Association of Family and Conciliation Courts
Colorado Chapter

Spring News

President's Message

Frances Fontana, JD

Greetings,

It's Spring - a time for renewal, rejuvenation and optimism – yes, the Rockies will be going to the World Series this year!

By the time you read this, we will have put on our Spring Program *High Conflict Personalities in Family Law: Identification and Intervention* with Bill Eddy as our Keynote Speaker. I hope that most of you were able to attend and can incorporate Mr. Eddy's information into your professional practice. As an attorney I am always looking for information on how to better manage all the personalities I encounter in my day to day practice, so I know I'll be working that information into what I do going forward.

I want to give a big shout out to Sarah Quinlan, Esq., and Gene Gross, PsyD., co-chairs of the Program Committee, for all their hard work in organizing and putting on the Spring Program. Our organization relies heavily on the volunteer work of members and Sarah and Gene have given generously of their time to maintain the quality of programming we are privileged to enjoy as part of our membership, which is greatly appreciated.

I want to welcome our new members and thank you for joining during our effort to garner the $5,000 payment from our parent organization. I am happy to announce that Colorado WON the Chapter Challenge, having increased our membership by more than 30% since July 2017. As a chapter we also captured the prize of our new members and look forward to getting to know you all, working with you, and increasing the talent pool of our membership. The ability to interact, share ideas, and brainstorm with other members adds value to our individual practices and keeps us going in those difficult times.

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AFCC COLORADO

Spring 2018
Volume 9, Issue 1

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It's not too late to sign up to attend the AFCC 55th Annual conference which is being held June 6-9, 2018 at the Washington Hilton, in Washington D.C. I was in D.C. last fall after a long absence and had forgotten what a beautiful place it is and how much there is to see and enjoy. The conference itself is well worth the trip but if you go, take time to check out the beautiful monuments and architecture that is just as wonderful at night as during the day – since you will be attending the presentations during the day!

As noted in our last newsletter, instead of having a conference in the mountains this fall we will be supporting the AFCC's 13th Symposium on Child Custody Evaluations in Denver, November 8-10, 2018. Keep an eye out for upcoming program information and registration and be sure to attend and support the auction to raise funds for our chapter.

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 55th Annual Conference:

Compassionate Family Court Systems: The Role of Trauma-Informed Jurisprudence

June 6-9, 2018
Washington Hilton
Washington, DC

Child Custody Symposium

November 8-10, 2018
Embassy Suites by Hilton
Denver, Colorado

SAVE THE DATE!

November 8-10, 2018

AFCC 13th Symposium on Child Custody

Guidelines and Standards and Rules, Oh My!

Look for more information and registration details coming soon!

Support COAFCC by Donating to the Silent Auction!

COAFCC will be sponsoring our Silent Auction in conjunction with the AFCC Symposium on Child Custody this year. 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. We will have many attendees from out of state to bid on our auction items so we have a great chance to really increase our fundraising with this event.

The silent auction will be held on Friday evening, November 9th, at the AFCC Symposium. 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! If you can't think of anything to donate, Rebecca made it easy by setting up an amazon.com wish list! You may simply go online and click your donation away. This is made even easier because the item gets shipped directly to Rebecca for the auction and you don't have to deliver it anywhere!!

To order from the Amazon wish list you click here:
https://www.amazon.com/hz/wishlist/ls/2VHCX2YY02EQS?&sort=default

Please remember many of our attendees will be visiting Colorado and returning to their home states, so items which can be packed are especially useful. To donate a Silent Auction item directly, please contact Rebecca Pepin at rpepin@jbplegal.com. We would GREATLY appreciate your support!

COAFCC 2018 Annual Meeting & Spring Conference

April 27, 2018

High Conflict Personalities in Family Law: Identification and Intervention

Reviewed by: Armand D. Lebovits, LCSW, CAC III

The COAFCC Spring Conference was held on April 27, 2018, at the University of Denver, Driscoll Student Center, Governors Ballroom. The conference featured Bill Eddy, LCSW, JD, CFLS, who presented on "High Conflict Personalities in Family Law Cases: Identification and Intervention." Bill Eddy is a Licensed Clinical Social Worker/therapist and mediator, and an attorney that is a Certified Family Law Specialist, based in San Diego, California. Mr. Eddy presented in Colorado in 2012 on "Understanding and Managing High Conflict Personalities" in a joint conference sponsored by COAFCC and MDIC; and has presented numerous times on High Conflict Personalities (HCPs) and on the "New Ways for Families" programs at AFCC Conferences in over 30 states in the U.S., as well as internationally. Mr. Eddy has published several books on how to deal with or manage difficult clients in the family law arena.

Our President, Fran Fontana, Esq., opened the conference with introductions, including complementing Gene Gross, Psy.D. and Sarah Quinlan, Esq., Co-Chairs of the Program Committee, as well as board and committee members involved in creating this very well attended conference. Fran reviewed the benefits of becoming an AFCC and COAFCC member; and then Gene Gross, introduced our featured
presenter.

In the early morning session, Mr. Eddy provided an overview of understanding the five "high conflict" personalities and how to work with their common high-conflict behaviors from attorney, mental health professional, judge or mediator (or ADR) perspectives. He described HCPs and their preoccupation with blaming or targeting co-parents and professionals. Mr. Eddy's approach and methods are aimed at calming HCPs and moving them into problem solving. Four key skills were presented that can be taught to clients and family members, including the **CARS Method** which includes **Connecting, Analyzing Alternatives, Responding** to Hostility and Misinformation (including writing effective emails that are **Brief**, **Informative**, **Friendly** and **Firm** (**BIFF**)) and **Setting Limits with EAR Statements** (demonstrating **Empathy**, **Attention** and **Respect**) and **Consequences**.

Mr. Eddy augmented his presentation with video clips to demonstrate the CARS Method and EAR statements as well as email approaches for BIFF; and a video demonstration of the "New Ways for Families" program.

Bill Eddy
LCSW, JD, CFLS

High-conflict personalities (HCPs) were characterized by (1) all or nothing thinking; (2) unmanaged emotions or extreme behaviors; (3) a pre-occupation with externalizing/blaming others; (4) unresolved long-standing conflict; and (5) exhausting professionals, the court, and families of energy, time, and resources. Mr. Eddy described some common problems for HCPs, including domestic violence (IPV), alienation, child abuse, and substance abuse that

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SPRING CONFERENCE REVIEW

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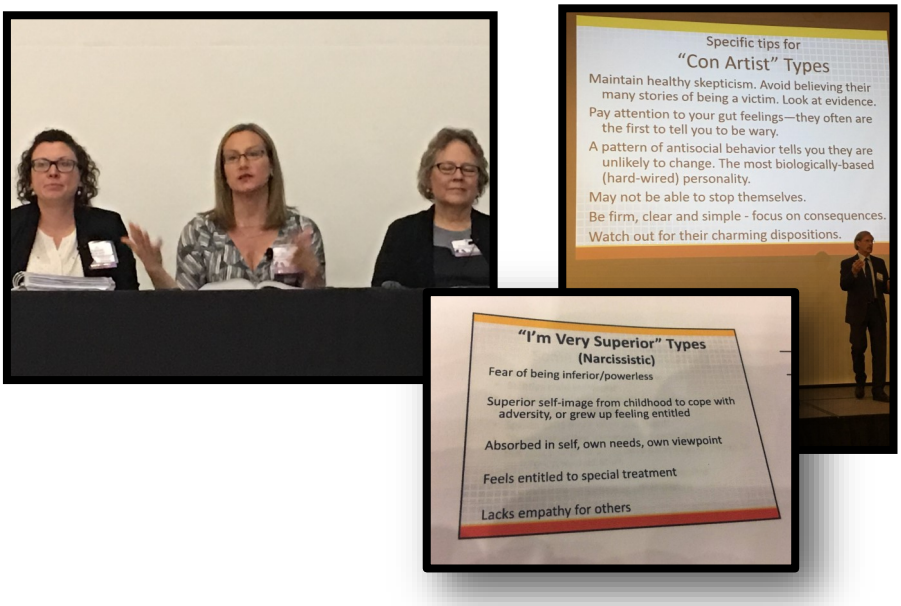
reflect the lack of self-management (or self-regulation) skills. These require learning to manage emotions, developing flexible thinking, moderating behaviors and checking themselves, and ensuring accountability for clients in terms of follow-up and monitoring of new learned skills.

We had a working lunch and continued the COAFCC Annual Members' Meeting and Elections with passing out and collecting ballots for new officers and board members. The lunch was sponsored by "Our Family Wizard" and they made an informative presentation of the various tools available on the website for families and professionals.

In the early afternoon, current Vice President, Lenny Tanis, Esq., moderated a panel of judicial officers focused on the topic of "Helping Colorado Families in Conflict." The panel included Judge Elizabeth Strobel from the 19th District Court (Weld County), Magistrate Meredith Patrick Cord from the 4th District Court (El Paso County), and Magistrate Sarah Zane from the 16th District Court (Crowley and Bent Counties). The judicial officers responded to questions from the moderator on how they manage high-conflict cases and personalities in their respective district courts and their approaches to problem solving, including limited professional resources at times and pro se parties with limited finances for CFI or PRE Appointments. This was a very open, transparent, and lively discussion with the judiciary panel.

The remainder of the conference was focused on ethics and risk management when working with HCPs which emphasized treating them with respect and avoiding professional splitting, that was followed by a summary and a Q & A with Mr. Eddy. This one-day 2018 COAFCC Annual Spring Conference was very well attended, including almost an equal mix of mental health professionals and attorneys, mediators and judiciary and quite a few new attendees in the audience.



Something New!

Those of you in the Colorado Springs and Metro area will want to mark your calendars now and plan to attend the first of a newly scheduled series of dinner meetings!

Southern Colorado (SoCo)
COAFCC
Dinner Meeting

September 11, 2018

Featuring:
A Judicial Panel Presentation

Colorado Springs
Fine Arts Center
30 W Dale Street
Colorado Springs

Judicial Officers, Family Law Attorneys, Court Personnel, Mental Health Professionals, Mediators, CFIs, CLRs, GALs, PREs, PC/DMs, and Parenting Time and Exchange Supervisors are welcome to attend!

Making Family Law Training and Networking Accessible Throughout the State

Robert S. Smith, Esq.

The previous COAFCC newsletter described the COAFCC Board's efforts to increase the availability of ongoing domestic relations training and professional networking opportunities to areas of the state that do not have organized interdisciplinary groups already in place. The initial effort was launched in Northern Colorado almost a year ago, with a planned program of five meetings sponsored by COAFCC, that were designed by members of the Judicial District Best Practices Teams from both Larimer and Weld counties. With organizational planning and creative ideas by a nine-member local committee, strong Chapter administrative support by April Freier, and a selected facility that lies just halfway between the two judicial district Courthouses, the NoCo Dinner Meetings program proved to be a viable and welcome chance for COAFCC members and potential new members to meet. The meetings took place on five Tuesday evenings over the past year and included networking and in-depth programming that appeals to mental health professionals, family law attorneys, mediators, Court staff, and judicial officers. The program has made a small profit, which is plowed back into additional COAFCC educational efforts.

As the NoCo Dinner Meeting program begins its second year of educational offerings and professional networking with the annual judicial officers' question-and-answer session on May 8th, the COAFCC Board has begun looking to expanding the concept in other Colorado locations that do not already offer regular educational opportunities. Beth Lieberman, Chapter Past President from Colorado Springs, began to lay the foundation for a SoCo Dinner Meeting series, using a development and planning guide conceived by Kate McNamara, who spearheaded the NoCo series of dinner meetings with me this past year. The SoCo effort has some distance challenges, however; since the initiators are working on plans to include not only the Colorado Springs and Pueblo domestic relations communities, but also meet the educational needs of the wider southeast area professionals. More information about the SoCo dinner meetings will be available in a future COAFCC newsletter; but those interested in being notified of future domestic relations educational and networking plans in the southeast part of the state should send an email to Beth Lieberman at bethlieboffc@aol.com.

While the development of regional dinner meetings is a time-intensive process, the COAFCC Board is working toward expanding educational and networking opportunities throughout the state - particularly in the Eastern Plains, Mountain, and Western Slope judicial districts–in cooperation with existing Best Practices Teams from those judicial districts. The Board also discussed encouraging professionals to gather at a centrally located law or mental health office to participate in scheduled AFCC webinars, as well as one-time regional conferences that would be offered by COAFCC Board and Chapter members presenting on specialized topics on a *pro bono* basis. While much of rural Colorado is hampered by problematic, or even non-existent, internet services, there is a political movement in the State Legislature to improve these rural internet services. This would eventually allow the COAFCC Board to plan more training opportunities throughout the state, along with even more established regional dinner meetings, to meet the domestic relations educational and networking needs of our members.

AFCC 12th Symposium on Child Custody

Beneath the Surface of High Conflict and Troubled Families

November 2-4, 2017

Milwaukie, Wisconsin

Reviewed by: Leonard D. Tanis, JD

The annual AFCC Regional Conference was held in Milwaukee, WI, at the beginning of November. The conference was well attended by members from across the United States and overseas. It was truly an exciting and informative conference that provided valuable information for everyone working with families in high conflict.

The Conference began with Melissa Scaia, MPA, John A. Moran, Ph.D., Leslie Drozd, Ph.D., and Robin M. Deutsch, Ph.D., ABPP, exploring how issues of substance abuse, intimate partner violence, and co-parent conflict strain the parent-child relationship and what interventions can reduce both the conflict and the strain on the child's relationship with the parents. They provided some valuable insights on these issues. For instance, Melissa Scaia pointed out that the abuser never sees the evaluator or therapist as a neutral; Leslie Drozd discussed how domestic violence correlates 60% of the time with mental illness or substance abuse and they must both be treated; and John Moran spoke about how, especially in these case, negotiated agreements have to have clear accountability provisions.

The rest of the day involved break out sessions, which presented additional valuable information and insights on dealing with high conflict and troubled families. One such workshop was given by Leslie Drozd and Michael Saini, Ph.D. They presented on the interventions that have been developed to address children's resistance and/or refusal to have contact with a parent post-separation and divorce. The workshop reviewed the empirical evidence of published studies, highlighted the measures used to assess the effectiveness of these approaches, and then introduced both a clinical checklist for assessing success and a research tool for evaluating the efficacy of interventions for strained parent-child relationships. Saturday morning continued with additional workshops.

The scope of the valuable information provided by these well-known experts was truly inspiring. I am sure that everyone left Milwaukee with new insights and new tools they could use in their work with high conflict families and families dealing with issues of IPV and substance abuse. As you may know, the AFCC 13th Symposium on Child Custody is being held in Denver on November 8-10, 2018, with the theme "*Guidelines and Standards and Rules, Oh My!*" This is an excellent chance to be able to attend this once a year conference without significant travel expenses. I look forward to seeing you all there. Of particular note is the Silent Auction that will be held during the event, the proceeds of which will come back to our chapter and help finance future instate conferences. Don't miss this opportunity!

MEMBERSHIP UPDATES

Welcome New COAFCC Members!

Norma Alkire
Laura Ammarell
Daniel Baur
Edward Budd
Jennifer Calcut
Rene Capron
Rachel Catt
Suzanne Chambers-Yates
Dina Christiansen
Erin Claeys
Kara Clark
Austin Cohen
Laura Fourzan
Lisa Frazer
Gwendolyn Gaumond
Amy Gosha
Jennifer Gray
Kathryn Hall
Anne Haro Sipes
Jennifer Helland
Deb Johnson
Kate Kaiser
Sarah Lamborne
Kate Lewis
Sarah Liggett
Beth Lindal
Kandace Majoros
Sandra Mann
Marta Martinez-Evans
Taya Matoy
Colleen McCoy
Monica McElyea
Peter Michaelson
Matthew Neal
Janelle O'Boyle
Meredith Patrick Cord
Jennifer Rice
Cynthia Roberts
Milena Rodionov
Patrick Shargel
Anne Shuler
Tiah Terranova
Jeanette Troncoso
Natalie Van Note
Marc Vick
Donalea Warren
Keren Weitzel
Charles Willman
Carolyn Witkus
Joan Woodbury
Tia Zavaras

WE DID IT!

The Chapter Challenge is complete and COLORADO AFCC wins the $5000 check after increasing our membership by more than 30% since July 1, 2017. Way to go (and welcome to our new members)! A special thanks to all the folks on the Membership Committee for their hard work and dedication in getting the message out there and bringing home this win!

ELECTION UPDATE

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

Director Nominees:

Gene Gross
Katie Hays
Rebecca Pepin
Robert Smith

Officer Nominees:

Vice President: Laurie Mactavish
Secretary: Resa Hayes

Lenny Tanis will move from the position of Vice President to the position of President in accordance with our bylaws.

A Special Thank You!

A heart felt thanks to our outgoing board members:

Bill Fyfe, Beth Lieberman, and Dan Mosley

Thank you for your service to COAFCC!

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.

Where Have All the PREs/CFIs Gone?

Ann Gushurst, JD

Late last year a senior attorney, talking to friends after a CLE, mentioned how irritated he was that in a recent case of his, even though he and the opposing counsel had agreed to the appointment of a PRE, the court had refused the appointment. What was more surprising still, is that he wasn't the only attorney in the group to have had the same experience. Colorado is one of a handful of states that has a specific provision allowing for the appointment by the court of mental health expert in the form of either a Child and Family Investigator (CFI) or a Parental Responsibilities Evaluator (PRE). While the idea of such an expert seems obvious, the number of states that have similar provisions is less than 20 at last count.

In the last several years Colorado has seen its statute change from one in which the court was required to appoint not only the first evaluator, but to also appoint a second evaluator unless there was a good reason not to, to the situation where, when two competent counsel told the court they ***needed*** a PRE, the court declined to appoint one. The question years ago wasn't whether or not you would have a PRE appointed, but who the PRE would be and who would pay for their services. Fast forward to today, when the court now has discretion to appoint a PRE and is increasingly using that discretion to deny appointing PREs ***or*** CFIs.

There are several things to consider as to what is behind this trend, and the first is cost. Based on the growing awareness that judges are increasingly denying requests for MH appointments, the Family Law Section put out a survey to its members. One of the questions was to have members report on the cost of their last PRE. 238 attorneys answered the survey; the average cost of a PRE (which is likely not totally accurate, as some people appear to have put in CFI appointments) was nearly $17,000 with several in the $30,000+ range. This is a lot of cost and, by necessity, limits who can afford to have a PRE appointed in their case. Most divorcing couples simply do not have $17,000, let alone $30,000, to spend on a PRE in addition to legal fees.

But cost alone doesn't explain the trend towards refusing to appoint PREs because according to the survey, CFIs are just as likely to be refused to be appointed as are PREs even though they are capped at a cost of $2,750. And it bears noting that what CFIs are designed to do is not the same job as that of PREs. CFIs are designed to do brief evaluations that primary consist of reporting back to the court what others have said.

A decade ago most jurisdictions had psychologists working for local Child Protective Service departments who could do evaluations for the indigent; these positions no longer exist and poor people only can get CFIs appointed.

This trend is chilling, and it doesn't just affect people with money. A decade ago most jurisdictions had psychologists working for local Child Protective Ser

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vice departments who could do evaluations for the indigent; these positions no longer exist and poor people only can get CFIs appointed. The difference between a CFI and a PRE is enormous, and this discrepancy is particularly chilling when you consider some of the problems – like chronic unemployment, severe mental health concerns, substance abuse, and severe domestic violence – that can occur in struggling families.

The cap on CFI fees was implemented by then-chief justice Michael Bender to provide a lower cost alternative to a PRE. However, although the costs of CFIs were running high, the imposition of a cap on the expense reflected much more than just holding a cost line. In effect, by capping the CFI cost, the CJD changed the nature of a CFI report from that of a mental health recommendation to a paid witness who could summarize facts from other witnesses. No one seriously believes that with the $2,750 cap that a CFI can conduct an investigation that effectively probes any difficult mental health issue and many of the current CFIs have zero mental health backgrounds.

Another change is that the statute now requires that before a PRE may be appointed, a party must justify why a CFI cannot be appointed instead - even though the scope of the two roles is entirely different. But these statutory and rule erosions to the evaluative roles of the PRE and CRI has been gradual and as alarming as deterioration is, the recent trend of outright denials of both CFIs and PREs is scary.

While virtually all states embrace the notion of making decisions based upon the "best interests" of the child, that concept means nothing if the person making the decision doesn't really understand what the best interests of the children really are.

The previously mentioned survey found that 23% of respondents reported a judicial officer refused to appoint a PRE when ***both parties*** agreed one should be appointed, and 34% stated that joint applications for a CFIs had also been refused. More worrisome still is the response that, of the judicial officers who refused to appoint a PRE, 59% stated that they did not want to appoint a PRE, and 28% opined that they had enough information without an expert witness of this type.

This latest finding is particularly incredible considering that Science has finally started to significantly link how children are raised with how they function as adult human beings. As I have noted in other forums, while most of us aren't social scientists with advanced degrees and specialized education, just about everyone thinks they "understand" family dynamics because we all grew up in families and we're all human. Judges are no different. So, while no one would ever think it reasonable to have just anyone advance theories on brain surgery, just about everyone thinks their opinions on families/children/parenting are as valid as anyone else's.

While virtually all states embrace the notion of making decisions based upon the "best interests" of the child, that concept means nothing if the person making the decision doesn't really understand what the best interests of the child really are. And, unlike brain surgery, the sad part is that virtually everyone ***thinks*** they know enough about best interests to forgo listening to people who actually are educated in it.

We now know that Adverse Childhood Experiences (ACEs) have lifelong impacts on the adult that the child becomes, leading to a plethora of medical issues and a strong risk of early death, but that knowledge hasn't really translated into more concern that we get it right in custody cases. And one of the more devastating consequences of

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limiting PRE and forensic work in general, is that judges are exposed to less and less information about what science says about good, bad, and mediocre parenting. One of the greatest side benefits of some people being able to afford PREs is that the knowledge may rub off on the judicial officers who can then use what they learn on one case to help another parent's children. Now even this source of judicial education is drying up, which is a real tragedy because, while we require Child and Family investigators to complete a 40-hour training designed to give them a basic exposure to the information needed to assess what serves a child's best interests, we do not require the same of the judicial officers who every day make decisions regarding children.

In fact, not only do many of our legal professionals have little to zero experience with children (other than theoretically having been a child at one point), many do not opt into the trainings that are offered through State Judicial, COBAR, the COAFCC, or the IDC/MIDC. In fact, in terms of attendance all too frequently those who attend child-related trainings are the ones that least need the training offered.

Colorado has a hard-won statute that allows parties the ability to have an expert who ***actually*** understands what is going on and what is needed to evaluate their family. These experts also have statutory authority requiring the parents to cooperate with them, giving them access to the parent's records, and the ability to conduct psychological testing on the parents. Losing these expert witnesses will not only disadvantage the families that can afford them, but it also disadvantages the entire system.

In general, divorcing parents have no idea about any of this; they have one divorce and that gives them no perspective other than their own experience. They have no idea what is at stake in having or not having a Mental Health professional guide the court with regards to their child. And courts, who must balance taking care of their dockets with the interests of the children they never meet, are all too frequently persuaded that they don't need expert opinion to make tough calls – especially when the cost of same is so high. Which leaves the divorce professionals alone in recognizing what is going on and having a responsibility to do something about it because, if we don't, the forces at play are poised to eliminate these expert witnesses.

So it is any wonder that the number of people doing quality CFI/PRE work is not only dwindling, and there are only 2-3 in the whole state people doing this work who aren't 55+? In ten years, if things don't change, there won't be anyone doing this work. Colorado has a proud tradition of promoting an intelligent approach to family litigation. We are losing that right now in what appears to be a subtle form of judicial activism. It's up to all of us to address this problem, including the problem of affordability.

Ann Gushurst has been practicing exclusively in Family Law for most of her law career, and her current practice is a mixture of litigation, collaboration and mediation. While Ann is a superb litigator, she always tries to steer cases to more collaborative solutions in order to minimize the emotional and financial toll inflicted by prolonged family conflict. Additionally, Ann is a trained mediator and has an active mediation practice.

10 Things to Know About Step-Up Planning: When and How to Determine the Right Time

Leslie Drozd & Marsha Kline Pruett

In the child custody field, we know that children do best when they have a relationship with parents that are reasonably able to take care of them and keep their interests in mind. We know that families change, developmentally and systemically, due to normative growth and unexpected events. We don't know how to come up with a parenting plan for 2 and 4-year old children that will for sure work ten years later. We can, though, come up with a framework to help us better know what we don't know. That framework is what we are calling a Step-Up Plan. A step-up plan involves increasing one parent's access to a child, from nothing to something, from daytimes to overnights, from supervised to unrestricted access, from less to more contact in a week. With such a plan we can help parents, counsel, and the court making an educated guess as to "when and how to determine the right time" in a manner that is similar to other decisions the family must make as the child grows up – for example, when a child is ready to cross the street herself, when it is safe for her to ride her bike to school on her own, to be dropped off at the movie theater with friends, or to drive a long distance alone on the highway.

> *I cannot say whether things will get better if we change; what I can say is they must change if they are to get better.*
>
> *— G. C. Lichtenberg*

Here are 10 things to bear in mind that we know or come close to knowing about stepping-up a child's time with a parent.

1. A step-up plan comes into play when one parent, usually the less-seen or nonresidential parent, requests a change in parenting access, time, and/or decision making. The process that ensues of sorting out whether the request is in the child's best interests—and is posed at an opportune time in the child's developmental trajectory—can be difficult even when parents agree on the situation or when one parent defers to the other's wish or decision.

2. A request for step-up becomes a problem when parents actively disagree. There is nothing fair about the process when one parent slows down a step-up process that is the other parent's deepest desire, and potentially in the child's best interests, but the parent resists the process. The parent's reasons may be based on real concerns for a child's safety or well-being; personal feelings and concerns that are more imagined than real; rooted in old wounds rather than recent ones; spilling from fears or anxieties rather than observations and understanding of the child. The major work for the clinician in these cases is to figure out how much the resisting parent can tolerate and support without bringing about the collapse of the family peace or developmental scaffolding that has been painstakingly erected.

3. In general, if the parents are healthy and the timing is right, step-ups are good for children. Toward this goal, we formulated questions to ask to carefully and thoughtfully obtain clear information about child, parental, and co-parental domains. This is in order to help the decision maker(s) contemplate the unique family situation under consideration.

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STEP-UP PLANNING

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4. The ultimate concern when first considering a step-up plan is whether the child and all family members are safe if the step-up is to be attempted. Four areas of major concern are situations of intimate partner violence, child abuse or neglect, parental substance abuse, and parental mental health issues. In addition, we advise canvassing the broader context of the family and social world surrounding the child to determine if there are other serious problems in those contexts that could cause safety concerns leading to greater caution about step-ups. Examples of these types of issues might include the presence of a substance-using new boyfriend/girlfriend in the home, a life-threatening illness the child that requires vigilant physical care and medication monitoring, a volatile neighborhood, or ongoing school bullying occurrences. The presence of any of these areas—when they interfere with the child's safety, consistent and sensitive parenting, and adequate co-parenting—raise a red flag. It says, "Not so fast!"

5. The next consideration in creating a step-up is the stability surrounding the child's life when the step-up is being considered. We designate two months as a cautious but reasonable period of time from which to examine whether the child's daycare or schooling and activities have been stable, for example, to avoid adding additional stress to the beginning of a new school year or change in day care. Also, significant events within the family and changes in family composition such as new partners, new children, or the loss of a beloved grandparent. When these changes are occurring, it is impossible to tell whether a step-up that is not successful was the problem, or whether other life events interfered with the child's ability to cope at that time. Positive adaptation requires time, energy, and focus. A calm period of two months or more optimizes the chances of a step-up becoming a welcomed and resilience-building context for children undergoing changes, often in a condensed period of time.

6. Once the decision to do a Step-up is made after questions about safety and stability are confirmed, an analysis of the origins of the request for a step-up will help determine the possibility of the parents making a decision together with or without the support of professionals. Documenting who is making the request, the other parent's reaction, and support or resistance coming from other professionals (e.g., therapists, lawyers), as well as the type and level of resistance expressed, provides the basis for the next step in decision making. If there is resistance on the part of a parent, understanding what the resistance is about enables an analysis of resources that need to be put into place to support the parent, allaying realistic fears and concerns and bolstering the parent's ability to cope with unfounded concerns or plaguing uncertainty.

7. When parents split on the decision, one focal point for scrutiny is the child's behavior.

- What are parents and professionals seeing that is developmentally appropriate?
- What is concerning?
- How long have the concerning behaviors lasted?
- When (In what contexts) are the behaviors occurring?
- What is the child saying about his thoughts and feelings to parents as well as other adults involved in his care and education?

Symptoms that have lasted more than two weeks, spanning major areas of functioning—cognitive, physical, emotional, and social, provide reason for concern. The child's comfort with and ability to make transitions commensurate with the frequency and spacing at which they are scheduled is a pivotal sign that the child may be ready to cope with a change.

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STEP-UP PLANNING

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8. Each parent's parenting is a second focus of inquiry. Parental symptoms such as depression, anxiety, or impulsivity are central concerns. Substance abuse is considered on its own merits, as such risks are of a high order of magnitude. Harsh disciplinary styles indicate a parenting style that is related to poor child outcomes and parental conflict. Role reversal, characterized as inappropriate use of the child for support by a parent, manifests as a parental vulnerability that pressures the child to take care of the parent and resist change and may make it difficult for that parent to allow the child more time away from him or her. A parent's denial of the child's participation in activities or support for homework has serious consequences for the child's social relationships and school achievement and is an indicator that parenting is either a low priority or an ineffectual area of competence. Finally, parents with widely divergent parenting styles pose risks for a step-up into a higher level of shared parenting, with younger children and special needs often requiring the most collaboration for care.

9. The co-parental relationship is a third area of focus crucial to child development and the potential success of a step-up plan. Children's direct exposure to parental conflict is the most obvious barrier to a step-up. More subtle forms of co-parental conflict must also be considered: Inability or unwillingness to communicate about the child; the parents' flexibility with, versus rigid adherence to, the schedule; interference with the quantity or quality of the other parent's time with the child; disavowal of the shared parenting experience by downplaying or prohibiting the child's acknowledgment of her experience with the other parent; or interference with extended family.

> *There is nothing permanent except change.*
>
> *—Heraclitus*

10. The goal of using a framework like the Step-Up Plan is for parents and professionals to distinguish between changes that are likely to harm a child from changes that are not desirable but aren't truly harmful. Resources that shore up behavioral or familial weaknesses are critical. The book chapter provided at the beginning of this short article provides types of resources that are likely to be most helpful with each type of question or concern enumerated. We encourage coordination with pediatricians and school counselors, co-parent counseling or consultation, mediation, therapy for individual or subgroups within the family, high conflict groups. Other interventions may be appropriate such as parenting coordination. In the best outcome, each parent maintains a vigilant, protective stance while getting the personal or therapeutic supports necessary to allow forgiving past affronts and more positive attitudes and behaviors. Such would exude from a co-parenting position of strength and generosity, when appropriate.

This framework is best used as a guide and not a formula. Some factors should be given more weight than other factors in any particular case, dependent upon individual factors about the child or one or both of the parents. While safety always comes first, we believe step-up plans should be given serious consideration when risk factors are absent or controlled and the plan does not seem to pose undue risk to the child.

Once a step-up is put into place, follow-up should be scheduled. If the concern is low, scheduling the follow-up one month out for children under two years, two months out for children under 3 years, and three to four months out for older children offers a rule of thumb. However, if the level of concern about the step-up's feasibility or suitability is high, shorter follow-up times may be desirable.

Kline-Pruett, M., Deutsch, R. & Drozd, L. (2016). *Step-up Parenting Plans: Grounded in Research*. Parenting Plan Evaluations: Applied Research for the Family Court, editors Leslie Drozd, Michael Saini, & Nancy Olesen. Oxford University Press, 2nd edition.

Children's Psychotherapist-Patient Privilege: Colorado's *L.A.N v. L.M.B.* Decision and Implications for High Conflict Domestic Relations Proceedings

Sheri Danz, Esq.

In its 2013 decision in the *L.A.N.* case, the Colorado Supreme Court held that children in dependency proceedings are entitled to the protections of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The Court set forth special considerations for deciding who can exercise the privilege on behalf of a child in a dependency proceeding and for determining the scope of any waiver of the privilege.

The questions certified by the Colorado Supreme Court in *L.A.N.* concerned whether, in a dependency proceeding, a child's guardian *ad litem* (GAL) could waive a child's psychotherapist-patient privilege and whether specific actions of the GAL in that case constituted a waiver of the privilege. *Id.* at 946-47. However, the Court's ruling that the psychotherapist-patient privilege applies to dependency proceedings represents an important recognition of children's interests in effective mental health treatment that should extend to other case types. Additionally, the rationale for the Court's designation of the child's independent legal advocate as the appropriate person to exercise the privilege may apply with equal force to high conflict domestic relations proceedings. Finally, many of the special factors the court identified as relevant in the determination of the scope of the waiver of the privilege may provide guidance for courts in other proceedings requiring consideration of parental rights along with children's rights and interests.[1]

DEFINTION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Commonly referred to as the psychotherapist-patient privilege, the privilege defined by § 13-90-107(1)(g), C.R.S., references several mental health professionals, including but not limited to: licensed psychologists, professional counselors, marriage and family therapists, social workers, addiction counselors, registered psychotherapists, and certified addiction counselors. *Id.* Registered candidates for some of these professions and some employees or agents of these professionals are also covered by the privilege. *Id.*

The privilege prevents these professionals from testifying as to any communication made by the patient or any advice given. *Id.* The privilege also prevents participants in, for instance, group therapy from testifying about the knowledge gained about another participant during the therapy without that other patient's consent. *Id.* The privilege applies not only to testimony during proceedings but also to pretrial discovery and disclosure. *See L.A.N.*, 292 P.3d at 947 (citing *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002)).

PURPOSE OF THE PRIVILEGE

In enacting Colorado's privilege statute, the General Assembly recognized the psychotherapist-patient privilege as among those "particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." § 13-90-107(1), C.R.S. The privilege's purpose "is to preserve the 'atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears' necessary for effective psychotherapy." *L.A.N.*, 292 P.3d at 947 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)).

The *L.A.N.* decision recognized that "[j]uvenile patients in particular require the privacy protection provided by the psychotherapist-patient privilege due to the

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[1] Many other state courts have considered the application of the psychotherapist-patient privilege to children in dependency, custody, and other case types. While this article will highlight some aspects of those decisions, it does not provide a comprehensive analysis or an exhaustive overview of those cases.

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sensitive nature of children's mental health care." *Id.* (citing *Dill v. People,* 927 P.2d 1315, 1321 (Colo. 1996)). Similarly, in *In re Kristine W.*, 94 Cal. App. 4th 521, 528 (2001), a division of the California Court of Appeals acknowledged that disclosure of child's therapy notes to an agency social worker whom the child did not trust might "inadvertently reinforce" feelings of betrayal and powerlessness caused by her father's physical and sexual abuse.

WHEN THE PRIVILEGE APPLIES TO CHILDREN IN DEPENDENCY PROCEEDINGS

The protections of the psychotherapist-patient privilege apply unless waived or statutorily abrogated. *See L.A.N.*, 292 P.3d at 947. In Colorado dependency proceedings, § 19-3-311, C.R.S., specifically abrogates the privilege with respect to communications that form the basis of a report for child abuse or neglect. Other than for such communications, the privilege applies unless waived.

DETERMINATION OF PRIVILEGE HOLDER

The *L.A.N.* decision provides a framework for identification of the privilege "holder" on behalf of a child in a dependency proceeding.

The Child

First, as the patient generally holds the privilege, a determination must be made as to whether the child is too young or otherwise incompetent to hold the privilege. *See L.A.N.*, 292 P.3d at 948. If the child is determined to be of sufficient age or competence, the child holds his or her own privilege. The *L.A.N.* Court did not address the criteria to be employed in determining sufficient age or competence to exercise one's privilege. In Colorado, the following statutory guidance may be relevant to this determination: children as young as 10 can be charged in delinquency proceedings, *see* § 19-2-104(1)(a), C.R.S.; written consent of a child age 12 or older is required for adoption, *see* § 19-5-203(2), C.R.S.; at the age of 15, a child can consent to his or her own mental health treatment, *see* § 27-65-103(2), C.R.S. Notably, the New Hampshire Supreme Court identified three factors for a court's consideration in determining whether a minor was of sufficient maturity to exercise the privilege: "the child's age, intelligence, and maturity;" "the intensity with which the child advances his preference;" and "whether the preference is based upon undesirable or improper influences." *In re Berg*, 886 A.2d 980, 987 (N.H. 2005).

The Parent

If the child is too young or otherwise incompetent to hold the privilege, the parent typically holds the privilege on behalf of the child. *See L.A.N.*, 292 P.3d at 948. However, the parent cannot hold the child's privilege "when the parent's interest as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship." *L.A.N.*, 292 P.3d at 948.

The *L.A.N.* Court's decision on this point is consistent with decisions from several other state courts holding that a parent whose position is legally adverse to the child

should not be permitted to assert or waive a privilege over the child's objection. *See, e.g., P.O. v. J.S.*, 377 P.3d 50, 57-58 (Haw. App. 2016), *vacated on other grounds by P.O. v. J.S.*, 393 P.3d 986 (Haw. 2017); *Berg,* 886 A.2d at 987-88 ("Where therapist-client privilege is claimed on behalf of a parent rather than that of a child, or where the welfare and interest of the minor will not be protected, a parent should not be permitted to either claim the privilege or, for that matter, to waive it."); *In re Daniel C.H.*, 220 Cal. App. 3d 814, 832 (1990) (parent cannot waive child's privilege when parent accused of sexually abusing child.); *In re Zappa*, 631 P.2d 1245, 1251 (Kan. App. 1981) (parent cannot assert or waive the child's privilege in a termination of parental rights case); *Nagel v. Hooks*, 460 A.2d 49, 52 (Md. App. 1983) (custodial parent cannot assert child's privilege in a custody case); *People v. Lobaito*, 351 N.W.2d 233, 240-41 (Mich. App. 1984) (parent cannot assert child's privilege to exclude damaging information in parent's criminal case); *In re D.K.*, 245 N.W. 2d 644, 648-49 (S.D. 1976) (parent cannot assert child's physician-patient privilege when the parent's own conduct is at issue); *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So.2d 301, 307 (Fl. App. 2001) (parents involved in litigation

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regarding the best interests of the child may not assert or waive privilege on the child's behalf). Notably, many of these decisions involve child custody proceedings.

The GAL

In Colorado, a GAL in a dependency proceeding is an attorney at law appointed to act in the best interests of the child. § 19-1-103(59), C.R.S. The GAL is charged with "the representation of the child's interests" and is statutorily charged with investigating, examining, and cross-examining witnesses, introducing the GAL's own witnesses, making recommendations to the court, and "participat[ing] further in the proceedings to the degree necessary to adequately represent the child." § 19-3-203(3), C.R.S. Ultimately, the GAL is "tasked with acting on behalf of the child's health, safety, and welfare." *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011). The GAL serves as the guardian for the proceeding and the representative of the child's best interests. *Id.*

The GAL is bound by the rules and standards of the legal profession. *See* Colorado Supreme Court Chief Justice Directive (CJD) 04-06(V)(B). "The 'client' of a GAL . . . is the best interests of the child," and the GAL's ethical obligations "flow from this unique definition of 'client.'" *Id*. The best interests of the child dictate the objectives of the GAL's representation and the "means by which they are to be pursued." C.R.P.C. 1.2(a). The GAL must be loyal to the best interests of the child and may not act as the GAL for multiple children with best interests adverse to one another. C.R.P.C. 1.7(a). The GAL must consult with the child in a developmentally appropriate manner regarding the child's position on issues before the court and must make the child's position known to the court. CJD 04-06(V)(B), (D)(1). Although a GAL is not prevented from revealing confidential information provided by the child when such information is necessary to ensure the child's best interests, CJD 04-06(V)(B), the GAL's professional obligation and duty of loyalty to the child's best interests prevent the GAL from revealing information contrary to those interests.

The *L.A.N.* Court decided that when neither the child nor the parent has the authority to hold the child's privilege, the GAL should hold the privilege. *See L.A.N.*, 292 P.3d at 950. As a result of the GAL's fiduciary and statutory responsibilities, "the GAL is in an optimal position to assert or waive the child's privilege in order to serve the child's best interests." *Id.* Additionally, as the appointment of a GAL is mandatory in dependency proceedings, the GAL will be "consistently available" to exercise the privilege consistent with the child's best interests. *Id.*

Other state courts have come to varying resolutions on whether an independent representative should be appointed to exercise the privilege on behalf of a child. *Compare, e.g., Berg,* 886 A.2d at 987 (holding that the trial court "has the authority and discretion to determine whether assertion or waiver of the privilege is in the child's best interests") *with Nagel*, 460 A.2d at 51 (requiring the appointment of a guardian to exercise the privilege when a child is too young to exercise it personally on his or her behalf). The *L.A.N.* Court specifically ruled out the juvenile court as the appropriate holder of the privilege, deciding that holding the privilege "could undermine the juvenile court's objective review function by injecting the juvenile court's subjective opinion regarding the child's privilege into what should be a purely objective calculus," and that requiring the court to hold the privilege "could unduly burden the juvenile court and would constitute a wasteful allocation of resources." *L.A.N.*, 292 P.3d at 949.

WAIVER

Determination of Whether Waiver Has Occurred

Waiver of the privilege may be expressed or implied. *See L.A.N.*, 292 P.3d at 947. "Waiver occurs if the evidence shows that the privilege holder 'by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.'" *Id.* at 947 (quoting *Sisneros*, 55 P.3d at 801). The court will apply a totality of the circumstances analysis to determine whether waiver has occurred. *See, e.g., Sisneros*, 44 P.2d at 801 (victim's testimony that her therapist had helped her recall some details of the assault did not amount to a waiver of the privilege); *People v. Silva,* 782 P.2d 846, 850 (Colo. App. 1989)(victim's testimony that she had sought counseling as a result of an assault did not constitute a waiver of the privilege).

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Notably, "relevance alone cannot be the test" regarding waiver "because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant information under prescribed circumstances." *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (internal quotations omitted).

Scope of Waiver

The *L.A.N.* decision provides a process and framework for determining the scope of a waiver of a child's psychotherapist-patient privilege once waiver of the privilege has occurred.

First, after the court determines a waiver has occurred, the court should consider "whether the scope of that waiver is readily apparent by considering the words or conduct" that constituted the waiver. *L.A.N.*, 292 P.3d at 951. If the scope is readily apparent, the court may order disclosure of the information subject to the waiver. *Id.* If the scope of the waiver is not readily apparent, the court must instruct the privilege holder to compile a privilege log identifying the documents the holder believes should remain privileged. *Id.* This privilege log must comply with requirements applicable to other privilege logs, identifying the reason why the holder believes the document should remain privileged and providing enough detail about the document for the court and parties to assess the privilege claim. *Id.* (citing *Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005)). If the court or other parties believe the privilege should not apply to any given document, the court may conduct an *in camera* review of the document. After reviewing the log and conducting any *in camera* review, the court must determine the scope of the waiver. The *L.A.N.* court identified the following "competing interests surrounding disclosure:"

- The damage to the patient's trust for the therapist and the therapeutic process that could result from disclosure, a concern "particularly pronounced in cases involving children."
- The "compelling policy considerations" that encourage disclosure during discovery, such as a parent's need to obtain information essential to a claim or defense, the elimination of surprise at trial, simplification of the issues, expeditious resolution of the case, and the benefit to the court's decision making.

L.A.N., 292 P.3d at 951. In balancing these competing interests, the court must keep in mind its "overarching duty to further the best interests of the child." *Id.* at 952. The following discretionary factors, along with any considerations unique to the case, may guide the court's balancing analysis:

- the best interests of the child and the impact of the waiver on the child;
- the parents' due process rights and ability to adequately respond;
- the impact of disclosure on any applicable permanency plan;
- the significance of the information and its impact on the case;
- whether the information is available from any other source
- the procedural posture of the case;
- the impact the disclosure may have on other people beyond the litigation. *Id.* at 952.

While some of these factors specifically apply to dependency proceedings, such as the impact on a child's permanency plan, many considerations may assist a domestic relations court in determining the scope of the waiver. These factors, however, should not influence the determination of whether waiver has occurred, as conflating that determination with the scope of the waiver would significantly undermine the important interests the privilege serves to protect.

CONCLUSION

The *L.A.N.* decision represents just one state's resolution of the unique challenges applicable to the child's psychotherapist-patient privilege in dependency proceedings. However, the Colorado Supreme Court's recognition of the privilege, the test for determining whether waiver or abrogation has occurred, and the framework for determining the scope of a waiver may provide helpful guidance for courts and counsel in domestic relations proceedings.

Sheri Danz, Esq.,
is the Deputy Director and a Staff Attorney for the Colorado Office of Child Representative (OCR). She is the contact for the 1st, 3rd, 8th, 12th, and 13th Judicial Districts.

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