 254 (Colo. App. 2007)), the Colorado Court of Appeals established conditions in which a trial court is mandated to hold a hearing to determine if a Guardian *ad Litem* ("GAL") should be appointed.

Those four conditions include when:

1. A spouse is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding;
2. A spouse is incapable of making critical decisions;
3. A spouse lacks intellectual capacity to communicate with counsel; and
4. A spouse is mentally or emotionally incapable of weighing the advice of counsel.

When any or all of these concerns are raised, the Court must conduct a hearing. If the court finds that any one of the above criteria is met by a preponderance of the evidence, the Court is then mandated to appoint a GAL. Some judges have determined that the only person who can raise a client competency issue is the attorney for that party in question. This raises the issue of an attorney potentially violating Colorado Rule of Professional Conduct 1.6 by exercising certain options under 1.14.

Existing case law regarding the role of the Guardian ad Litem is all over the place. In the Dependency and Neglect case *Gabriesheski* (262 P.3d 653 (Colo. 2011)) the Colorado Supreme Court determined that the GAL's client is the "best interests" of the minor child. "Because a child who is the subject of a dependency and neglect proceeding is not the client of a court-appointed guardian ad litem, neither the statutory attorney-client privilege nor ethical rules governing an attorney's obligations of confidentiality to a client strictly apply to communications by the child." *Id. at 655.* If the purpose of the GAL is to represent the party's best interests, this writer suggests that there is no confidential relationship between the party and the GAL.

> *"As more people seek to divorce in their 50's, 60's, 70's, and even 80's, issues of client competency are becoming more commonplace."*

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CLIENT COMPETENCY

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If a party is manifesting one of the above conditions, it leaves the attorney representing the party without a client to provide direction. If the GAL is to advocate for the party's best interests, without some other appointed person, no one stands in the place of the party meeting one or more of the *Sorensen* criteria.

For this author and practicing attorney, the ruling left many questions unanswered. Another Dependency and Neglect case, *People in the Interest of M.M.* (726 P.2d 1117 (Colo. 1986)), also decided by the Colorado Supreme Court may be instructive:

In determining whether a court has abused its discretion in not appointing a guardian ad litem for an adult parent who is also represented by counsel, it is appropriate to consider the function of a guardian ad litem in relation to the role of counsel in a termination proceeding. While it is the lawyer's duty to provide the parent with legal advice on such decisions as whether to contest the termination motion and whether to present particular defenses to the motion, it is the role and responsibility of the parent to make those decisions. If the parent is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding or incapable of making those critical decisions that are the parent's right to make, then a court would clearly abuse its discretion in not appointing a guardian ad litem to act for and in the interest of the parent. A court would also abuse its discretion in not appointing a guardian ad litem in those situations in which it is clear that the parent lacks the intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in her own interest. If, however, the evidence shows that a parent, although mentally disabled to some degree, understands the nature and significance of the proceeding, is able to make decisions in her own behalf, and has the ability to communicate with and act on the advice of counsel, then a court might well conclude, and properly so, that a guardian ad litem could provide little, if any, service to the parent that would not be forthcoming from counsel.

This case was decided some 25 years before *Gabriesheski*. The confusion lies in the Court's use of the phrase "to act for and in the interest of the parent." An attorney cannot act in the best interests of the client. The attorney must advocate for the client's wishes. Acting for a party suggests

a fiduciary duty while acting in the interest of a party suggests more of a *Gabriesheski* type of role where the party's "best interests" is the client. This writer asserts that a GAL can recommend a course of action in the party's best interests, but cannot maintain that role while also standing in the place of the client as a fiduciary does. Thus, a GAL can, for example, recommend evaluation and/or treatment for the party, opine that a proposed settlement is in the client's best interests, recommend the appointment of a conservator or special conservator to manage the party's finances, but cannot sign the Separation Agreement, Parenting Plan, or other legal documents.

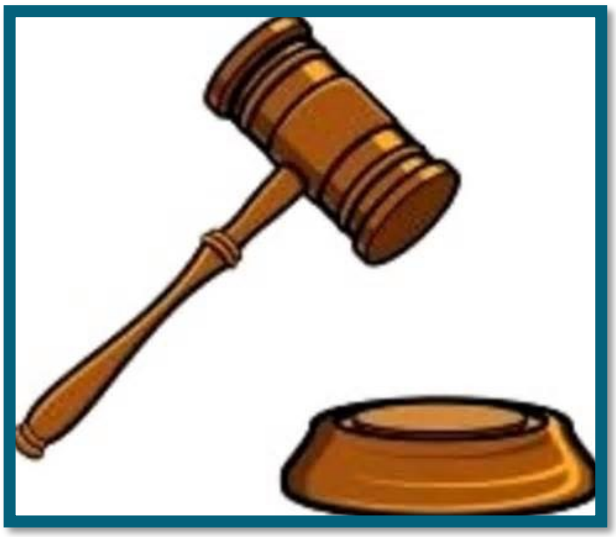
The Colorado Bar Association has had a committee working on these issues for at least the past two years. Presently, the focus is on making revisions to C.R.P.C. 17(c), to clarify and define the role of the GAL and to use a Special Conservator to operate with a fiduciary duty for the client identified with one or more of the *Sorensen* conditions. A final draft is in progress that will go to the entire CBA Governing Board for discussion and approval. The next step will be approval by the Supreme Court Rules Committee. Stay tuned for further developments.

View From the Bench

The Honorable Robert R. Lung
Judge, Division 6, Douglas County District Court

I begin with a question: In what other practice are the decisions in a single case more impactful, more far-reaching, or more personal, than in domestic practice? If you've appeared in my division, you and your client have heard the encouragement (or warning) to enter mediation with the mindset of finding common ground. The encouragement (or warning) is that if the parties aren't able to exercise agency over their own lives, then they will ask a complete stranger (the Judge) to decide the most intimate details of their lives. The expanse of the decisions at Permanent Orders is formidable and includes deciding where each party will reside, what car each will drive, the details of their personal finances including their retirement plans and, if applicable, where, when and how often they will see their own children. It is a daunting responsibility to make such decisions when the parties are unable to agree and it is a task from which I derive honor, humility, and gratitude. It is an honor to serve as a Judge assigned to a Domestic Division because it is my task to guide people through the difficult times of a divorce so they may discover their new lives post-decree.

The likelihood of a smooth and successful transition from Petition to post-Decree is directly correlated to the ability of the parties and their attorneys to be forthright and honest. A couple decades ago deception and duplicity may have seemed to serve a client's interests, but with certain rule changes in civil procedure and an awareness of studies such as the CDC-Kaiser ACE study, there is now a distinct shift in domestic practice, recognized and embraced by both the bench and the bar. I would regard any domestic attorney or judicial officer, aware of the ACE study and their own ACE score, as an informed domestic attorney or an informed judge.



This shift in practice is easily recognized at the initial status conference ("ISC") when the informed Court routinely asks as much about the parties' respective financial circumstances as about their emotional or mental health. The standard practice of inquiring about the current employment and daily living arrangements of each party remains. However, informed courts may also ask whether there are any other issues the Court needs to address such as existing protection orders, related criminal matters, mental health concerns of the parties or children, and whether there is a concern about drug or alcohol abuse. It is as much from the Court asking these personal questions as from a frank disclosure by parties and counsel that the Court learns about the needs of the case; in particular, whether the case will need to be macro-managed or micro-managed.

In a macro-management case the Court may anticipate that the parties are functioning at a higher level, have already reached a number of agreements and will likely proceed by setting a non-contested permanent orders hearing with a telephone status conference mid setting. In a micro-management case the Court will anticipate the need for temporary orders as well as the potential for ancillary motions regarding property, nuptial agreements, parenting time concerns, or discovery. The insight garnered by an informed court enables it to

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appropriately set cases to their specific needs rather than setting all cases for the same schedule of hearings.

However, the real shift in practice comes from informed attorneys disclosing concerns such as mental health issues or alleged drug abuse, and informed courts responding, not with condemnation and alienation, but with acceptance, concern, and understanding. In Douglas County a team of attorneys, mental health professionals, community service providers, and judicial officers are collaborating under a pilot project lead by Domestic Relations Coordinator Kara Martin, J.D., of State Court Administrator's Office, to create protocols to 'triage' domestic cases. This triage system anticipates developing county-specific protocols to promptly address the specific needs of each case. In the macro-management cases, the Court will have fewer in-person settings and encourage the parties and counsel to focus on the "big picture" of achieving permanent orders quickly to reduce stress and costs. In the micro-management cases, there will likely be more status conferences or formal settings and the Court will encourage the parties and counsel to take a step-by-step approach to resolving the conflicts and achieving sustainable, informed permanent orders.

Aside from learning about the impact of adverse childhood experiences from the CDC-Kaiser study, I have had the opportunity to preside over Dependency & Neglect cases both as an Arapahoe County Magistrate and now a Douglas County Judge. And while some may regard an assignment of divorce cases and child abuse cases as a tough assignment, I have felt blessed.

Dependency & Neglect ("D&N") cases range from educational neglect or hygiene issues all the way to the worst of outcomes, including fatalities. The most essential key, in my opinion, in every D&N case is hope. Almost regardless of the nature of the allegations against the parents, I perceive that if the allegations are sustained, the parents in front of me have the potential of being the best parents I have ever met if the treatment plan is successful. It is during these juvenile cases that I began the practice of telling parents something they had probably never heard before (and at least initially, don't believe), "I don't care what shows up on your drug screen, I just want to know what you need help with and what I should order the Department to provide you so you can be the best parent for your child." And I absolutely mean it. A D&N case is a civil not a criminal matter and the purpose is to improve the life of a child, hopefully by strengthening the family. If the drug screen comes back positive, I know at least one thing we can do to help the parent be a better parent and that's a good place to start.

> *"In what other practice are the decisions in a single case more impactful, more far-reaching, or more personal, than in domestic practice?"*

I practice this in domestic relations cases as well. I want to know, as the presiding judge, what I can do to help these two people through this difficult time. While I appreciate the level of vulnerability and fear a party may experience by the Court addressing their mental health issues or addictions, the informed Court does not perceive these as a character flaw, but as an opportunity to strengthen the individuals before it. I know if we address all their needs and issues, there is a better chance the resulting order will be sustainable, manageable, and most importantly, acceptable. The order that fails to address the needs of the parties will likely be unrealistic, ineffective, and appealed.

I recall from ancient history (also known as trial practice in law school), our professor encouraging us to steal the other side's thunder by proactively addressing any perceived weaknesses in our own case. In the D&N cases, I often remind parents during review hearings that the stronger, healthier person is the one courageous enough to ask for help, not the one trying to shoulder all their burdens quietly only to fall alone. I encourage counsel to do the same in my courtroom because identifying the perceived weaknesses of your client will be perceived as honesty and be welcomed as an opportunity to help the parties improve their lives during the proceeding.

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I will leave the insights of an informed court now and address a few more issues in domestic practice with some hopefully helpful and practical advice. First, though I hope this goes without saying, know that when you respect or disrespect division staff it's as if you were doing that directly to the magistrate or judge. While I believe we have some of the best division staff secreted away in the domestic benches, it is difficult work for our staff to keep up with all the moving parts of managing a domestic division. While staff is limited to forty hours a week, the judicial officers are often putting in far many more hours and producing more work than the average clerk can process in less time. A friendly greeting and a "thanks for all your help" goes a long way with our staff. And lest I forget my first thirteen years on the bench as a magistrate, be cognizant that the magistrate divisions often carry much higher (two to three times higher) docket loads so patience is more than a virtue, it is a necessity when working with a judicial officer who may be responsible for three or four or five hundred cases.

Second, efficiency! In Division 6 we encourage counsel and parties at the ISC to call or email staff if something "catches fire." Motions often take four weeks, while a phone call takes 48 hours. I always caution that if there is a motion you feel compelled to file such as a motion to restrict then by all means follow your practice. However, if there is a dispute on the payment of the CFI or a disagreement on discovery, contact division staff to see if it can be addressed in a telephone status conference ("TSC"). Admittedly, there are times that the Court discovers during the TSC that the disputed issue is so complex it warrants pleadings, but I'm happy to discover that with you in a few days rather than litigate every detail in four week increments till trial. Find out from each division what their preference or approach is – it will save you and your client time and money.

Third, the value of an attorney's professional reputation is immeasurable, invaluable and irreplaceable – it is an asset you must work to build, maintain and protect. As such never allow the case, the parties, their respective conflicts, or the opposing attorney to impair or impugn your professionalism. Contested domestic cases are inherently divergent with battle lines being drawn and battles within the war being waged. It is disconcerting as a Judge to see an attorney of distinct reputation and skill, suddenly regress into brash bantering in playground-bully antics with the opposing party or counsel. It is disruptive, distracting, and it universally disparages everyone involved when the case and counsel engage in name calling and blame-laying. Find the high ground and stay there – it will benefit this client and all future clients while securing your professional reputation with the court. The Court will not fail to appreciate your professionalism, its effect on the case (which inevitably results in a more proper and efficient resolution) and the dividends of your professional contribution will be paid in this case and compounded in future cases.

The last piece of advice is as much an encouragement to private counsel as a practice tip or suggestion for fellow judicial officers – when appropriate, recognize the parties' efforts in reaching a full agreement. In cases in which the parties accomplish stipulated permanent orders, I recognize the parties on the record by literally thanking and congratulating them for their hard work in finding common ground. I have been known to give the "long distance high five" from the bench in some cases because the parties really achieved a functional and fair outcome.

Along with recognizing the parties, I particularly enjoy the opportunity to recognize private counsel for being professional and ethical through the proceedings. When I have the opportunity I specifically recognize counsel on the record in front of their clients for making the case more about getting *through* the process rather than making it *about* the process – which would have been far more financially, mentally, and emotionally costly to the parties.

Lastly, and honestly most importantly, when the perception of the domestic bar and bench is how may we better serve all the needs of the parties rather than sizing up a win-loss spreadsheet, the purpose of domestic practice becomes something honorable and rewarding because we are truly making a difference one case at a time.

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If you are interested in committee work please contact April Freier at aprilfreier@hotmail.com

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- ◊ Ads must be in image-ready JPEG format for display ads (pictures or logos included) or PDF format for type-only ads
- ◊ Email the JPEG or PDF file to April Freier at aprilfreier@hotmail.com
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- ◊ Advertising space is limited and offered on a first-come, first-served basis
- ◊ No refunds are given for advertising due to the nature of print deadlines and the costs associated with layout changes
- ◊ Deadline to submit ads for inclusion in the Fall/Winter newsletter is October 1 and for the Spring/Summer newsletter April 1

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