

# Updates to GRID (August 2015)

## CHECKLISTS

Insert the following item to checklist of tasks to be completed during Preliminary Protective Hearing (pages H3 for GAL and H8 for RPC):

- ❑ Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege.

Insert the following item to checklist of tasks to be completed during remaining hearings: (pages H32, H50, H79, H106, H128, H149, H183 for GAL and H36, H54, H82, H110, H131, H152 for RPC):

- ❑ Obtain ruling on privilege holder if child is receiving any services covered by psychotherapist-patient privilege and privilege holder has not yet been determined by court. Seek modification of privilege holder as appropriate.

## HEARINGS CHAPTERS

### PRELIMINARY PROTECTIVE PROCEEDING

H13

Add as last sentences of third paragraph:

The BIA will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact. *Guidelines*, 80 Fed. Reg. 10154 at B.6.(e). Counsel should be aware of the notice requirements set forth in the *Guidelines*. 80 Fed. Reg. 10153-154 at B.6.

H14

Following the last sentence of the **Applicable Rules subsection** insert the following between C.R.J.P. and *People*:

1.

H21

Add as first complete sentence in first partial paragraph:

The *Guidelines* define a qualified expert witness as one having “specific knowledge of the Indian tribe’s culture and customs” and lists persons, in descending order, who are presumed to meet the requirements of a qualified expert. 80 Fed. Reg. 10157 at D.4.(a) & (b).

H21

Substitute as **TIP**:

The *Guidelines* set forth a lower standard of “reason to believe the child is an Indian child” and require the GAL and agency representative to certify on the record whether s/he has discovered or “know[s] of any information that suggests or indicates the child is an Indian child.” *Guidelines*, 80 Fed. Reg. 10152 at B.2.(b). It is imperative that the provisions of ICWA are strictly followed if there is any reason to believe the child is an Indian Child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe. *Guidelines*, 80 Fed. Reg. 10152 at A.3.(d).

H23

Change the citation at the end of the first sentence of the second practice tip to 7.107.1 *et seq.*

Add the following to the end of the second **TIP**:

The Colorado Department of Human Services has developed a new Colorado Safety Assessment Tool and is in the process of training county departments on the tool. The effective date of the new tool is in flux at the timing of this rewrite, but is currently targeted for January 1, 2017. *See* pending amendments to 7.107.1 *et seq.*

**H25**

Add as last paragraph to **Relative Placement/Temporary Custody to Relatives subsection**:

SB 15-087 expands the background check requirements for emergency placement, noncertified kinship care, and licensed placements to include fingerprint-based and other background check requirements for relatives and kin, as well as adults residing in the home. The court shall inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of a relative, and the department must share the results of the fingerprint-based background checks with a GAL pursuant to a court order. *See* 2015 updates to F209-F211 of **Relative and Kinship Placement fact sheet**.

**H26**

Add the following paragraph at the end of the **Evidentiary Issues subsection**:

Children in Dependency and Neglect Proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child's interests are adverse to those of his or her parents. *See id.* at 945, 950. Information that is protected by the privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *See id.*

Insert the following **TIP** below the new paragraph:

- ❖ **TIP:** GALs must ensure that the court has made a ruling on the holder of the privilege prior to the introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advocate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950-52 (setting forth waiver procedures and considerations).

## PRETRIAL HEARING

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H39

At the end of **Pretrial Conferences subsection**, insert additional **TIP**:

- ❖ **TIP:** While the juvenile court may join a paternity action with the D&N proceeding, the juvenile court must follow the procedures outlined in the Uniform Parentage Act (UPA) in order to have subject matter jurisdiction to decide paternity. *See In Interest of J.G.C.*, 318 P.3d 576, 578-80 (Colo. App. 2013). Failure to comply with the UPA notice provisions outlined in § 19-4-110 will deprive the court of subject matter jurisdiction to determine paternity. *Id.*

H43

Insert “parents of siblings” in the last complete sentence on the page. *See* updates to **Family Finding/ Diligent Search fact sheet**.

H46

Add the following to the end of the second **TIP** in the **Discovery subsection**:

The Colorado Department of Human Services has developed a new Colorado Safety Assessment Tool and is in the process of training county departments on the tool. The effective date of the new tool is in flux at the timing of this rewrite, but is currently targeted for January 1, 2017. *See* pending updates to 7.107.1 *et seq.*

H47

Add the following subsection to the end of the **Special Considerations section**:

**9. Psychotherapist Patient Privilege:** Children in Dependency and Neglect Proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child’s interests are adverse to those of his or her parents. *See id.* at 945, 950. Information that is protected by the privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *See id.*

Insert the following **TIP** below the new paragraph:

- ❖ **TIP:** GALs must ensure that the court has made a ruling on the holder of the privilege prior to the discovery or introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advocate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950-52 (setting forth waiver procedures and considerations).

## ADJUDICATORY HEARING

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**Note:** At the time of the writing of this update, *In Interest of J.G.* is pending before the Supreme Court. Docketed as 15 SC 57, this case involves a review of the Court of Appeals decision *In Interest of J.G.*, 2014 COA 182, and will address the following issues: Whether the Court of Appeals erred in requiring jury findings as to the fault of each parent when a trial court is adjudicating a child dependent or neglected under the injurious environment provision of the Colorado Children's Code; Whether the Court of Appeals erred in holding that the status of the child as dependent or neglected must be considered in relation to each parent's acts or failures to act and the parent's availability, ability, and willingness to provide reasonable parental care. The Supreme Court's eventual holding in this case may implicate multiple sections of the Adjudicatory Hearing chapter. Practitioners should monitor developments in this case and may wish to note its potential implications on the following pages: H67(end of paragraph concluding **Admissions subsection** and prior to **TIPs**); H69 (end of first sentence of third paragraph in **Required Findings/Basis for Adjudication section**, following *People in the Interest of T.T.* citation); H72 (end of **Injurious Environment subsection**).

H59

Add as last sentence of **TIP**:

The ICWA *Guidelines* delineate requirements of proper notice. See 80 Fed. Reg. 10153-10154 at B.6(a) – (g).

H62

At the end of second TIP add:

*But see People in Interest of J.J.M.*, 318 P.3d 559 (Colo. App. 2013) (holding that C.R.J.P 4.3(b) allows for a collective total of three peremptory challenges to all respondents and does not give the court jurisdiction to increase the number of peremptory challenges given to each respondent).

H65

In **Default Adjudication subsection**, strike entire paragraph and insert the following:

A default adjudication is only appropriate when proof of notice is established, followed by a failure to plead or otherwise defend. C.R.C.P. 55(a), (b). *See In Interest of K.J.B.*, 342 P.3d 597 (Colo. App. 2014)(holding that nonappearance at adjudicatory trial alone does not constitute a failure to defend under C.R.C.P. 55(b) and that court erred in entering a default judgment against mother who had actively participated in the proceeding but who had failed to appear for trial). When a party fails to appear for trial, the court may proceed with the adjudicatory hearing by receiving evidence in the party's absence and rendering judgment on the merits. *See id.* at 600.

H65

In **Summary Judgment subsection**, add the following to the end of the first paragraph:

*See also In Interest of S.N.*, 338 P.3d 508 (Colo. App. 2014) (holding, after remand from Colorado Supreme Court, that summary judgment was not appropriate remedy due to a dispute in material facts and because reasonable minds could draw differing inferences from prior adjudication and termination in a case involving prospective harm). For adjudications based on prospective harm, summary judgment may be warranted infrequently but may be entered pursuant to traditional rules governing summary judgment. *In Interest of S.N.*, 329 P.3d 276, 283-84 (Colo. 2014).

In **Summary Judgment subsection**, add the following to the end of the **TIP**:

*See also S.N.*, 329 P.3d at 282 (stating that nonmoving party cannot rely on pretense, apparent formal controversy, allegations or denials in pleadings, argument, or mere assertion of a legal conclusion to avoid summary judgment).

H66

At the end of the last full sentence, insert the following citation to the string cite:

*In Interest of N.G.*, 303 P.3d 1207, 1216 (Colo. App. 2012)(adjudication of child “as to” mother did not avoid need for adjudication of child “as to” father).

H68

In **Continued/Deferred Adjudication subsection**, add the following paragraph after the **TIP**:

Because adjudication relates to the status of the child on the date of the adjudication, a parent who has entered into a deferred adjudication that is neither revoked nor expired is not barred by an earlier admission from requesting an evidentiary hearing. In *In Interest of N.G.*, 303 P.3d 1207, 1210 (Colo. App. 2012). At that hearing, the court must consider the child’s current status, and relevant evidence may include “new” evidence incurred during the deferral period. *Id.* at 1213-14. The *Troxel* presumption of fitness will ordinarily survive the entry of a deferred adjudication, particularly when the deferred adjudication is based on a no-fault admission. *Id.* at 1215.

H69

In **Required Findings/Basis for Adjudication section** add the following sentence after the second sentence in the second paragraph of the section:

The child must be under the age of 18 for the court to have subject matter jurisdiction to adjudicate the child dependent or neglected. *In Interest of M.C.S.*, 327 P.3d 360, 361-62 (Colo. App. 2014).

H70

Add the following citation to the last sentence of the **Required Findings/Basis for Adjudication** introductory paragraph (prior to Abandonment subsection):

*See also In Interest of S.N.*, 329 P.3d 276, 281 (Colo. 2014).

H75

In **Evidentiary Issues/Considerations** section, add the following subsection:

**3. Psychotherapist Patient Privilege:** Children in Dependency and Neglect Proceedings enjoy the benefit of the psychotherapist-patient privilege. *L.A.N. v. L.M.B.*, 292 P.3d 942, 947 (Colo. 2013). The GAL may exercise the privilege when the child is too young or otherwise incompetent to exercise the privilege and when the child's interests are adverse to those of his or her parents. *See id.* at 945, 950. Information that is protected by the privilege cannot be presented as evidence unless the holder of the privilege has waived the privilege or the abrogation of the privilege set forth in § 19-3-311 applies. *See id.* at 945, 950.

Insert the following **TIP** below the new paragraph:

- ❖ **TIP:** GALs must ensure that the court has made a ruling on the holder of the privilege prior to the introduction of any information protected by the psychotherapist-patient privilege. GALs who have been deemed the holder of the privilege must ensure that any waiver of the privilege serves the best interests of the child, advocate for limited waivers when appropriate, and obtain clear rulings on the scope of any limited waivers effectuated. *See id.* at 950-52 (setting forth waiver procedures and considerations).

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## DISPOSITIONAL HEARING

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H88

Insert the following as the first **TIP** in the **Caseworker's Report** section:

- ❖ **TIP:** GALs serving as the holder of the child's psychotherapist-patient privilege should ensure that the caseworker's report does not contain privileged information and move to strike any



such information contained in the report. The failure to do so may be construed as an implied waiver of the child's privilege. *See generally L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013).

H90

Insert at the end of the page:

ICWA provides that “the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.” 25 U.S.C. § 1922.

H94

Add as last paragraph to **Legal Custody with Relative or Other Suitable Person subsection:**

SB 15-087 expands the background check requirements for emergency placement, noncertified kinship care, and licensed placements to include fingerprint-based and other background check requirements for relatives and kin, as well as adults residing in the home. The court shall inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of a relative, and the department must share the results of the fingerprint-based background checks with a GAL pursuant to a court order. *See* 2015 updates to F209-F211 of **Relative and Kinship Placement fact sheet**.

H94

Add to end of last paragraph in **Legal Custody in the County subsection:**

SB 15-087 expands the background check requirements for emergency licensed placements to include fingerprint-based and other background check requirements for relatives and kin, as well as adults residing in the home. The court shall inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of the department, and the department must share the results of the fingerprint-based background checks with a GAL pursuant to a court order. *See* 2015 updates to F209-F211 of **Relative and Kinship Placement fact sheet**.

H97

Add the following citation to second sentence in second **TIP**:

P.L. 113-183 § 113 (amending 42 U.S.C. § 675(1)(B) to empower youth aged 14 and older to participate in the development of their treatment plan).

H98

In first full paragraph on the page (second paragraph in **TIP**) strike everything beginning with the second sentence. Replace with:

In addition, counsel should review the department's records, including information the assessments it has performed as required by the Colorado Safety Assessment Continuum. *See* 7.301.1 *et seq.*; 7.107.1 *et seq.* Safety and risk assessments performed must be integrated into the treatment plan. 7.301.231.

H99

Change cite to 7.202.62(B) at the end of the second sentence of the first full paragraph on the page to:

7.202.1 *et seq.*

Change cite to 7.301.1(G), (H) to:

*See* 7.301.1(B)(3); 7.301.23(A).

H100

Add the following as a last paragraph to the **Adoption of a Treatment Plan subsection**:

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, requires child welfare agencies to formulate policies and procedures for identifying, documenting, and determining appropriate services for children for whom the state has reasonable cause to believe are victims, or at risk of becoming a victim, of sex trafficking. *See* § 101(a)(3)(C) (amending 42 U.S.C. §671(a)(9)).

H103

In the first sentence of the **Intervention subsection**, after “grandparent” insert:

relative

In the first sentence of the **Intervention subsection**, after “three months” insert:

who has information or knowledge concerning the care and protection of the child

Add subsequent sentence stating:

The three-month requirement does not apply to parents, grandparents, or relatives. *See In Interest of O.C.*, 308 P.3d 1218, 1222 (Colo. 2013).

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## PERMANENCY HEARING

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H115

Strike the last sentence and accompanying cites in the **Participation of Parties and Others subsection**.

H117

Add the following cite to the end of the **TIP** in the **Required Findings section**:

*In Interest of M.D.*, 338 P.3d 1120, 1125 (Colo. App. 2014).

Add the following to the end of the reference to § 19-3-702(3.5)(a) within that section:

or (b).

H118

Insert after “GAL” in the last sentence of the **TIP**:

, if privilege holder,

Strike the citation at the end of the sentence and replace it with the following:

*See L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013).

H122

At the end of the first paragraph in the **Another Planned Permanent Living Arrangement subsection**, add the following:

The Preventing Sex Trafficking and Strengthening Families Act eliminates the OPPLA permanency goal to youth under the age of 16. *See* P.L. 113-183 § 112(a)(1)(amending 42 USC 675(5)(C)(i)); *see also* 7.301.24(Q). The act also requires the department to document “intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts” made to return the child home or secure a placement for the child with a relative, legal guardian, or adoptive parent. *See id.* at § 112(b)(1)(amending 42 U.S.C. 675a); *see also* 7.304.24(Q).

H122

Add to the end of the **TIP** in **Another Planned Permanent Living Arrangement subsection**:

Pursuant to the Preventing Sex Trafficking and Strengthening Families Act, 7.301.24(Q)(5) requires review of the OPPLA goal by the family engagement or equivalent team at least every six months. Additionally, the county is required to request a court review every 12 months to determine whether the youth in demonstrating exceptional circumstances that prevent other permanency options from being viable.

H123

In the **TIP**, change the age of 16 to:

14

Also note: The term “Independent Living” has been replaced with Transition Planning for a Successful Adulthood. *See* P.L. 113-183 § 113(c) (amending 42 USC 675 (1)(D), (5)(C)(i), and (5)(C)(iii)).

## PLACEMENT REVIEW HEARING

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H138

Insert the following **TIP** as the first **TIP** in the **Evidentiary Issues/Considerations** section:

- ❖ **TIP:** GALs serving as the holder of the child's psychotherapist-patient privilege should ensure that any reports or materials submitted do not contain privileged information and move to strike any such information contained in the report. The failure to do so may be construed as an implied waiver of the child's privilege. *See generally L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013). GALs seeking to introduce privileged information as evidence should ensure that any waiver of the privilege effectuated serves the child's best interests and should seek rulings and stipulations on limited waivers as appropriate. *See id.* at 950-52 (setting forth waiver procedures and considerations).

H143

Add as second sentence of third paragraph:

Under the *Guidelines*, the court must ask, as a threshold question at the start of any state court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the GAL and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child. 80 Fed. Reg. 10152 at B.2.(b).

H144

Insert the following paragraph at the end of the page:

Pre-adoptive foster parents do not have a liberty interest in the child, and the Colorado Children's Code does not prohibit the removal of a child from a foster placement. *See M.S. v. People ex rel. A.C.*, 303 P.3d 102, 105 (Colo. 2013). The court must consider and act on the child's best interests in making placement modification decisions. *Id.*

## TERMINATION HEARING

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H159

Insert the following paragraph prior to first full paragraph on page (in **Right to Counsel subsection**):

Erroneous denial of a respondent parent's right to counsel during a substantial part of a parental rights termination hearing will require application of an automatic reversible error standard. *See In Interest of R.D.*, 277 P.3d 899, 896 (Colo. App. 2012). Effectively dismissing counsel by precluding counsel from participating in a termination hearing in a parent's absence is a violation of a parent's statutory right to counsel. *See id.* at 893.

H161

Strike all language after first sentence of second paragraph of **Who May Participate in Hearing subsection**.  
Insert the following language:

Parents, grandparents, relatives, or foster parents who have the child in their care for more than three months who have information or knowledge concerning the care and custody of the child and who have intervened as a matter of right pursuant to § 19-3-507(5)(a) may also participate in the hearing. *See Intervention fact sheet*.

H163

Insert new **subsection**:

### 11. Default Judgment

The entry of a default judgment against a parent who has actively participated in the proceeding but has failed to appear at the termination hearing is not an appropriate remedy under C.R.C.P. 55. *See R.D.*, 277 P.3d at 893. *But see In Interest of V.W.*, 958 P.2d 1132, 1134 (Colo. App. 1998)(upholding default judgment terminating parental rights when father had not requested an attorney until after his parental rights had been terminated).

H175-  
76

Add as last sentence of subsection 5:

The *Guidelines* define a qualified expert witness as one having “specific knowledge of the Indian tribe’s culture and customs” and lists persons, in descending order, who are presumed to meet the requirements of a qualified expert. 80 Fed. Reg. 10157 at D.4.(a) & (b).

H177

Insert after “GAL” in third line of second **TIP**:

, if privilege holder,

Strike the second sentence in the **TIP** and replace it with the following:

In *L.A.N. v. L.M.B.*, 292 P.3d 942, 950 (Colo. 2013), the Colorado Supreme Court held that by disseminating a letter from the child’s therapist, the GAL had at least partially waived the child’s psychotherapist-patient privilege and remanded the case to the juvenile court to determine the scope of the waiver.

Strike all language after “seek” in the final sentence of the **TIP** and insert the following:

stipulations from parties and rulings from the court on limited waiver as appropriate. *See id.* at 950-52 (discussing procedure and considerations for determining the scope of waiver in D&N proceedings).

H178

In first paragraph of **Requests for Relative Placement subsection** change citation to 7.304.53(B)(2)(a) to:

7.304.52.(2).

Add the following sentence to the end of the paragraph:

As a result of the Preventing Sex Trafficking and Strengthening Families Act, the State Board of Human Services is in the process of amending the family search and engagement requirement to include parents of a sibling. **See Family Finding/Diligent Search** updates.

## POST-TERMINATION REVIEW HEARING

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H187

Insert the following sentence after “dental needs” (sixth line from the bottom of the page):

If privilege holder, the GAL should be careful not to effectuate any waivers of the privilege that do not serve the child's best interests and should seek rulings and stipulations on limited waivers as appropriate. *See generally L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013).

H190

Change cite to 7.304.52(E) in **Requests for Relative Placement subsection** (referring to required documentation) to 7.304.52(F).

H191

Insert the following paragraph at the end of the **Next Steps/Setting the Next Hearing Section**:

Legislation enacted in 2014 sets forth a process for the reinstatement of the parent-child legal relationship. Section 19-3-612 allows for the county department or the GAL of a child to file a petition to reinstate the parent-child relationship if a parent has remedied the conditions that led to the filing of the original D&N petition and termination of the relationship, the child has no legal parent and is not in an adoptive placement, and other permanency options have been exhausted. The child must be 12 or older unless the child is part of a sibling group in which one of the children is eligible for this process and the child meets the other required conditions for reinstatement. Certain substantiated allegations, such as sexual abuse and serious injury, exclude eligibility. Children sixteen and older may file the petition on their own behalf.

Section 19-3-612 outlines specific notice and procedures for this process, sets forth a requirement of a transition plan and period, and requires findings by clear and convincing evidence. Notably, the petition cannot be filed until three years after the date of the original termination unless the court makes a good cause finding. Venue for the filing of such petition is in the county or city that has legal custody of the child. 19-3-201(1)(b).



## FACT SHEETS

### ADOPTION

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F1 Substitute as cite for ICWA Guidelines:

80 Fed. Reg. 10158 F.2.

### ALLOCATION OF PARENTAL RESPONSIBILITIES/GUARDIANSHIP

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F14 At the end of the first paragraph under **Required Findings subsection**, add the following citation:

*See also In Interest of M.D.*, 338 P.3d 1120, 1126-28 (Colo. App. 2014).

### APPEALS

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F19 Add additional bullet to delineation of orders held not to be final orders:

- An order determining that no appropriate treatment plan can be devised for parents. *People ex rel. M.S.*, 292 P.3d 1247 (Colo. App. 2012).

F20 Add the following after the first sentence in the **Notice of Appeal** subsection:

Alternatively, counsel may file the notice of appeal through the court's e-filing system within the required time frame. *See* C.A.R. 25(a).

F23

Replace the last paragraph in the **Petition on Appeal subsection** with the following:

Counsel may file the notice of appeal through the court's e-filing system , by mail addressed to the Clerk of the Court of Appeals, or by hand-delivery. *See* C.A.R. 25(a).

F24

Replace the last paragraph and **TIP** in the **Response to Petition on Appeal subsection** with the following:

Counsel may file the notice of appeal through the court's e-filing system , by mail addressed to the Clerk of the Court of Appeals, or by hand-delivery. *See* C.A.R. 25(a).

❖ **TIP:** Counsel who has not been identified as a GAL in the Notice of Appeal or Petition on Appeal may be required to file an entry of appearance in order to e-file their response. GALs electing to use e-filing should confirm that they are able to file in the appellate case number in the court's e-filing system well before the deadline for filing their response.

F25

In the **Mandate subsection**, change 22 days to 29 days.

F26

Replace fourth sentence of first paragraph with the following:

Counsel may file the notice of appeal through the court's e-filing system, by mail addressed to the Clerk of the Court of Appeals, or by hand-delivery. *See* C.A.R. 25(a).

F27

Add the following sentence to the first paragraph in the **C.A.R. 21 section**:

In *Madrone v Madrone*, 290 P.3d 478 (Colo. 2012), the Colorado Supreme Court held that its exercise of original jurisdiction under C.A.R. 21 to review a trial court's determination of its jurisdiction under the UCCJEA was appropriate; because the UCCJEA juris-

dictional determination question constitutes the necessary first step in the allocation of parental responsibilities and because of the impact on the short- and long-term stability of the child's life and relationships, appeal of the court's UCCJEA determination would be an inadequate remedy.

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## CHILDREN IN COURT

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F30

Add the following as a new paragraph at the end of the **National Support for Youth Involvement in Court** section:

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, specifically requires the court to ask any child with a permanency goal of OPPLA about his or her desired permanency outcome. *See* §112(b)(adding 42 U.S.C. § 675a(a)(2) (A)).

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## CHILDREN'S RIGHTS

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F43

Add to the end of the last paragraph:

*See also* 7.304.62(P). The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, further advances participation in extracurricular activities by requiring that in each foster home or child care institution there is a designated caregiver authorized to make parental decisions regarding the child's participation in extracurricular activities. *See* § 111 (adding a new subsection 42 U.S.C. §675(a)(1)(10) and amending 42 U.S.C. §671(a)(24); 42 U.S.C. §671(a)(10); 42 U.S.C. §677(a)). The "reasonable and prudent parent" standard will apply to such decisions. At the time of this update, the Colorado State Board of Human Services is in the process of promulgating rules to comply with these new provisions.

## CROSSOVER YOUTH

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F46

Strike the fifth sentence of the second **TIP** and replace with the following language:

Unless the juvenile has waived his or her psychotherapist-patient privilege in the JD proceeding, the GAL should not disclose information from the therapist in pleadings or recommendations. While the Supreme Court's ruling in *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013) pertains to D&N proceedings, its reasoning underscores the importance of the psychotherapist-patient privilege.

F49

Strike the first full paragraph on page (second paragraph of **TIP**) and replace with the following:

Each Juvenile is entitled to representation from the Office of the State Public Defender or if there is a case conflict by the Office of Alternate Defense Counsel at the Detention hearing. § 19-2-508 (2), (2.5).

F50

In the **Plea and Pretrial Hearings subsection**, strike all language in the first paragraph beginning with the third sentence and replace with the following:

Counsel from the Office of the State Public Defender or the Office of Alternate Defense Counsel in the case of a conflict shall be appointed if the juvenile and his or her parents, guardian or other custodian are indigent, the child is in the custody of a state or county department of human services, counsel is needed to protect the juvenile's interests or the parents refuse to hire counsel. The court is not required to appoint counsel if the child has retained private counsel or has made a knowing, intelligent and voluntary waiver of counsel. § 19-2-706. The parents may be responsible for reimbursement of costs if they refuse to hire counsel. *Id.*

**F55**

At the end of the first paragraph (continued from previous page), insert the following:

The entry of an order for a psychosexual evaluation after a juvenile is found incompetent that his or her competency cannot be restored implicates neither the juvenile's privilege against self-incrimination nor the presumption of innocence. *See In Interest of C. Y.*, 275 P.3d 762, 769-71 (Colo. App. 2012).

**F57**

Strike last sentence on page (“If a D&N case remains open . . .”) and replace with the following **TIP**:

- ❖ **TIP:** If a D&N case remains open when the Juvenile becomes eligible for deregistration, the GAL should identify whether the deregistration is automatic pursuant to the completion of § 16-22-113(1)(d), (1.3)(a)(applying to deferred adjudications), and ensure that the court completes the deregistration process. For non-automatic deregistration, the GAL may assist in the filing of the deregistration by connecting the child with resources, including counsel, and providing relevant information and assistance to counsel or the self-petitioning child. § 16-22-113(1)(e), C.R.S. (2014). The GAL must be clear about his or her role in the process and should not obtain confidential information that may harm the child if disclosed.

**F58**

Strike first sentence of the **Direct File subsection** and replace with the following:

§ 19-2-517 sets forth the district attorney's authority to file directly into adult court. This ability is limited to youth who are over the age of 16 and who meet specified criteria. If the juvenile has been charged by a direct filing of information or by an indictment in District Court, the Juvenile may file a Motion to transfer the case to juvenile court, known as a “reverse-transfer” hearing in which the court must review and make findings as to a number of factors similar to those reviewed in a transfer hearing. § 19-2-517(3)(b). The direct file statute also has specific sentencing options, including adult sentencing, to the youthful offender system, or as a juvenile. § 19-2-517(6), (7).

Keep the first **TIP** on F58 but strike the remaining language in the subsection.

F59

Insert a new subsection at the end of the **Special Considerations** section:

## 6. Expungement of Juvenile Records

HB 13-1082 significantly expanded the expungement process for juveniles. Section 19-1-306 now provides that in addition to the court or the parole department, the juvenile, a respondent parent or guardian, or a court-appointed GAL may initiate expungement proceedings. Adjudications of certain offenses, including domestic violence, unlawful sexual behavior, or possession of a weapon, will preclude eligibility for this process. Juveniles are immediately eligible for expungement upon certain case outcomes, including but not limited to a finding of not guilty at an adjudicatory trial, dismissal of the petition, or successful completion of a diversion or deferred adjudication program. A range of waiting periods applies to expungement petitions for other outcomes.

Insert **TIP**:

- ❖ **TIP:** As expungement of records usually serves the best interests of juveniles and GALs now have authority to petition for expungement, GALs should ensure the expungement of all eligible records by petitioning to expunge records if the juvenile becomes eligible during the GAL's appointment. When the GAL's appointment will end prior to expungement eligibility, the GAL should confirm that the juvenile and his or her parent or guardian understand expungement eligibility and how to initiate the process. The GAL should ensure the juvenile understands, but should not advise a parent and should ensure that counsel has explained the process.

## EDUCATION LAW: RIGHTS AND ISSUES

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F69

Strike “The Colorado Department of Education provides” from the last (incomplete) sentence on the page and replace with the following:

Typically, local school districts provide

F70

Add the following as a second paragraph in the **Advocating for School Stability** section (prior to **TIP**):

The on time graduation rate for youth in foster care in Colorado is only 27.5%. See Judy Martinez and Sheree Wheeler, *Foster Care and Education Summary Report 2013* MARTINEZ, JUDY & WHEELER, SHEREE, FOSTER CARE AND EDUCATION SUMMARY REPORT 2012-2013 at 4 (2014), available at [http://www.cde.state.co.us/dropoutprevention/foster\\_care\\_education\\_summary\\_report\\_2012-13](http://www.cde.state.co.us/dropoutprevention/foster_care_education_summary_report_2012-13). (hereinafter “*Foster Care and Education Summary Report*”). In contrast, 77.3% of Colorado youth graduated on time in 2014. COLORADO DEPARTMENT OF EDUCATION, *2014 Graduation Statistics*, available at <http://www.cde.state.co.us/cdereval/gradcurrent>.

These poor educational outcomes are undoubtedly related to the high frequency of school moves. In 2012-2013, 42.8 percent of youth in out-of-home placement changed schools during the school year. *Foster Care and Education Summary Report* at 5-6. Youth in foster care have, by far, the highest mobility rates of any other special population in Colorado (e.g., gifted and talented, disabled, English language learners, Title I, migrant, and homeless students). *Id.*

F72

Insert the following tip after the first complete paragraph on the page:

- ❖ **TIP:** Under Fostering Connections, the requirement to “ensure” a student can remain in their school is triggered by the presumptive fact that it is in the child’s best interest to remain in the same school. Counties do not currently have in place processes to make these best interest determinations. As GAL, advocate for thoughtful and deliberate decision-making prior to any school moves

Insert the following paragraph before the last paragraph in the **Presumption against Changes in Educational Placement Subsection**:

Educational agencies also have a reciprocal duty to collaborate with child welfare agencies to ensure that children in foster care can remain in their schools. U.S. Department of Education & U.S. Department of Health and Human Services, *Letter to Chief State School Officers and Child Welfare Directors* (May 30, 2014), available at <http://www.acf.hhs.gov/programs/cb/news/fostering-connections-letter>. Colorado law also has protections in place for all students who change residences during the school year. If a student moves out of the school district in the middle of a school year, the school district must allow her to remain enrolled in her school until at least the end of the semester or term. § 22-32-116(1). Elementary school students and high school seniors must be permitted to remain enrolled until the end of the academic year. §116(1)-(2). Note that although this statute also permits Elementary school students to re-enroll in their schools in some circumstances, this was restricted by the decision in *Bradshaw v. Cherry Creek School District No. 5*, 98 P.3d 886 (Colo. App. 2003).

F73

Replace the second sentence of the first paragraph in **Enrollment subsection** with the following sentences:

Determining residence is fact-specific and requires examination of multiple statutes. C.R.S. § 22-1-102 is the generally applicable statute for determining residence. This statute lists many ways a child may establish residence in a given school district. *Id.* The overall effect of the residency statute is that a child is usually a residence of the district where they actually live most of the time. *See id.* One way a student can be a resident of a district is if the legally appointed guardian of his person resides in that district. § 22-1-102(2)(b). The Children's Code clarifies that this is the person to whom legal custody has been granted by the court. § 19-1-103(73)(b). In some circumstances, residency for special education students is determined differently than for general education students. §22-20-107.5. Special education students who are living in group homes, residential treatment facilities, and some other facilities will be considered residents of the district where their parents live. *Id.*



Insert the following **TIP** at the end of the paragraph:

- ❖ **TIP:** A school district must enroll a student who becomes a resident of that district. There is no exception for reasons such as it being the end of the school year, the students are taking exams, etc.

F74

Insert the following sentence at the end of the **Transfer of Records** subsection:

When special education students transfer schools, the new school must provide “comparable services” as those listed in a student’s most recently implemented IEP. 34 C.F.R. 300.323(e).

Insert the following **TIPS**:

- ❖ **TIP:** Enrollment delays are often due to a delay in transfer of special education records. To prevent this, the GAL should always keep a copy of special education students’ most recent IEPs and triennial evaluation reports on file.
- ❖ **TIP:** The Uninterrupted Scholars Act allows caseworkers to access educational records, enabling them to facilitate timely transfer of records. See *infra* **Confidentiality of Educational Records** subsection.

F76

Add the following as a last sentence to the **Confidentiality of Educational Records** subsection:

The Uninterrupted Scholars Act amends FERPA to allow educational agencies to release education records to child welfare caseworkers without consent or a court order when the child welfare agency is legally responsible for the student. PL 112-278 *codified at* 20 U.S.C. § 1232g(b)(1)(L). The caseworker may re-disclose educational records to individuals or agencies “engaged in addressing the student’s education needs.” *Id.*

F78

Strike the second sentence of the **Individualized Education Program** subsection and replace with the following:

An IEP is written document describing a student’s educational needs, goals, and how the school district will provide the

student a free appropriate public education. The IEP must be reasonably calculated to permit the student to receive more than *de minimis* benefit (also sometimes phrased “some benefit”) from their education. *Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996) (interpreting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206 (1982) to require more than *de minimis* educational benefit); *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008) (citing *Urban* for the same). The IEP should also describe the placement where the child will receive services in his or her least restrictive environment. *Id.*

Strike the **TIP** at the end of the subsection and replace with the following:

- ❖ **TIP:** The district's complete offer and description of a free appropriate public education should be included in the written IEP document. To make your advocacy the most effective and efficient, request that the school provide you a copy of the draft IEP (schools almost always prepare a draft) a few days before the meeting. After the meeting, request that the final version be sent to you for review before the IEP is “locked” (i.e., finalized in the school district's computer system, making it difficult to revise).

F79

Insert the following at the end of the **American with Disabilities Act subsection**:

The ADA (42 U.S.C. § 12132) and Section 504 (29 U.S.C. § 794) have distinct requirements to protect students with disabilities from discrimination. Compliance with the IDEA does not necessarily ensure compliance with the ADA. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013). In some cases, the ADA's requirement to provide equal access may require a school district may have to provide additional services under Title II of the ADA that they would not have to provide under the IDEA. Department of Justice, Office of Civil Rights, *FAQs on Effective Communication for Students with Hearing, Vision, or Speech Disabilities*, 64 IDELR 180 (November 12, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

## EXPEDITED PERMANENT PLACEMENT PROCEDURES

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F86

Strike the entire citation following the first and only sentence in the second **TIP** and replace with the following:

*See L.A.N. v. L.M.B.*, 292 P.3d 942, 950 (Colo. 2013)(holding that the GAL may serve as the privilege holder when neither the child nor the parent is available to do so and that the dissemination of a therapist's letter by the GAL constituted at least a partial waiver of the child's psychotherapist-patient privilege). GALs serving as privilege holders should seek stipulations from parties and rulings from the court on limited waiver as appropriate. *See id.* at 950-52 (discussing procedure and considerations for determining the scope of waiver in D&N proceedings).

## FAMILY FINDING/DILIGENT SEARCH

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F91

At the end of the first complete paragraph on the page add the following:

The Preventing Sex Trafficking and Strengthening Families Act provides for more expansive search of siblings by requiring the department to notify all parents of a sibling of the child, where such parent has legal custody of such sibling, in addition to other relatives. *See* P.L. 113-128 § 209 (amending 42 U.S.C. § 671(a)(29)). For the purpose of these provisions, sibling is defined to include siblings as defined by state law as well as individuals who would have been considered a sibling of the child under state law but for a termination or other disruption of parental rights. *See id.* (adding 42 U.S.C. § 675). ***See also Siblings fact sheet.*** The State Board of Human Services is in the process of promulgating conforming rules.

## FUNDING AND RATE ISSUES

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F99

Change all references to 7.001.41 in **Title IV-E Funding section** to:

7.601.81.

F100

Change all references to 7.001.41 in **Title IV-E Funding section** to:

7.601.81.

F101

Add the following sentence to the second **TIP**:

Additionally, the Colorado Department of Human Services is participating in the federal Title IV-E Waiver Demonstration Project, which allows greater flexibility in the use of federal funds. *See* SB 13-2311 (adding § 26-5-105.4). This program, in existence through June 30, 2019, *see* § 26-5-105.4(9), allows counties to opt into providing additional kinship supports. *See* Waiver World Presentation (January 30, 2014) *available at* [www.coloradochildrep.org/training/materials](http://www.coloradochildrep.org/training/materials).

F102

Add the following after the citation to 7.303.13 at the top of the page:

Counties may now elect to provide Program Area 3 Services to serve children at risk of being involved in the child welfare system or at risk of continued involvement in the child welfare system. *See* 7.303.11, 7.303.13(A).

F104

In **SSI subsection**, change cite 7.001.44 to:

7.601.82.

F106

At the end of the **RGAP subsection** add the following:

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 111-183, provides for the continuation of kinship guardianship assistance payments to a successor legal guardian named in the kinship guardianship assistance agreement upon the death or incapacity of a relative guardian. *See* § 207 (adding 42 U.S.C. 673(d)(3)(C)).

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## HEARSAY IN D&N PROCEEDINGS

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F109

After “any act” in the first line of the first bullet under **Admissible Statements subsection**, insert:

or attempted act

After “performed” in the second line of that bullet, insert:

or attempted to be performed

F112

Add the following sentence at the end of the page:

Regardless of whether *Crawford* applies to D& N proceedings, statements whose primary purpose is not testimonial will not be subject to the confrontation clause analysis. In *Ohio v. Clark*, 135 S.Ct. 2173, 2181-82 (2015), for example, the United States Supreme Court held that statements made by a three-year-old child to his preschool teacher in response to the teacher's questions about his injury were not testimonial and not subject to the Confrontation Clause.

## IMMIGRATION

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F115

In last sentence of first paragraph, change “ICE holds” to the following:

detainers or “holds” by Immigration and Customs Enforcement (ICE).

F117

Strike the second sentence in the **Education subsection** and replace with the following:

Prior to the passage of the Colorado ASSET Legislation (Senate Bill 13-033) in 2013, Colorado did not recognize undocumented students as in-state residents for determining tuition at higher education institutions, forcing undocumented students to pay nonresident tuition rates. Colorado ASSET now allows undocumented students to pay in-state tuition at Colorado's public colleges and universities as long as they meet certain qualifications. In general, a student will need to demonstrate that she or he, 1) has attended a Colorado high school for three years right before graduating, 2) is admitted to a participating college within twelve months of graduating, and 3) has signed an affidavit, stating he or she is not legally present in the U.S., but is seeking or will seek status when eligible.

Insert the following language after “Undocumented children” in the subsequent sentence:

and also those granted Deferred Action for Childhood Arrivals (DACA) (see below).

Add the following cite to the end of the **TIP** following the amended paragraph:

*See* <http://unitedwedream.org/blog/6-scholarship-opportunities-undocumented-students/>, <http://www.finaid.org/otheraid/undocumented.phtml>, <http://www.goldendoor-scholars.org/>.

F127

Correct the phone number for the NHTRC in the **TIP**:

1-888-373-7888.

F128

Update the website reference in the first **TIP**:

**<http://www.acf.hhs.gov/programs/orr/resource/state-of-colorado-programs-and-services-by-locality>**.

F128

Add a new **subsection 5.5**:

**Deferred Action for Childhood Arrivals and Executive Action:** Deferred action is a discretionary decision by the Department of Homeland Security not to pursue enforcement of the immigration laws against a person for a specific period of time – essentially, a pause of enforcement. Deferred Action for Childhood Arrivals or “DACA” is the same. Announced on June 15, 2012, DACA provides approved applicants with a two-year “pause” of deportation/enforcement of the immigration laws, along with permission to work legally in the U.S. However, a grant of DACA does not alter an individual’s existing immigration status or provide a path to citizenship or residency. In most cases, though, employment authorization through DACA will allow a person to obtain a valid social security number and a Colorado driver’s license. To establish eligibility for DACA, individuals must demonstrate that they: 1) are at least 15 years old; 2) arrived and established residence in the United States before reaching their 16th birthday; 3) continuously resided in the United States from June 15, 2007 to the present; 4) were physically present in the United States on June 15, 2012, as well as at the time of requesting deferred action from USCIS; 5) entered without inspection before June 15, 2012, or that their lawful immigration status expired on or before June 15, 2012; 6) on the date of application, are in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are honorably discharged veterans of the U.S.

Coast Guard or the U.S. Armed Forces; 7) have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, and do not otherwise pose a threat to national security or public safety. Submitting a request for DACA does not affect any other pending immigration applications such as filing for a U Visa or pending family-based petitions.

- ❖ **TIP:** On November 20, 2014, President Barack Obama announced the creation of a deferred action program for parents of U.S. citizens and lawful permanent residents who met certain criteria (called DAPA) and an expansion of the existing DACA program. The DACA expansion modified the criteria for applicants by eliminating the upper age cap of 31 years, moving the beginning date of continuous residence from June 15, 2007 to January 1, 2010, and extending employment authorization to a period of three years instead of two years. However, at the time of this writing, due to a federal court order, USCIS did not begin accepting requests for the expansion of DACA or DAPA as originally planned. Instead, in *Texas v. United States*, the court issued a temporary injunction on DAPA and DACA expansion. On May 26, 2015, the Fifth Circuit Court of Appeals denied the government's request for an emergency stay. As a result, the hold on DAPA and DACA expansion continues while the Fifth Circuit considers the government's appeal of the preliminary injunction itself. The court's temporary injunction does not affect the original DACA requirements (those outlined prior to the expansion). Individuals may continue to come forward and request an initial grant of DACA or renewal of DACA under the guidelines established in 2012.

F129

Eliminate last sentence in the **Other Means of Obtaining Lawful status** (referring to the DREAM Act) and accompanying cite.

F130

Add the following resource to the **Resources section**:

**College in Colorado:** Initiated by the Department of Higher Education, CIC's Colorado ASSET-focused website (<http://www.ciccoloradoasset.org/>) has fantastic resources for undocu-



mented students in Colorado, including legal resources regarding ASSET and scholarship opportunities.

## INDIAN CHILD WELFARE ACT

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F131

Insert as third paragraph:

The U.S. Department of Interior (Department) Bureau of Indian Affairs (BIA) published updated ICWA *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines)* on February 25, 2015 which were effective immediately. 80 Fed. Reg. 10146-02 (2015). The updated *Guidelines* reflect recommendations made by the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence and "significant developments in jurisprudence since ICWA's inception." *Id.* On March 20, 2015, the Department published and sought comment on proposed regulations "to improve ICWA implementation by state courts and child welfare agencies." The proposed regulations are substantively similar to the updated *Guidelines*, but as of this update the regulations have not yet been enacted.

F132

Add as last sentence of **Child Custody Proceedings subsection:**

ICWA applies to "proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights." *Guidelines*, 80 Fed. Reg. 10151 at A.3.(a). ICWA provisions 1912 (d) & (f) and 1915(a) do not apply in private adoption case where Indian father abandoned the child before birth and never had custody of the child. *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_, 133 S.Ct. 2552, 2552, 186 L.Ed.2d 729 (2013).

F132

Substitute as first sentence in first **TIP**:

- ❖ **TIP:** It is imperative that the provisions of ICWA are strictly followed if there is any reason to believe the child is an Indian Child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe. *Guidelines*, 80 Fed. Reg. 10152 at A.3.(d).

F132

Add after 1st sentence in **Indian Child subsection**:

*But see Guidelines*, 80 Fed. Reg. 10152 at A.3.(d) (the provisions of ICWA apply if there is any reason to believe the child is an Indian Child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe).

F132

Add authority for second sentence in **Indian Child subsection**:

*Guidelines*, 80 Fed. Reg. 10153 at B.3.

F132

Add as last sentence in **Indian Child subsection**:

The *Guidelines* also reject the “existing Indian family” doctrine. 80 Fed. Reg. 10153 at A.3.(b). The *Guidelines* provide an illustrative but not exhaustive list of factors which should not be considered in determining whether ICWA is applicable. *Id.*

F132

Add as second paragraph in **Indian Child subsection**:

Where it has not been established on the record that the child is an “Indian child,” the notice requirements but not the substantive provisions of the ICWA apply. *People in Interest of N.D.C.*, 210 P.3d 494 (Colo.App. 2009); *People in Interest of L.O.L.*, 197 P.3d 291 (Colo. App. 2008). The court must treat the child as an Indian child for purposes of emergency removal until the

court determines that the child is not an Indian child. *Guidelines*, 80 Fed. Reg. 10155 at B.8.(c)(1).

F133

Add at end of paragraph in **Inquiry subsection**:

Under the *Guidelines*, State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the GAL and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child. 80 Fed. Reg. 10152 at B.2.(b).

F133

Add as last sentence of first **TIP**:

The *Guidelines* set forth a lower standard of “reason to believe the child is an Indian child” and require the GAL to certify on the record whether s/he has discovered or “know[s] of any information that suggests or indicates the child is an Indian child.” 80 Fed. Reg. 10152 at B.2.(b).

F133

Add as a third **TIP**:

- ❖ **TIP:** To establish tribal identity, as much information as is known regarding the child’s direct lineal ancestors, such as genograms or ancestry charts for both parents, should be provided to the tribes and, if a specific tribe has not been identified, the BIA. *Guidelines*, 80 Fed. Reg. 10153 at B.6.(b).

F133

Strike first sentence in **Notice subsection** and replace with the following:

ICWA mandates that the party seeking the foster care placement of an Indian child or the termination of an Indian child’s parental rights notify the parents, the Indian custodian, if applicable, and the child’s tribe of each proceeding. *Guidelines*, 80 Fed.

Reg. 10153 at B.6.(a). Notice must be in clear and understandable language and include specific information regarding the child, tribe(s) and proceeding. *Id.*, at 10153 – 10154 at B.6.(c)& (d).

Replace “*Id.*” at the end of the subsequent sentence (beginning with “Such notice . . .”) and replace with:

25 U.S.C. § 1912(a).

F134

Add as second sentence on page:

The BIA will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact. *Guidelines*, 80 Fed. Reg. 10154 at B.6.(e).

F134

Add as last sentence on page:

The court must inform a parent or Indian custodian appearing without counsel of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings. *Guidelines*, 80 Fed. Reg. 10154 at B.6.(h).

F135

Add as second & third sentences of last paragraph:

ICWA does not define the term “imminent physical damage or harm.” The *Guidelines* define the term as “present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.” 80 Fed.Reg. 10151 at A.2. (2nd column, 2nd full paragraph).

F135

Add as last sentence of **Exclusive Tribal Jurisdiction subsection:**

*But see Guidelines*, 80 Fed. Reg. 10153 at B.5.(a)(The State court must dismiss the child custody proceeding as soon as it determines that it lacks jurisdiction).

F136

Substitute as first paragraph:

**c. Transfer of jurisdiction.** Upon the petition of either parent, the Indian custodian, or the tribe, a state court shall transfer a proceeding involving an Indian child to the tribal court absent good cause to the contrary or an objection by a parent or a decline of transfer by the tribal court. 25 U.S.C. § 1911(b); *Guidelines*, 80 Fed. Reg. 10156 at C.2.(a). ICWA does not define what constitutes good cause for declining to transfer the case to tribal court. The *Guidelines*, which are not binding but are persuasive in Colorado courts, see *X.H.*, 138 P.3d at 302 n.2, establish a procedure for determining good cause, assign the burden of proof in a transfer hearing and provide examples of what constitutes good cause. 80 Fed. Reg. 10156 at C.3. For example, the *Guidelines* provide the court may not consider the level of contacts the child has had with the tribe. 80 Fed. Reg. 10156 at C.3.(d)(1).

F136

Insert the following citation at the end of the first sentence of the second paragraph:

*But see* 80 Fed. Reg. 10156 at C.3. (b)(providing that the court may not consider whether the case is at an advanced stage in determining good cause to transfer).

F137

Add as last sentence in first partial paragraph:

The *Guidelines* provide that the court may not consider whether the case is at an advanced stage in determining good cause to deny transfer. 80 Fed. Reg. 10156 at C.3. (b).

F137

Insert the following **TIP** at the end of the **Transfer of Jurisdiction** subsection:

- ❖ **TIP:** the new *Guidelines* significantly alter permissive considerations for transfer of jurisdiction and potentially conflict with some cases cited in this subsection. Counsel should review the *Guidelines* in detail when faced with any transfer of jurisdiction issue.

F137

Add as third sentence in first paragraph of **Burdens of Proof/Requisite Finding** subsection:

Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. *Guidelines*, 80 Fed. Reg. 10156 at D.3.(c).

F137

Add as last sentence in first paragraph of **Burdens of Proof/Requisite Findings** subsection:

The *Guidelines* define a qualified expert witness as one having “specific knowledge of the Indian tribe’s culture and customs” and lists persons, in descending order, who are presumed to meet the requirements of a qualified expert. 80 Fed. Reg. 10157 at D.4.(a) & (b).

F137

Add as **TIP** following first paragraph of **Burdens of Proof/Requisite Findings** subsection:

- ❖ **TIP:** The GAL and Parent’s counsel should be familiar with the procedures and standards set forth in the *Guidelines* regarding emergency removal proceedings at 80 Fed. Reg. 10155-10156 at B.8.-B.9.

F137

Delete last sentence of second paragraph of **Burdens of Proof/Requisite Findings** subsection and substitute:

The “active efforts” standard requires more than the “reasonable efforts” standard in non-ICWA cases. 80 Fed. Reg. 10150 at

A.2.; *People in Interest of A.R.*, 310 P.3d 1007 (Colo. App. 2012); *People in Interest of A.V.*, 297 P.3d 1019 (Colo. App. 2012). *But see K.D.*, 155 P.3d at 637. The *Guidelines* define “active efforts” as efforts “intended primarily to maintain and reunite the Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act 942 U.S.C. 671(a)(15)).” 80 Fed. Reg. 10150 A.2.

❖ **TIP:** Counsel should be familiar with the examples of “active efforts” listed in the *Guidelines*. *See* 80 Fed. Reg. 10150 A.2. (1)–(15)

The court must immediately stay the proceedings if any party asserts or the court has reason to believe that the Indian child may have been improperly removed or custody improperly retained. *Guidelines*, 80 Fed. Reg. 10155 at B.9.(a). The court must terminate the proceeding and the Indian child returned immediately if the court finds that the Indian child was improperly removed or custody improperly retained, unless such return would subject the child to imminent physical damage or harm. *Guidelines*, 80 Fed. Reg. 10155 at B.9.(b).

F138

Add as First full sentence of page:

Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. *Guidelines*, 80 Fed. Reg. 10156 at D.3.(c).

F138

Add as last sentence to paragraph before **TIP:**

Sections 1912(d)(active efforts to prevent breakup of the Indian family) and 1912(f)(proof beyond reasonable doubt that continued custody of the child is likely to result in serious emotional or physical damage to the child) do not apply in private adoption case where Indian father abandoned the child before birth and never had custody of the child. *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_, 133 S.Ct. 2552, 2552, 186 L.Ed.2d 729 (2013).

F138

Add as first sentence in first paragraph of **Placement Preferences section**:

ICWA provides that “no foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e).

F138

Add as new second sentence under second paragraph of **Placement Preferences section**:

The proponent of deviation from the preferences the burden of proving good cause by clear and convincing evidence. *Guidelines*, 80 Fed. Reg. 10158 F.4.(b).

F138–  
139

**Substitute for bullet points and add paragraph following bullet points in Placement Preferences section:**

- Request by the parent or child, if the child is able to understand and comprehend the placement decision;
- The extraordinary physical or emotional needs of the child, excluding any “ordinary bonding or attachment that may have occurred as a result of a placement;
- The unavailability of a placement which meets the preference *Guidelines*, even after active efforts have been made to find such a placement.

*Guidelines*, 80 Fed. Reg. 10158 F.4.(c)

“The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.” *Guidelines*, 80 Fed. Reg. 10158 F.4.(c)(2). The court may not consider a placement “unavailable” if it “conforms to the prevailing social and cultural standards of the Indian community.” *Id.*, at F.4.(c)(4). Likewise, the court may not deviate from the ICWA’s placement preferences “based on the socioeconomic status of any placement relative to another



placement.” *Id.*, at F.4.(d). Placement preferences do not apply in private adoption case where no alternative party has formally sought to adopt the child. *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_, 133 S.Ct. 2552, 2552, 186 L.Ed.2d 729 (2013).

F139

Add before **TIP**:

In *In the Interest of A.R.*, 310 P.3d 1007 (Colo.App. 2012), the Court of Appeals held the trial court was not required to apply ICWA placement preferences to its analysis of less drastic alternative, but the trial court erred in giving the department authority to consent to the adoption of the child but not the authority to place the child with Indian relatives because that order constituted a deviation from ICWA's placement preferences. The record was insufficient to support the trial court's finding of good cause to deviate from ICWA's placement preferences.

## INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

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F145

Change reference to 7.307.6(a) following bulleted findings to:

7.304.62(A).

F145

Change references to 7.307.62(B) in last paragraph (beginning with “Volume 7”) to:

7.307.64.

## INTERVENORS

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F149

At the end of the **Caregivers subsection** add the following:

Parents, grandparents, and relatives may intervene as a matter of right without regard to whether the child has been in their care. *People in Interest of O.C.*, 308 P.3d 1218, 1222 (2013). Foster parent intervention turns on the amount of time a child has been in their care and the foster parent's ability to inform the court about the "care and protection of the child." *A.M. v. A.C.*, 296 P.3d 1026, 1031 (Colo. 2013).

F149

Strike "Requesting Custody" from the title of subsection 2 (now entitled **Relatives**). Insert the following sentence as the first paragraph of the subsection:

Following adjudication, parents, grandparents, and relatives may intervene as a matter of right pursuant to § 19-3-507(5)(a) without regard to whether the child has previously been in their care or the amount of time the child has been in their care. *O.C.*, 308 P.3d at 1222.

F150

Delete first sentence of first paragraph and substitute the following sentence:

Individuals who meet the statutory criteria for intervention under § 19-3-507(5)(a) may participate fully in the termination hearing. *A.M. v. A.C.*, 296 P.3d 1026, 1033 (Colo. 2013). Such participation includes making opening statements, cross-examining witnesses, introducing evidence, making evidentiary objections, and giving closing argument in the termination of parental rights hearing. *Id.*, 296 P.3d at 1037-38.

F150

Add as second bullet point:

- "Preadoptive" foster parents have no legal rights to a child placed in their care and are not entitled to due processes concerning removal of the child from their care. *M.S. v. People*,

303 P.3d 102, 106 (Colo. 2013). The Court of Appeals has held that custodians do not have a fundamental liberty interest in the care, custody, and control of children after adoption decree was set aside as void. *M.C. v. Adoption Choices of Colorado, Inc.*, 2014 WL 64885660 at 15-17 (Colo. App. Nov. 20, 2014) cert. granted *In Interest of Baby A*, 2015 WL 1743170 (Colo. 2015).

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## JURISDICTIONAL ISSUES

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F154

Insert a new paragraph at the end of the **Initial Jurisdiction subsection**:

These four statutory grounds constitute the only basis for the court's exercise of initial jurisdiction under the UCCJEA. See *Madrone v. Madrone*, 290 P.3d 478, 482 (Colo. 2012)(rejecting intent of the parties to remain in Colorado as a test for jurisdiction under the UCCJEA).

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## MEDICAL AND DENTAL NEEDS OF CHILDREN IN CARE

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F173

In **HIV testing subsection**, change citations to 7.200.22 to:

7.608.

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## § 19-3-207

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F182

At the end of the **Admissions subsection**, add the following sentence:

The Court of Appeals has held that protections of this subsection apply only to formal admissions to allegations in the petition and not to testimonial statements. See *People v. Stroud*, 2014 COA 58.

## PARENTS' RIGHTS

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F187

Insert the following as a new paragraph prior to first full paragraph on the page (in **Representation by Counsel subsection**):

Erroneous denial of a respondent parent's right to counsel during a substantial part of a parental rights termination hearing will require application of an automatic reversible error standard. *See In Interest of R.D.*, 277 P.3d 889, 896 (Colo. App. 2012). Effectively dismissing counsel by precluding counsel from participating in a contested hearing in a parent's absence is a violation of a parent's statutory right to counsel. *See id.* at 893 (reversing order terminating parental rights).

F190

Change cite to 7.200.1(F) in **Treatment Plan subsection** to:

7.301.22.

## PREGNANT AND PARENTING TEENS

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F195

Change all references to 7.001.41 in **Title IV-E subsection** to:

7.601.81

## REASONABLE EFFORTS

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F203

In second sentence of the last paragraph, correct citation of § 19-3-115(7) to:

§ 19-1-115(7).

## RELATIVE AND KINSHIP PLACEMENT

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**F209** On the first line after “*see generally*” insert the following:

§19-1-103(78.7) (defining noncertified kinship care).

**F209** At the end of the partial paragraph beginning the page, add the following:

SB 15-087 expands the background check requirements of § 19-3-406 (emergency placement) and added § 19-3-407(non-certified kinship care) to include fingerprint-based and other background check requirements for relatives and kin, as well as adults residing in the home. *See* §§ 19-3-406 (1)(c), (2), (4.5); 19-3-407. The legislation requires the State Board to promulgate rules to effectuate these new provisions. The Court shall inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of a relative, and the department must share the results of the fingerprint-based background checks with the GAL pursuant to a court order. *See* §§ 19-3-203(2); 19-3-508(8).

**F209** At the end of the first sentence of the first paragraph of the **Certified Kinship Care subsection**, add the following cite:

*See also* §§19-1-103(71.3); 26-6-102(4.8)(defining kin).

**F210** Insert the following paragraph prior to the **TIP** at the end of the **Certified Kinship Care subsection**:

In December 2012, the State Board of Human Services promulgated rules pursuant to HB 12-1047. These rules give the authority to issue non safety licensing waivers to the county director or his or her designee, *see* 7.708.7, set forth procedures to be followed, *see* 7.708.1, and specify requirements that may or may not be waived, *see* 7.708.7, 7.708.73. They also allow the imposition of certain restrictions and requirements upon the

granting of a waiver. *See* 7.708.72. Consistent with the enabling legislation, prospective kinship and family placements cannot appeal a non-waiver decision. *See* § 16-6-106(6)(a)(I)(c); 7.708.74.

Insert the following additional paragraph:

SB 15-087 defines certified kinship care as “kinship foster care home” and codifies more stringent background checks for emergency placements and licensed foster homes, including kinship foster care homes. *See* § 26-6-102(4.9)(defining kinship foster care home); *see generally* §§ 19-3-406 (setting forth screening and background checks for emergency placements, including relatives and kin); 26-6-106.3–26.6-107 (setting forth procedure and requirements for kinship foster care homes). The State Board is required to promulgate rules to effect these provisions. The Court shall inquire about documentation of the required screening and background checks when entering a decree placing the child in the legal custody of the department, and the department must share the results of the fingerprint-based background checks pursuant to a court order. *See* §§ 19-3-203(2); 19-3-508(8).

F211

Add the following sentence to the end of the second bullet:

- The court shall inquire about documentation of the required screening and background checks when placing the child in the legal custody of a relative. § 19-3-508(8).

F216

Add the following subsection to the **Special Considerations section**:

**5. Intervention:** Parents, grandparents, and relatives may intervene as a matter of right without regard to whether the child has previously been in their care. *People in Interest of O.C.*, 308 P. 3d 1218, 1222 (2013). *See also* **Intervention fact sheet**.

## SIBLINGS

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F 218

In **Sibling, Biological, and Half-Sibling subsection**, eliminate reference to 7.000.5(AA).

F218

Add a new paragraph to the end of the **Pre-Placement Duties of the Department subsection**:

The Preventing Sex Trafficking and Strengthening Families Act provides for more expansive search of siblings by requiring the department to notify all parents of a sibling of the child, where such parent has legal custody of such sibling, in addition to other relatives. *See* P.L. 113-128 § 209 (amending 42 U.S.C. § 671(a)(29)). For the purpose of these provisions, sibling is defined to include individuals defined as siblings under state law as well as individuals who would have been considered a sibling of the child under state law but for a termination or other disruption of parental rights. *See id.* (adding 42 U.S.C. § 675).

F222

In **RGAP subsection**, change reference to 7.301.21 to:

7.311.21.

## TRANSITION TO ADULTHOOD AND INDEPENDENT LIVING

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F233

Add a new **subsection** to the **Overview of Relevant Federal Law** section:

### 3. Preventing Sex Trafficking and Strengthening Families Act

President Obama signed into law the Preventing Sex Trafficking and Strengthening Families Act on September 29, 2014. The bipartisan law seeks to protect foster children and improve the child welfare system by (1) preventing children/youth over whom the state has responsibility for placement, care, or super-

vision from becoming victims of sex trafficking, (2) creating normalcy for youth in foster care, (3) improving the permanency goal of Another Permanent Planned Living Arrangement (APPLA or OPPLA), and (4) increasing the amount of adoption incentive payments and improve guardianship subsidies. Among other changes, the act prohibits OPPLA as a permanency goal for children under the age of 16, requires documentation of intensive, ongoing and unsuccessful efforts for family placement for children with an APPLA goal, requires that children 14 years and older assist in the development of and be consulted about their case plan , and sets forth improvements in practice concerning youth participation in enrichment activities, youth empowerment during the case planning process and notification of youth rights.

**TIP:** While Colorado law already provides for some of the protections provided by this new federal legislation, the State Board of Human Services has amended some rules and is in the process of amending other rules as a result of this legislation. These changes and potential changes are noted in relevant sections of this **Fact Sheet**. Counsel should continue to monitor the Secretary of State's website for final promulgation of applicable rules.

F233

In **Extension of Court's Jurisdiction Until Age 21 section** add second **TIP:**

- ❖ **TIP:** The child must be adjudicated dependent or neglected prior to his or her eighteenth birthday. *See in Interest of M.C.S.*, 327 P.3d 360, 363 (Colo. App. 2014).

F233

In **Documentation of Assessment and Provision of Independent Living Services subsection** change the age of 16 to:

14

Additionally, note the change in terminology from “independent living plan” to:

“plan for successful transition to adulthood.” *See* P.L. 113-183 § 113 (amending 42 U.S.C. § 675(I)(D)).



F234

Replace first full paragraph on page and subsequent paragraph with the following:

For youth ages 14 and older, the family service plan must include a description of services and programs that will help the child prepare for the transition from foster care to successful adulthood. *See* P.L. 113-183 § 113 (amending 42 U.S.C. § 675(I)(D)). The child must be involved in the development of the plan and is entitled to select up to two members of the team developing the plan. *Id.* (adding 42 U.S.C. § 675(5)(a)(iii), (iv)). The department must provide the child with a document describing his or her rights with respect to education, health, visitation, and court participation. *Id.* (amending 42U.S.C. § 675a(b)). The State Board of Human Services is in the process of promulgating conforming rules.

F234

In **Required Court Findings subsection**, replace the age of 16 with:

14. *See* P.L. 113-183 § 113(b) (amending 42 U.S.C. § 675(5)(c)).

F235

Strike “ages 16 to 18” in the first sentence of the **Credit Check subsection** and replace with:

over the age of 16.

Insert the following sentence after the first sentence:

The department must inform the court of inaccuracies of the report and refer the matter to a nonprofit or governmental entity. *Id.* *See also* 7.305.2(E) (detailing procedures).

F235

Change citation to 7.305.2(E) to 7.305.2(F) in **Emancipation Transition Plans subsection**. Eliminate reference to 7.000.5.

F235

Add the following cite to the end of the first sentence in the **Vital Health Records and Other Required Records subsection**:

*See also* P.L. 113-183 § 114 (amending 42 U.S.C. § 675(5)(I)).

F236

In the **Medicaid subsection**, strike all language including and after “21” and replace with the following:

26. § 25.5-5-101(1)(e).

F236

Add the following **subsection**:

**7. Transition of Youth with Intellectual and Developmental Disabilities into the Adult System:** HB 14-1368 provides for the transition of youth with intellectual and developmental disabilities who are being served through the child welfare system into the home and community based programs for adults with developmental disabilities. *See generally* § 25.5-6-409.5. This legislation required the transition of youth over the age of 18 at the time of the legislation unless the court or an interdisciplinary team determined that due to extenuating circumstances such transition was not in the best interests of a youth. *See* § 25.5-6-409.5(2), (3)(a). Departments have ongoing responsibilities to identify children in the child welfare system with intellectual and developmental disabilities who will become 18 in the upcoming six months and to plan for their transition into the adult system prior to their eighteenth birthday. § 25.5-6-409.5(3)(b), (c). The best interests of the child must take precedence over any transition process. § 25.5-6-409.5(5).

F237

Add the following to the end of the **TIP in Independent Living Grants subsection**:

The State Board of Human Services is in the process of promulgating rules to expand the eligibility age for these services to ages 14-21. *See* 7.305.4. *et seq.*

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## VISITS

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F248

Add “and great-grandparents” after “grandparents” in the first sentence of the **Visits with Grandparents subsection**.