Specialty Law Columns
Family Law Newsletter
Colorado's Implementation of the Federal Adoption and Safe Families Act
by Seth Grob

In November 1997, President Clinton signed into law the Adoption and Safe Families Act of 1997. [1] This legislation presents the most sweeping changes to the nation's adoption and foster-care system since the Adoption Assistance and Child Welfare Act of 1980. The federal law builds on the reforms that began in recent years to make the system more "child friendly" and more responsive to children's developmental needs. The new law provides financial incentives [2] for states to amend their laws, making it easier to remove children from abusive families and speed up adoptions.

In an effort to comply with the federal mandates, Colorado passed House Bill ("H.B.") 98-1307, which went into effect July 1, 1998. Like its federal counterpart, Colorado law now fundamentally shifts the focus of child protection proceedings from a presumption that everything should be done to reunite children with their birth parents to giving greater weight to the child's health and safety. The new law also demands a greater sense of urgency to finding foster children a permanent home. This article summarizes these amendments to the Colorado Children's Code.

The Safety of the Child

One of the most important changes in the new law is a clarification of the "reasonable efforts" requirement. Under prior law, the term "reasonable efforts" was defined and typically interpreted as mandating that supportive and rehabilitative services be provided to birth parents in almost all cases where children had been removed from the home due to abuse and neglect. These efforts were often made in an effort to keep biological families together at all costs. The result of this widespread practice has been that thousands of children have languished in foster care, often moving multiple times awaiting the outcome of their parents' responsiveness to treatment. [3] Others who were reunited with their birth parents found themselves back in the foster care system as a result of being revictimized, with little attention being paid to their right to permanency. [4]

The legislative intent now stresses that the child's health and safety will be the paramount concern in determining what is reasonable for purposes of making service provisions, placement, and permanency planning decisions. [5] Where children have been subjected to severe maltreatment by their parents and their health and safety would be compromised by allowing the parents an opportunity to rehabilitate themselves and demonstrate their fitness to parent, no reasonable efforts should be made. Thus, no parent is entitled to a second or third opportunity to hurt, maim, or kill their child where there has been a showing that the child or a sibling has been the victim of a serious injury.

Termination of the parent-child legal relationship should now be immediately pursued by the department of social services or the guardian *ad litem* ("GAL") [6] without the benefit of a treatment plan under certain expanded circumstances. These additional situations include where the child has been the victim of: (1) "a single incident resulting in serious bodily injury or disfigurement"; [7] or (2) "an identifiable pattern of sexual abuse of the child." [8] Additionally, if a sibling has been killed or has received serious bodily injury due to proven parental abuse or neglect, termination should be immediately pursued on behalf of the child at issue without following the reasonable effort requirement.

The addition of "serious bodily injury" as a basis for terminating parental rights substantially expands the cases where termination can be pursued immediately without affording parents a court-ordered treatment plan. Serious bodily injury is defined in the criminal statute to mean "bodily injury at the time of the actual injury or at a later time which involves a substantial risk of death, a substantial risk of serious permanent disfigurement, or a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree." [9]

Colorado courts have continually adopted a liberal interpretation of what constitutes serious bodily injury. The Court of Appeals has held that even though a child's injuries may heal and make a good recovery, such information is not relevant to the determination that the child suffered a serious bodily injury at the time of the assault. [10] Moreover, in *People v. Brown*, gunshots that wounded a left finger such that the finger might eventually be forced to be amputated was sufficient to qualify the injury as "protracted impairment of function of any part of the body." [11]

In addition to obviating the need for providing reasonable efforts to preserve or reunify families in the above-mentioned cases, the new law also makes it easier to terminate parental rights where a treatment plan has been adopted by the court. Most notably, a finding of unfitness can now be established if a child has been in foster care under the responsibility of the county department of social services for fifteen of the most recent twenty-two months. [12]

Thus, where a child has been in placement for a significant length of time, either continuously or where placement at home has been disrupted and failed, a termination petition can be filed on the basis that the child has been in placement beyond the statutory time limit. Several exceptions, however, were added by the legislature. These exceptions include where a child has been living with a relative, the county department has documented that filing such a motion would not be in the child's best interests, reasonable efforts have not been provided, or the child's placement in foster care is due to circumstances beyond the control of the parent. [13]

Retroactive or Prospective

One obvious issue raised by the passage of the amended termination statute is whether the amendments apply to dependency and neglect cases and termination petitions filed prior to July 1, 1998, or whether they are limited to new petitions filed after such date. A strong argument can be made that the new substantive amendments are applicable to petitions filed both prior to and subsequent to the effective date.

By its plain language, the effective date of the amendments is July 1, 1998. Nowhere does the act limit its application to petitions filed only on or after that date. Moreover, in *People in Interest of N.F.*,[14] the Colorado Court of Appeals held that an amended termination statute expanding the grounds for termination could be applied to a dependency and neglect case filed before the statutory amendments. The basis for the ruling was that such an application did not violate the *ex post facto* provision in Colorado Constitution Article II, § 11, as long as the evidence was based on a parent's condition after the date of the amendment.[15]

Accordingly, it appears that as long as facts presented at a termination hearing relate to a parent's present condition as it exists after the adoption of the statutory amendments in July 1998, the new statute can be applied. To avoid any due process challenges, however, an amended motion for termination should be filed, providing adequate notice is given to parents that termination is based on the new statutory criteria.

Expedited Permanency Planning

Courts are now required to hold a permanency planning hearing no later than twelve months after the child is considered to have entered foster care. [16] This legislative change recognizes that foster care is intended to be a temporary setting and not a place for children to be raised. The permanent plan, as now defined by statute, includes reunification with the birth parent(s), adoptive placement and termination of parental rights, referral for legal guardianship or custody, a relative placement, or another permanent living arrangement. [17]

By shortening the permanency planning hearing from eighteen to twelve months, greater pressures are placed on all participants in the child welfare system to ensure that quality rehabilitative services are provided immediately to parents in appropriate cases in an effort to gauge whether they can resume parenting within a year's time. While a year, from a parent's perspective, is a relatively short period of time to change lifelong behaviors, the legislature has now determined that, from a child's perspective, this period is the maximum time a child should remain in legal limbo without the benefit of a permanent family. Child development research has long confirmed the critical importance of securing a permanent home for a child within a timely period. [18]

Concurrent Planning

During the past decade, a growing trend has emerged nationwide to encourage concurrent planning. Concurrent planning involves simultaneously planning two alternatives on the basis that the first alternative might fail. Thus, where an infant has been severely neglected, it may well be appropriate to place the child immediately into a foster-adopt home, while still providing reasonable efforts to the birth parents in an effort to reunify the family. In such a case, if the birth parents are unable to be adequately rehabilitated, the child can be adopted by the foster-adopt home. This eliminates the trauma to the child of having his or her placement disrupted.

Another added benefit of concurrent planning experienced by states that have implemented this process is that a much higher percentage of birth parents have been willing to voluntarily relinquish their parental rights. This has been attributed to the fact that birth parents whose children have been placed in foster-adopt homes are more willing to give up their children to a family they believe will provide a nurturing and supportive home for their child.

Colorado now joins those states that have enacted laws specifically to provide for concurrent planning. The new legislation provides that "efforts to place a child for adoption with a legal guardian or custodian may be made concurrently with reasonable efforts to preserve and reunify the family." [19] By enacting this legislation, any arguments asserted by respondent parents that the child was prematurely placed for adoption should be without merit. Courts are now free to focus on the child's needs. Further, it is incumbent on GALs and county department caseworkers to design a contingency plan from the outset of a case. This will help to reduce the number of placements for children and avoid situations where outcomes are achieved by default rather than by design.

Foster Parent, Relative, and Preadoptive Parents' Rights

The trend toward providing foster parents and relatives greater rights vis-à-vis children placed in their physical care was continued in H.B. 1307. Under the newly enacted legislation, "foster parents, relatives, and preadoptive parents who have a child placed with them by the county department must now be provided notice and an opportunity to be heard in any review or hearing to be held with respect to the child in their care." [20] However, this provision does not make these individuals a party to such a review or hearing solely based on receiving notice and an opportunity to be heard. [21]

Foster parents, relatives, and preadoptive parents, pursuant to this legislation, can expect the agency having legal custody of their foster child to provide them notice of all hearings affecting their child's interests. The notice should be provided without revealing their identity to the other parties. [22] This new process will better enable such individuals to testify or make a statement at every hearing about their concerns for the child's welfare.

Whether the language of an "opportunity to be heard" also entails the right to present evidence outside their own personal knowledge by calling additional witnesses remains unclear. To safeguard this right and to better ensure full participation at every hearing, foster parents, relatives, and preadoptive parents should still seek leave to intervene formally as an interested party. [23]

Criminal Records Check for Adoptive Parents

To better safeguard against children being adopted by potentially violent individuals, the legislature enacted language that limits a court's ability to finalize an adoption where prospective adoptive parents have engaged in certain crimes. A criminal records check must now be done on all prospective adoptive parents, including stepparents. [24] If the prospective adoptive parent was convicted of a felony relating to child abuse or neglect, spousal abuse, crimes against children, or any crime involving violence, rape, sexual assault, excluding other physical assault or battery, the court is precluded from granting the decree of final adoption. [25]

There is no time limit for when the felony may have been committed. Thus, whether the felony was committed twenty years ago or within the past five years, the result is the same—the adoption cannot be approved by the court. [26]

Health Insurance for Special Needs Children

The new federal law also seeks to reduce the number of special needs children lacking health insurance. Under the Adoption and Safe Families Act, states are now required to provide health insurance coverage for any child with special needs for whom there is an adoption assistance agreement [27] and who the state has determined has special needs for medical, mental health, or rehabilitative care. [28]

On July 1, 1998, the Colorado Department of Human Services enacted new regulations to conform with the federal law. Under the recently enacted regulations, counties must now provide Medicaid for all children who have an adoption assistance agreement from Colorado. [29] This regulation applies to special needs children who have already been adopted and those awaiting adoption.

Previously, only children who were determined to be IV-E eligible under the Social Security Act and who had an adoption assistance agreement were eligible for Medicaid. This past practice resulted in many foster children on Medicaid to lose their Medicaid benefits on their adoption. Once uninsured, the pool of adoptive families willing to adopt these special needs children significantly decreased. Providing Medicaid to all subsidized children should help make the difference for many of these children between growing up in a foster home and having a new adoptive family of their own.

Conclusion

By enacting H.B. 1307, the Colorado General Assembly has continued its recent trend toward making the Children's Code more "child centered." Increasingly, the state legislature has enacted legislation promoting the view that children are persons in their own right who deserve protection and consideration. While the legislature has clearly articulated its priority to ensure the safety and well-being of children, it is now incumbent on GALs, county attorneys, social workers, court-appointed special advocates, and judges to heed that legislative directive.

The enactment of this new legal framework, requiring that permanency decisions be made within one year, heightens the responsibility of all individuals in the child welfare system to expedite dependency cases. Timely provision of quality services, eliminating delays and continuances, concurrent planning, and achievement of permanent homes for all children within twelve months must now become the norm rather than the exception. Outcomes and accountability must be achieved to ensure that children experience what it means to be an integral part of a loving family.

NOTES

1. Pub. L. No. 105-89.

2. The federal legislation provides bonuses to states that increase their adoptions, giving them $4,000 for each child adopted above the previous year's number and $6,000 for each adoption of a child who is older or has some physical or emotional disability. 42 U.S.C. § 673b(d)(1).

3. *See L.P.M. v. Governor of the State of Colorado*, Civ. No. 94-M-1417 (D.Colo. 1994); "Lives in Limbo—Foster Kids Put on Hold by Court Woes," *The Denver Post* (Aug. 29, 1996).

4. State Judicial Department's Dependency and Neglect Court Assessment Advisory Council Report (June 1997).

5. CRS § 19-1-103(89).

6. *In the Interest of M.N.*, 950 P.2d 674 (Colo. App. 1997).

7. CRS § 19-3-604(1)(b)(II).

8. CRS § 19-3-604(1)(b)(VI).

9. CRS § 18-1-901(V)(p).

10. *People v. Thompson*, 748 P.2d 793 (Colo. App. 1988); *People v. Rodriguez*, 888 P.2d 278 (Colo.App. 1984).

11. 677 P.2d 406 (Colo.App. 1983).

12. CRS § 19-3-604(2)(k). The grounds for unfitness also have been expanded to include: (1) murder, voluntary manslaughter, or circumstances in which a parent aided, abetted, or attempted the commission of or conspired or solicited to commit murder of a child's sibling; (2) where a parent has committed felony assault that resulted in serious bodily injury to the child or another child of the parent; or (3) where there is a single incident of serious bodily injury or disfigurement of the child. CRS § 19-3-604(2)(d)(g)(j).

13. CRS § 19-3-604(2)(k)(I), (II), (III), and (IV). Such circumstances include where there have been court delays or continuances that are not attributable to the parent and where the parent is incarcerated for a reasonable period of time. CRS § 19-3-604(2)(k)(IV). It should be noted that it is difficult to understand how incarceration is beyond the control of the parent when the parent committed the criminal act that resulted in the parent's being unavailable to parent his or her child. Nonetheless, it is included among those exceptions to the general rule.

14. 820 P.2d 1128 (Colo.App. 1991).

15. *Id.* at 1132.

16. Foster care is now defined as the earlier of the date that the court first approves the child's placement out of home or sixty days after the removal. CRS § 19-3-702(1).

17. CRS § 19-3-702(4).

18. Goldstein, Solnit, and Freud, *The Best Interests of the Child* (The Free Press, 1996).

19. CRS § 19-3-508(7).

20. CRS § 19-3-502(7).

21. *Id.*

22. *Id.*

23. CRS §19-3-507(5).

24. CRS §§ 19-5-207(2.5)(a) and -210(b.5).

25. CRS § 19-5-210(4).

26. It should be noted that Colorado opted not to follow the federal legislation's requirement that an adoption cannot be approved in any case of a felony conviction for physical assault, battery, or drug-related offenses committed within the past five years. 42 U.S.C. § 671(a)(20)(A)(ii).

27. An adoption agreement is a contract between the county department of social services and the adoptive parents, outlining the benefits that will be provided to assist the family in raising a child with special needs. *See* Grob, "Adoption Practice in Colorado: Procedure and Difficult Issues," in *Advocating Excellence, Offering Hope for the Innocents* (Denver: University of Denver College of Law, 1997).

28. 42 U.S.C. § 671(a)(21).

29. 12 C.C.R. §§ 7.507.51 and 7.602.

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