SUPREME COURT **STATE OF COLORADO** **2 East 14th Avenue** **Denver CO 80203** Opinion by the Court of Appeals Case No. 23CA1613 Trial Court Judge: Honorable Judge Bonnie H. McLean Case Number: 2023JV30006	DATE FILED December 10, 2024 8:29 PM FILING ID: B2D96382237FC CASE NUMBER: 2024SC337
R.G., **Petitioner** **v.** **THE PEOPLE OF THE STATE OF COLORADO,** **In the Interest of** **C.G. and N.G.,** **Children.**	**□ COURT USE ONLY□**
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JOINT ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with all requirements of C.A.R. 56 and the applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

I. The brief does comply with the applicable word limits set forth in with C.A.R. 28(g) or C.A.R. 28.1(g).

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II. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)A) and/or C.A.R. 28(b).

☐ **For each issue raised by the appellant**, It contains under a separate heading before the discussion of the issue a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☒ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement of whether such party agrees with the appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Original Signature on File	/s/ Original Signature on File
Jordan Lewis	Sheena Knight

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INTRODUCTION

This case concerns a straightforward question of whether a respondent parent may impliedly waive their statutory right to a jury trial in a dependency and neglect adjudication when they fail to appear for trial, even if their attorney appears. Pursuant to the Colorado Rules of Civil Procedure, established law about how statutory rights may be waived, and the circumstances presented here, the answer to that question is yes. C.R.C.P. 39(a)(3) allows a trial court to find a party waives their right to a jury trial when they fail to appear for trial, and the record here supports the trial court's finding that Mother voluntarily waived her statutory right to a jury trial after its repeated efforts to inquire as to Mother's whereabouts and the circumstances concerning her absence before converting the jury trial into a bench trial.

Evaluating whether Mother waived her right to a jury trial here is no different from evaluating a waiver of any other statutory right. It is well-established that a waiver of a statutory right must be voluntary but, unlike a waiver of a constitutional right, it "need not be knowing and intelligent." *People in Interest of B.H.*, 2021 CO 39, ¶69 (quoting *Finney v. People*, 2014 CO 38, ¶16). Waivers of statutory rights may be implied, and an "[i]mplied waiver requires a person to 'engage[ ] in conduct which manifests an intent to relinquish that right' ***or*** to 'act[ ] inconsistently with its assertion.'" *Id.* at ¶67 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo.

1984)) (emphasis added). A parent's failure to appear for their jury trial without explanation when they had notice of the trial and when the trial court cannot glean any information suggesting a reason for the absence that is consistent with the assertion of that right means the trial court may conclude the parent has impliedly waived their statutory right to a jury trial. This is what happened here.

ISSUE PRESENTED FOR REVIEW

Whether the division erred in concluding that, under C.R.C.P. 39(a)(3), Mother waived her right to an adjudicatory jury trial when she did not appear for the scheduled jury trial, but her counsel was present and ready to proceed.

STATEMENT OF THE CASE

A Petition – Dependent or Neglected Children (hereinafter "the Petition") regarding the Minor Children, C.G. and N.G., was filed on January 6, 2023. The Petition alleged both C.G. and N.G. had missed significant periods of school, police had responded to the family home on more than one occasion due to altercations between Mother and Father, and both parents had untreated mental health concerns. CF, pp 1-18. The Petition alleged the children lacked proper parental care through the actions or omissions of their parents, the children were in an injurious environment, and the parents failed or refused to provide proper or necessary

subsistence, education, medical care, or any other care necessary for the children's health, guidance or well-being. CF, p 12. Father admitted to the allegations in the Petition, but Mother requested a jury trial. Mother failed to appear at the jury trial she requested, and her trial was converted to a bench trial. TR 7/19/23 (J. Toussaint), p 17:19-22. After the bench trial, the children were adjudicated as to Mother. Mother appealed.

A. Relevant Facts

1. Mother's Request for a Jury Trial

Mother requested a jury trial which was initially set for May 30 and May 31, 2023. TR 3/20/23, p 16:6-8. At a status conference on April 20, 2023, Mother's counsel represented to the trial court that Mother would be prepared to proceed to trial as scheduled. TR 4/20/23, p 17:23-24. Mother appeared in person for a pre-trial conference on May 18, 2023. TR 5/18/23, p 4:11-13. At that hearing, the trial court appointed an adult GAL for Mother and continued the jury trial to July 19 and July 20, 2023. TR 5/18/23, p 17:22-24. At a pre-trial conference on July 10, 2023, Mother once again declared she would be ready for the jury trial. TR 7/10/23, p 5:18-22.

2. Mother's Request for ADA Accommodations

On May 9, 2023, Mother filed an Americans with Disabilities Act (hereinafter "ADA") notice with the trial court, requesting an accommodation that the Arapahoe

County Department of Human Services (hereinafter "ACDHS") provide transportation for her to court. CF, p 96. Notably, nowhere in the ADA notice did Mother explain how or why her diagnoses of schizophrenia, schizoaffective disorder, and PTSD impacted her ability to travel. No other accommodations were requested. Mother asked ACDHS to arrange transportation for her to the trial, and noted ACDHS paying for Ubers had been working well for her. TR 7/10/23, p 6:1-15. Mother's counsel stated that paying for the Uber to get to the trial would be appropriate. *Id.*

3. Mother's Failure to Appear at the Jury Trial

Although the jury trial was set to start at 9AM on July 19, 2023, the parties were instructed to appear at 8:30AM to address pre-trial issues. TR 7/10/23, p 25:2-10. Mother did not appear on the morning of July 19, 2023. TR 7/19/23 (J. Toussaint), p 5:4-21. Mother's counsel indicated to the trial court he had been unable to contact Mother the morning of trial, but he had spoken to her the night before. *Id.* p 6:20-21. As Mother requested, ACDHS sent an Uber to pick her up for the jury trial. *Id.* pp 10:16-11:11. The Uber arrived at Mother's house, attempted to contact her for ten minutes, and eventually left after Mother failed to enter the Uber or contact the Uber driver. *Id.* p 11:4-11.

The People, the Guardian ad Litem/Counsel for Youth (hereinafter

"GAL/CFY") and Mother's counsel all made arguments to the trial court about what should happen with the jury trial given Mother's failure to appear. All parties agreed that the relevant law was *People in Interest of C.C.*, 2022 COA 81 and C.R.C.P. 39. TR 7/19/23 (J. Toussaint), pp 6:7-10:14.

At 8:53AM, the trial court went off the record to read *C.C.* and recalled the case at 9:37AM. TR 7/19/23 (J. Toussaint), p 12:14. When the trial court returned, Mother's counsel stated he had missed a call from Mother before 8:00AM. Mother left a nineteen-second voicemail message stating she was trying to get a hold of her attorney, but the voicemail message did not have any information about why she was not at the trial. *Id.* pp 12:22-13:17; 16:15-21. Mother reportedly sounded very tired or sick, and her GAL was concerned about Mother after hearing the message. *Id.* pp 12:22-13:17. Mother's counsel attempted to reach her during the break but was unable to. *Id.* p 13:8-12. The trial court attempted to call Mother, but Mother did not answer. *Id.* p 16:2-8.

The trial court, after reading *C.C.*, determined it would give Mother until 10:00AM—ninety minutes after the parties, including Mother, were to be present in court—to get in contact with someone. TR 7/19/23 (J. Toussaint), p 17:19-22. At 10:00AM, the trial court, relying on *C.C.*, found Mother had waived her right to a jury trial by failing to appear. *Id.* p 19:4-11. The trial court sent the case to another

division to conduct a bench trial. *Id.* p 20:3-8. In front of the new judge, Mother's counsel again requested to continue the trial. The new trial court denied this request but set the trial over the next two days via Webex in hopes Mother would appear. TR 7/19/23 (J. McLean), p 7:7-15. She never did.

4. Information Provided to the Trial Court After the Conversion to a Bench Trial

Mother's counsel successfully contacted Mother between the first and second day of the bench trial. At the start of the second day, Mother's counsel represented to the court that Mother was having phone troubles the morning of the jury trial. TR 7/20/23 (J. McLean), p 4:21-23. Mother's counsel did not provide any additional information about Mother's wellbeing or discuss any other impediment to Mother appearing at the jury trial.

Mother also never appeared for the second day of the court trial. Mother's counsel stated Mother had a dental appointment and thus she would not be appearing. TR 7/20/23 (J. McLean), pp 4:18-5:16. Based on the dental appointment, Mother's counsel requested a continuance. The trial court, noting Mother was supposed to be in court for a jury trial and there was no documentation to support that Mother had a dentist appointment, denied the continuance. TR 7/20/23 (J. McLean), pp 4:5-15. After an evidentiary hearing, the trial court adjudicated the minor children as to Mother. Mother never appeared for any part of the trial.

B. Lower Court Arguments and Rulings

On appeal, Mother argued the trial court erroneously found Mother waived her right to a jury trial and converted the adjudicatory jury trial to a bench trial. *See generally Mother's COA Opening Brief*. Mother contended the trial court misapplied C.R.C.P. 39(a) in reaching this conclusion and should have proceeded with the jury trial even in Mother's absence because Mother's counsel was present. *Id.* Notably, Mother never argued C.R.C.P. 39 should not apply or Mother's due process rights were violated by converting the jury trial into a bench trial or that her rights under the ADA had been violated.

A division of the Court of Appeals rejected Mother's arguments, concluding Mother waived her statutory right to a jury trial under C.R.C.P. 39(a). *People in the Interest of C.G. and N.G.*, 23CA161, ¶¶16-26 (Colo. App. April 18, 2024) (unpublished) ("*COA Opinion*"). Specifically, the division first analyzed the plain language of C.R.C.P. 39(a)(3), which provides that after a jury trial has been demanded: "The trial shall be by jury of all issues so demanded **unless** … (3) all parties demanding trial by jury fail to appear at trial." C.R.C.P. 39(a)(3) (emphasis added); *see also COA Opinion*, ¶¶15-18. In addressing Mother's argument that the appearance of her counsel did not waive her right to a jury trial under C.R.C.P. 39(a)(3), the court noted "C.R.C.P. 39(a)(3) provides that a waiver of a jury trial

occurs when a *party* fails to appear," and "[a] *person* named a respondent" is defined as "a *party* to the proceeding" under § 19-3-502(5.5)(a), C.R.S. *COA Opinion*, ¶16 (emphasis in *COA Opinion*). "Thus, when read together, C.R.C.P. 39(a)(3) and section 19-3-502 provide that a respondent parent – in this case, mother – is a party to the dependency and neglect proceeding and her failure to appear could result in a waiver of a jury trial." *Id*. The court therefore determined an appearance solely of counsel without Mother did not equate to the appearance of a party under the plain language of C.R.C.P. 39(a)(3). *Id*.

The appellate court also applied *People in Interest of C.C.*, 2022 COA 81, to uphold the trial court's finding that Mother's waiver was voluntary. *Id*. at ¶¶19-22. The division noted the trial court's factual findings in support of this conclusion, including: Mother was over an hour late for trial; ACDHS provided a rideshare service, which Mother did not use; although Mother left a voicemail for her counsel, she did not disclose whether she was sick or could not come to trial; the trial court attempted to contact Mother, but she did not answer; the trial court gave counsel additional time to call Mother, who did not answer her phone, contact her attorney, or arrive in court. *Id*. at ¶20. The division thus concluded "the juvenile court properly followed the instructions in *C.C.*," which requires a trial court to "first inquire regarding (1) 'the parent's whereabouts' and (2) 'the circumstances concerning [the]

absence.'" *Id*. at ¶14 (quoting *C.C.*, ¶ 18) & ¶22. The division noted, "mother's counsel provided no information to the juvenile court regarding mother's whereabouts and if her arrival was imminent" and did not "provide any concrete reason for mother's absence." *Id*. at ¶22. As a result, the record supported the trial court's determination that Mother "had voluntarily waived her right to a jury trial." *Id.* at ¶23.

On August 19, 2024, this Court accepted Mother's *Petition for Writ of Certiorari*, which again argued the lower courts misapplied C.R.C.P. 39(a) and contended a party does not fail to appear in a dependency and neglect action where their counsel is present. Mother's *Petition for Writ of Certiorari*. After this Court accepted Mother's appeal, Mother's opening brief argues, *for the first time*, that C.R.C.P. 39 does not apply in dependency and neglect actions and the lower courts erred in applying those rules. *See Mother's Opening Brief* at 10-21. Mother also, for the first time, argues the lower court rulings unlawfully discriminated against her under the ADA and infringed upon her due process and equal protection rights. *Id*. at 28-42. An amicus brief, filed in support of Mother, raises similar arguments under the ADA and the constitution that were not presented to the lower courts.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly conducted a two-prong analysis to affirm the

trial court's conversion of Mother's jury trial to a bench trial. First, the division correctly determined C.R.C.P. 39(a)(3) applies to dependency and neglect actions, and its plain language provides a party may waive their right to a jury trial if they fail to appear, even if their counsel appears. Second, even where a party fails to appear for their jury trial, the court must also evaluate whether the party has voluntarily waived their statutory right to a jury trial. The division here correctly concluded the record supported Mother's implied waiver of her statutory right to a jury trial.

Unlike waivers of constitutional rights, which must be "knowing and intelligent," a waiver of a statutory right need only be voluntary. *B.H.*, ¶69. A waiver of a statutory right may also be explicit **or** implicit, and implicit waivers of statutory rights occur "through freely chosen conduct that clearly manifests an intent to relinquish the right ***or*** *is inconsistent with its assertion.*" *Id.* at ¶70 (emphasis added). Here, the trial court "inquir[ed] … about the parent's whereabouts and the circumstances concerning her absence before converting a jury trial to a bench trial." *C.C.*, ¶18; *see also COA Opinion*, ¶¶20-25. Where Mother had clear notice of her scheduled jury trial and failed to appear for over an hour, failed to use the rideshare service provided, failed to provide any information to her counsel or the court regarding her whereabouts or reason for her absence, and failed to answer repeated

phone calls, it was reasonable to conclude this conduct is inconsistent with an assertion of a right to a jury trial. *Cf. B.H.*, ¶70. Accordingly, the record supports the trial court's finding that Mother impliedly waived her statutory right to a jury trial.

Further, this conclusion was not unconstitutional and did not violate Mother's rights under the ADA. Not only did Mother not preserve these arguments, but they are unsupported by the record and conflate the waiver of a constitutional right with a statutory one. This Court should uphold the division's conclusion Mother waived her statutory right to a jury trial under C.R.C.P. 39(a)(3), even when her counsel was present, and it should affirm the constitutionality of the test articulated under *C.C.*, which provides useful guidance to lower courts in evaluating the voluntariness of a parent's waiver under C.R.C.P. 39. In doing so, the Court should recognize that members of the community should not be required to appear for jury duty and sit through a trial where the parent cannot be bothered to attend.

ARGUMENT

I. The Court of Appeals Correctly Upheld the Trial Court's Determination that Mother Waived Her Statutory Right to a Jury Trial under C.R.C.P. 39(a) when She Failed to Appear at her Jury Trial Even Though Her Counsel was Present.

A. Preservation of the Record and Standard of Review.

The People and the GAL/CFY agree Mother preserved the issue of whether she waived her right to a jury trial under C.R.C.P. 39(a) and whether that waiver was

voluntary. Mother, however, did not preserve arguments she now makes in her opening brief—namely that C.R.C.P. 39(a)(3) does not apply to dependency and neglect actions or that the conversion of her jury trial into a bench trial violated the ADA and her constitutional rights. *See Est. of Stevenson v. Hollywood Bar & Cafe, Inc.* 832 P.2d 718, 721 n. 5 (Colo. 1992) ("Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal."); *see also Bermel v. BlueRadios, Inc.*, 2019 CO 31, ¶18 n. 4 (declining to address argument, "which asserts both a new and independent ground for barring this claim" and noting the argument was "beyond the scope of the question for which we granted certiorari review [and] appeared nowhere in Bermel's petition to this court.").[1]

The People and the GAL/CFY partially agree with the Standard of Review contained within Mother's Opening Brief. The construction of a law or statute, to include the Colorado Rules of Civil Procedure, is to be reviewed *de novo. People in Interest of L.M.,* 2018 CO 34, ¶13; *People in Interest of J.G.,* 2016 CO 39, ¶ 13. As

[1] The limited issue certified by this Court stems from whether <u>*under*</u> C.R.C.P. 39(a)(3), Mother waived her right to an adjudicatory jury trial. Mother did not argue to the court of appeals nor in her petition to this Court that Rule 39 does not apply or that her constitutional rights or rights under the ADA were violated. Because these arguments were never presented to the trial court or the court of appeals, this Court should not entertain them here.

to the specific issue of whether Mother waived a statutory right, that presents a mixed question of fact and law. *B.H.,* ¶ 50. The court's findings of fact should be upheld if those factual findings are supported by the record; however, the legal significance of those factual findings shall be reviewed *de novo. Id.*; *People ex rel. A.J.L.,* 243 P.3d 244, 249-250 (Colo. 2010).

B. The Court of Appeals Correctly Concluded C.R.C.P. 39(a)(3) Applies to Dependency and Neglect Actions, and its Plain Language Provides a Party May Waive Their Right to a Jury Trial if They Fail to Appear.

1. C.R.C.P. 39 governs waivers of jury trials in dependency and neglect proceedings.

"Dependency and Neglect proceedings are civil in nature." *People ex rel. Z.P.,* 167 P.3d 211, 214 (Colo. App. 2007). Dependency and neglect actions are governed by the Colorado Children's Code and the Colorado Rules of Juvenile Procedure. *See generally People in Interest of K.J.B.,* 2014 COA 168. "Generally, the Colorado Rules of Civil Procedure apply to those juvenile matters that are not governed by the Colorado Rules of Juvenile Procedure or the Children's Code." *Id.* ¶9*; see also* C.R.J.P. 1.

The Colorado Children's Code provides: "[A]ny respondent … may demand a trial by jury of six persons at the adjudicatory hearing…." C.R.S. § 19-3-202(2). No further details regarding the mechanics of jury trials or how to waive the right to

a jury trial are included in the Children's Code. Under C.R.J.P. 4.3(a), "at the time the allegations of a petition are denied, a respondent…may demand…a jury of not more than six. Unless a jury is demanded or ordered, it shall be deemed waived." C.R.J.P. 4.3 is silent as to how a jury trial could be waived after the demand for a jury trial is made. Accordingly, because neither the Children's Code nor the Colorado Rules of Juvenile Procedure provide guidance regarding waivers of a jury trial after a demand is made, the Colorado Rules of Civil Procedure govern. *See K.J.B.,* ¶9; C.R.J.P. 1.

Mother now argues for the first time that C.R.C.P. 39 does not apply notwithstanding the long-established law applying the Rules of Civil Procedure to juvenile matters where the Rules of Juvenile Procedure are silent and notwithstanding her previous position, including in her Petition for Certiorari, acknowledging the application of C.R.C.P. 39 to dependency and neglect matters. *Compare Mother's Opening Brief* at 21 (arguing because § 19-3-202(2), C.R.S., does not include a provision for waiving a jury trial, C.R.C.P. 39 should *not* apply) *with Mother's Petition for Writ of Certiorari* at 9 ("The Rules of Juvenile Procedure make clear that the Rules of Civil Procedure also apply to the proceedings in areas where the Rules of Juvenile Procedure or the Children's Code are silent."), 10 (affirmatively arguing in the heading that "a parent may only forfeit her jury trial

right for the reasons enumerated in C.R.C.P. 39"), & 11-15 (arguing how to interpret and apply C.R.C.P. 39(a)). Because Mother never previously argued C.R.C.P. 39 does not apply here, the Court should not entertain this new argument.

Moreover, courts have repeatedly and consistently applied C.R.C.P. 39 to evaluate whether a respondent parent waives their statutory right to a jury trial. *See, e.g., People in Interest of J.R.M.,* 2023 COA 81 (overturning trial court's conclusion mother waived her right to a jury trial after she failed to appear at a pretrial conference because such a finding was inconsistent with C.R.C.P. 39's waiver provision for a failure to appear *at trial*); *C.C*, ¶12 (reversing juvenile court's conversion of jury trial into bench trial where mother was ten minutes late to her trial and applying C.R.C.P. 39(a)); *People In Interest of S.M.J.*, 24CA0436, ¶11 (Colo. App. Oct. 3, 2024) (unpublished) (examining C.R.C.P. 39(a) and affirming juvenile court's conversion of jury trial into a bench trial because the record indicated mother had notice of the scheduled jury trial and voluntarily failed to appear); *People in Interest of R.R.S.*, No. 23CA2219, ¶9 (Colo. App. Aug. 1, 2024) (unpublished) (applying C.R.C.P. 39(a) in affirming juvenile court's conversion of jury trial into bench trial); *People in Interest of C.C.M.*, No. 23CA1691, ¶7, (Colo. App. Apr. 4, 2024) (unpublished), *cert granted in part,* 24SC301 (2024) ("the waiver of a jury trial in dependency and neglect adjudications is controlled by C.R.C.P. 39(a).").

Not only does Mother's newly-found position seek to overturn this precedent, but her argument that the only way to waive a jury trial in a dependency and neglect case is by failing to demand a jury trial in the first place is unsupported. *See Mother's Opening Brief, pp 18-22.* While the Colorado Rules of Juvenile Procedure do specifically provide *one* option to waive a jury trial by failing to demand one when a parent denies the allegations in the petition, the Colorado Rules of Juvenile Procedure do not state that a parent is unable to waive their right to a jury trial later in the case. Similarly, the Colorado Children's Code is also silent as to the issue of a parent's waiver of their right to a jury trial after their initial demand for a jury trial.

Reading the rules and statutes as Mother encourages this Court to do would lead to untenable and unintended outcomes. Mother's reading would prevent parents from later electing to proceed with a bench trial if they have a change of heart after initially requesting a jury trial. Mother's reading would force parents to move forward with a jury trial even if they wished to admit to the allegations in the petition in dependency and neglect after initially requesting a jury trial. Similarly, Mother's argument would lead to the conclusion that a jury trial still must occur if the parent and the parent's counsel both fail to appear. *Cf. McBride v. People*, 2022 CO.30, ¶23 ("we avoid [statutory] constructions that would render any words or phrases superfluous or lead to illogical or absurd results."). Mother's reading would lead to

illogical and absurd results and should accordingly be rejected.

2. The plain language of C.R.C.P. 39(a)(3) allows for a waiver if a *party* does not appear for trial.

The plain language of C.R.C.P. 39(a)(3) provides for a jury trial *unless the party demanding a jury trial* fails to appear at the jury trial. Mother ignores this plain language and fails to address the reasoning articulated by the Court of Appeals by arguing an appearance solely of her counsel is sufficient to avoid waiving her right to a jury trial. *See COA Opinion*, ¶15 ("Because the plain language of the rule does not support mother's assertion, we reject it."). Specifically, the appellate panel looked to the definitions within the Children's Code, which defines a *party* to the proceeding as a "*person* named a respondent" and concluded that "when read together, C.R.C.P. 39(a)(3) and section 19-3-502 provide that a respondent parent – in this case, mother – is a party to the dependency and neglect proceeding, and her failure to appear could result in a waiver of a jury trial." *Id*. ¶16. The court further reasoned: "If the drafters of the rules intended that a waiver would occur only when the party *and* counsel failed to appear, they would have said so explicitly." *Id.; see also In re People in Interest of A.T.C.,* 2023 CO 19, ¶16 ("In construing a statute, we may not add words to it.").

Mother ignores this reasoning and the plain language of C.R.C.P. 39(a) and

instead cites to inapposite language in cases addressing whether a parent has a right to be present at a termination of parental responsibilities hearing. *See Mother's Op. Br.* at 23 (citing *People in Interest of C.G.*, 885 P.2d 355, 357 (Colo. App. 1994) and *People in Interest of V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989)). These cases highlight that dependency and neglect actions are civil actions where parents do not have a constitutional right of confrontation and therefore do not need to be present for trial and may appear through their attorneys—but a lack of a right to confrontation does not translate into a higher threshold to waive a statutory right to a jury trial. Indeed, these cases do not address a waiver of a jury trial or waivers of any statutory right and therefore have no bearing on the issue here.

Ultimately, Mother's arguments do not address the plain language of C.R.C.P. 39(a)(3), which specifically allows the trial court to find a waiver of a jury trial if the party demanding the jury trial fails to appear. In dependency and neglect proceedings, the attorney and the client are not interchangeable. To say otherwise would again lead to absurd outcomes. For example, a parent surely could not appear through counsel to participate in family time. A parent cannot appear at therapy sessions through counsel. A parent cannot send their counsel in their place to complete drug testing. If a parent is called as a witness, they cannot send their counsel to testify in their place. Throughout dependency and neglect cases, parties,

not their counsel, have obligations they must meet themselves. C.R.C.P. 39(a)(3) makes clear one of these obligations is appearing at a jury trial that the parent, as the party to the case, demanded.

C. The Court of Appeals Correctly Concluded the Record Supported the Trial Court's Finding Mother Waived her Statutory Right to a Jury Trial.

Because dependency and neglect proceedings are civil in nature, "the Colorado Constitution does not guarantee the right to jury trials in these cases." *J.R.M.,* ¶8 (citing *People v. Johnson,* 2017 COA 11, ¶32 and *C.C.,* ¶11). "But the General Assembly has granted parents a statutory right to demand a jury trial at the adjudicatory hearing phase of dependency and neglect cases." *C.C.*, ¶11 (citing § 19-3-202(2), C.R.S.). Importantly, in contrast to waivers of constitutional rights, waivers of statutory rights "must be voluntary, but need not be knowing and intelligent." *B.H.*, ¶69; *see also J.R.M.*, ¶9 ("A party may waive the right to a jury trial, either expressly or impliedly, but the waiver must be voluntary.").

This Court's opinion in *B.H.* is instructive. There, one of the issues was whether father had waived his *statutory* right to court-appointed counsel in a dependency and neglect termination proceeding, explaining "the waiver of a statutory right is effective if it is the product of a free choice, regardless of whether the holder has the 'information legally relevant to the making of an informed

decision' and is 'fully aware of what he is doing.'" *B.H.,* ¶69 (quoting *People v. Walker,* 2014 CO 6, ¶16). "Thus, a person impliedly waives a statutory right through freely chosen conduct that clearly manifests an intent to relinquish the right **or** is inconsistent with its assertion." *Id.,* ¶70 (emphasis added). This Court in *B.H.* upheld the juvenile court's determination that father impliedly waived his statutory right to court-appointed counsel, reasoning: "Threatening to kill one court-appointed lawyer and then failing to cooperate with the replacement is clearly inconsistent with asserting the right to appointed counsel." *Id*. ¶74.

Here, Mother's actions were likewise inconsistent with asserting her right to a jury trial. Specifically, Mother was present when she made the demand for the jury trial and was present when the jury trial was scheduled. TR 5/18/23, p 4:11-13; 17:22-24; CF, pp 121-23. Other than leaving one short voicemail, Mother had not been in contact with her counsel the morning of the jury trial. TR 7/19/23 (J. Toussaint), p 6:20-21. Mother's counsel made several attempts to contact Mother but was unsuccessful. *Id.* p 13:8-12. The trial court even made attempts on the record to contact Mother. Again, those attempts were unsuccessful. *Id.* p 16:2-8.

ACDHS had also provided Mother with transportation to the courthouse on the day of the jury trial, as requested by Mother in her ADA notice. CF, p 96; TR 7/19/23 (J. Toussaint), pp 10:16-11:11. The only information regarding Mother's

whereabouts provided to the trial court was Mother was not present, no one knew why Mother was not present, and Mother had left a voicemail for her counsel earlier in the morning. TR 7/19/23 (J. Toussaint), pp 6:20-21; 12:22-13:17. Within the voicemail Mother left for her counsel, Mother provided no information regarding the reasons for her absence. She provided no information regarding any basis for not attending court that morning or any exigent circumstances preventing her from being able to appear at the jury trial she demanded.

While Mother's counsel and her GAL speculated Mother was possibly ill, there was no evidence or information before the trial court establishing Mother was experiencing any kind of illness or emergency rendering her unable to attend the jury trial. TR 7/19/23 (J. Toussaint), pp 12:22-13:17; *see also COA Opinion*, ¶¶22-24. Nonetheless, the trial court waited ninety minutes to see if Mother would appear or contact her counsel before converting the jury trial to a bench trial. Mother's failure to appear, failure to use the rideshare service provided to her, failure to answer her phone or contact her attorney, and failure to communicate any reasons why she was not present evinced a waiver of her statutory right to a jury trial because these actions were inconsistent with her asserting a right to a jury trial.

In concluding Mother had waived her right to a jury trial, the trial court relied on *C.C.*, which articulates the test for evaluating a waiver of a statutory right to a

jury trial. In *C.C.*:

> The mother's counsel and GAL were present when the trial was scheduled to start, and before dismissing the jurors, the court did not even ask the mother's counsel or GAL why the mother was running late or whether they wanted to proceed in her absence. Instead, the court waited a mere ten minutes after the scheduled start time and then released the jurors.
>
> *Under these circumstances*, we conclude that the mother's failure to appear for trial on time did not constitute a waiver – either express or implied – of her statutory right to a jury trial. In reaching this conclusion, we do not suggest that a parent can never waive her right to a jury trial by being late. However, *before a court determines whether a waiver has occurred, it should inquire further about the parent's whereabouts and the circumstances concerning her absence before converting a jury trial to a bench trial* … The court failed to make such inquiries or accommodations, and while its concern about inconveniencing the jurors was understandable, it was an insufficient reason to overcome the mother's statutory right to a jury trial.

C.C., ¶¶17-18 (emphases added).

In contrast to *C.C.*, the juvenile court here made repeated efforts to ascertain Mother's whereabouts and the circumstances concerning her absence. *See COA Opinion*, ¶20 (outlining findings the juvenile court made supporting its conclusion Mother had waived her statutory right to a jury, including: Mother was over an hour late; Mother did not use the rideshare service the ACDHS provided; Mother contacted her counsel but did not disclose if she was sick or could not come to trial; Mother's counsel and GAL were concerned by the tone of her voice that "she was sick or something towards that effect"; the court unsuccessfully attempted to call

Mother around 9:40 a.m.; and the court granted counsel additional time to call her, but she never answered, contacted her attorney, or arrived in court).[2] Based on these findings, the appellate panel correctly concluded the trial court's factual findings supported a conclusion that Mother voluntarily waived her statutory right to a jury trial under C.R.C.P. 39(a)(3): "[M]other's counsel provided no information to the juvenile court regarding mother's whereabouts and if her arrival was imminent. Nor did counsel provide any concrete reason for mother's absence." *COA Opinion*, ¶¶22-23.

The guidance in *C.C.* is straightforward, easy to implement, and protects a parent's statutory right to a jury trial by requiring a trial court to consider the

[2] The lack of any exigent circumstances was reinforced on the second day of the bench trial when Mother reported she was having phone issues. TR 7/20/23 (J. McLean), p 4:21-23. This explanation undermines counsel's previous speculation that Mother had been ill and unable to appear. It is also contradicted by Mother's own phone call to her attorney at approximately 8:00 AM on the day the jury trial was set to commence, and it does not explain why Mother was unable to be at the courthouse in person, especially when ACDHS arranged transportation to pick Mother up and bring her to the courthouse. Mother also informed her attorney she had scheduled a dentist appointment and would not be present for the second day of trial. TR 7/20/23 (J. McLean), pp 4:15-5:16. Again, there was no indication that this dental appointment was emergent in nature. Ultimately, Mother failed to appear at any point during the two-day adjudicatory bench trial.

circumstances of a parent's absence before converting a jury trial to a bench trial. It ensures a trial court does not find a parent has waived their right to a jury trial by simply being a few minutes late or due to legitimate circumstances beyond the parent's control, thereby protecting a parent's due process and statutory rights. At the same time, *C.C.*'s guidance recognizes that, pursuant to C.R.C.P. 39(a)(3), parents are required to appear at the jury trials they demand, and it allows for conversion of the jury trial to a bench trial in circumstances in which a parent simply fails to appear without explanation—behavior that is inconsistent with asserting the right to a jury trial and evinces an implied waiver. Mother invites this Court to eschew the guidance in *C.C.* and overturn several appellate cases relying on C.R.C.P. 39(a)(3) in this context and simply conclude a parent does not need to appear when they are the party who demanded the jury trial.

Such an outcome—requiring jury trials even where parents voluntarily waive their right to one—would result in clogged dependency and neglect dockets and ultimately hinder the juvenile courts' ability "to proceed with all possible speed to a legal determination that will serve the best interests of the child" in other cases. *K.D. v. People*, 139 P.3d 695, 698-99 (Colo. 2006). For example, in 2024, Arapahoe County has averaged over 400 open dependency and neglect cases at any given time. The County has one full time dependency and neglect judge and one whose docket

is dedicated to these matters half-time. These limited judicial resources result in calendaring multiple hearings and trials on top of each other. *See, e.g.,* TR 7/19/23 (J. Toussaint), pp 19:12-20:2 (after converting the jury trial to a bench trial, the trial court continued with a termination docket, set at the same time). If jury trials must go forward despite a parent's absence where the court follows the procedure under *C.C.* to ensure the parent has voluntarily waived their statutory right, it would unnecessarily place further strains on the limited judicial resources by requiring judges to conduct full jury trials and requiring members of the community to appear for jury duty even when parents cannot be bothered to attend their own trials. Such a result does nothing to preserve a statutory right when a parent has already waived it and instead only serves to hinder the efficient use of judicial resources and require juries to sit through a trial the parent has opted not to attend.

D. The Trial Court Did Not Violate the ADA or Mother's Constitutional Rights by Concluding She Waived her Statutory Right to a Jury Trial.

Preliminarily, the Court need not address these issues because they were not preserved. *See discussion supra at* 19. However, even if they were preserved, the ADA does not apply here because Mother's argument is unsupported by the record and improperly requires the trial court to *sua sponte* diagnose a disability and to determine any appropriate accommodations, placing the onus on the court instead of

the party. Further, Mother's constitutional rights were not violated because Mother received fair procedures in the lower courts' evaluation of whether she waived a *statutory* right. Mother's implicit argument that *C.C.*'s guidance is unconstitutional should be rejected.

The ADA prohibits a public entity from discriminating against a qualified individual with disabilities. It is well established the ADA applies in dependency and neglect proceedings. 42 U.S.C. §§ 12131-12134; *People in Interest of S.K.,* 2019 COA 36, ¶¶17-22. Although the ACDHS and the trial court must provide reasonable accommodations for a qualified individual, it is the parent's responsibility to disclose to the trial court the necessary information regarding his or her disability, including any reasonable accommodation he or she believes to be necessary. *S.K.,* ¶21. Here, Mother filed an ADA Notice alerting the trial court of a disability and outlined the accommodations she believed to be necessary to adequately accommodate her. Specifically, Mother requested an accommodation of transportation to and from court proceedings. ACDHS ensured that accommodation was made available, and transportation was arranged for Mother for the jury trial.

Mother asserts "the record suggests that Mother was experiencing confusion on the morning of her trial as a result of her mental health related disabilities, which precluded her in-person attendance." *See Mother's Opening Brief, pp 34-35.*

However, Mother fails to cite to the record to support this assumption that her absence was a result of her mental health and further fails to address the appellate panel's conclusion that "mother cannot point to anything specific in the record that would necessarily lead to one or more of these conclusions [that Mother "was confused about where she needed to be and how to get there," "was unaware of when her trial was scheduled to take place," or erroneously believed the transportation provided for her "was fraudulent or illegitimate."]. *COA Opinion*, ¶24. All information in the record related to Mother's mental health on the morning of the jury trial is mere speculation from Mother's counsel and her GAL based on how Mother sounded in the voicemail she left for her counsel.[3] These assumptions were not based on any specific statements from Mother but merely based on her tone of voice. Not only does the record not support Mother's assumptions, but the trial court is entitled to deference regarding its factual findings where they are supported by the record. *B.H.,* ¶ 50.

Furthermore, Mother's argument her rights under the ADA were violated by converting the jury trial into a bench trial would require trial courts to *sua sponte*

[3] This speculation is further contradicted by Mother's subsequent call to her attorney, in which she blamed phone troubles for her absence and explained her further absence was due to a dental appointment without claiming any illness or mental health issues. *See discussion supra at* 13.

identify an ADA issue and then determine the accommodation—even where the parent is represented by counsel who did not make any ADA argument or request any accommodations that were not already addressed.[4] This is not what the ADA or Colorado law contemplates. *Cf. S.K.*, ¶22 ("The Department can accommodate, and the juvenile court can address, only disabilities that are known to them.").

In addition to the absence of record support to establish Mother's mental health as the reason she failed to appear at the jury trial, Mother also failed to appear by any means. Mother's assertion in her Opening Brief that her mental health disabilities precluded her from attending the proceedings in-person also ignores that Mother did not appear at all. Had Mother communicated with her counsel that her mental health precluded her from attending the jury trial in-person, the trial court could have determined whether accommodations could be made for Mother to appear by telephone or virtually through WebEx. Alternatively, had Mother answered any one of the many attempts to contact her by either the trial court or her

[4] The only discussion of the ADA was Mother's counsel informing the trial court about the ADA motion they filed "two or three months ago," explaining "our main concern actually was transportation for [Mother], and her ability to get to visits and to get to the court appearances." TR 7/19/23 (J. Toussaint), p 6:22-7:1. Not only did ACDHS provide a rideshare for Mother that morning to accommodate her, but her counsel affirmatively represented, "it's my understanding she did not get inside of that Uber." *Id*. p. 7:3-6.

counsel, Mother could have provided information to the trial court about any barriers she was experiencing, whether those barriers were related to her purported disability or something else. Utilizing the guidance outlined in *C.C.*, the trial court could have taken all of that information into consideration as the trial court assessed Mother's circumstances and why she was not present before making a determination regarding whether Mother waived her right to a jury trial. That, however, was not the case here where no information was provided to the court by counsel or Mother to explain her absence. Mother's due process and equal protection rights, therefore, were not violated when she voluntarily relinquished her statutory right to a jury trial by failing to appear for over ninety minutes and by failing to communicate with the court or her attorney regarding why she was not present notwithstanding their repeated efforts to communicate with her.

Accordingly, the division of the Court of Appeals did not err in concluding Mother impliedly waived her statutory right to an adjudicatory trial under C.R.C.P. 39(a)(3) when the only evidence in the record supports a finding Mother had "act[ed] inconsistently with [the right's] assertion." *B.H.*, ¶67.

CONCLUSION

The People and GAL/CFY respectfully ask that this Court affirm the Court of Appeals.

Respectfully Submitted,

/s/ Original Signature on File	/s/ Original Signature on File
Jordan Lewis, #50198	Sheena Knight, #49586

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2024, a true and correct copy of the foregoing was served by the Colorado E-filing system on all interested parties on the day of filing.

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