SUPREME COURT, STATE OF COLORADO
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Opinion by the Court of Appeals
Case No. 23CA1613
Arapahoe County District Court No. 2023JV30006
Honorable Bonnie H. McLean, Judge

R.G.
Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO,

In the Interest of:

C.G. and N.G.
Children

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 3.4, C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Reply Brief complies with C.A.R. 28(g) and 3.4(h) because it contains 3847 words and complies with the requirements of C.A.R. 3.4(f)(1)(A)-(D).

The Reply Brief complies with C.A.R. 32 because it is prepared using Roman style font of 14-point size, including footnotes.

I acknowledge that my brief may be stricken if it fails to comply with applicable requirements of C.A.R. 3.4, 28 and 32.

Dated this 5th day of January 2025

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Sources

INTRODUCTION

In their Joint Answer Brief, the Arapahoe County Department of Human Services ("DHS" or the "Department") and the guardian ad litem on appeal (the "GAL") do not dispute that Mother has been diagnosed with schizophrenia, schizoaffective disorder, and post-traumatic stress disorder ("PTSD") (*See* Joint Answer Br. at 10.) The first two of these are known to cause sufferers to experience hallucinations and delusions. Yet, the Joint Answer Brief nevertheless insists that Mother *voluntarily* waived her right to an adjudicatory jury trial because, as the Joint Answer Brief strongly implies, Mother could not "be bothered to attend" her trial. (Joint Answer Br. at 17.)

The Joint Answer Brief's dismissal of the likelihood that Mother's mental health conditions caused or contributed to her non-attendance is striking, particularly given the severity of Mother's diagnoses. Not only is the record ambiguous at best as to the reasons for Mother's non-attendance, but this case highlights the difficulty that courts face when

trying to determine the precise reasons for a respondent parent's absence on the morning of trial when the only available information is secondhand and limited. Indeed, the *ad hoc* approach practiced by the courts below is likely to produce inconsistent results, is prone to discriminatory application against parents with disabilities, and is not conducive to treating equally situated parents equally, risking violations of parents' due process right to fundamentally fair procedures.

A decision by this Court that C.R.C.P. 39 does not apply in dependency and neglect cases, or that an appearance through counsel is sufficient to preserve a respondent parent's jury trial right under C.R.C.P. 39(a)(3), would largely eliminate these problems. It would relieve trial judges of the need to determine on short notice, based on incomplete information, whether a particular parent is absent voluntarily, or is absent because of a disability or some other factor beyond the parent's control. And it would prevent the inconsistent

application of the rules governing jury trial rights, thus averting discrimination on the basis of disability and unequal treatment of similarly situated respondent parents.

Accordingly, this Court should hold that the conversion of Mother's adjudicatory jury trial to a court trial was improper, especially given that Mother's counsel was present in the courtroom and prepared to proceed on the morning of trial. This Court should reverse the order of adjudication on that basis.

ADDITIONAL FACTUAL BACKGROUND

At the outset, it is important to emphasize that Mother's mental health was not a little known background fact, but was central to the Department's initial justification for becoming involved with this family. In the summary that the Department prepared in advance of the initial custody hearing, the intake caseworker wrote of an instance in which Mother reported to her psychiatric and mental health nurse practitioner that someone had broken into her home and "drugged" her

with Latuda, even though Latuda was a prescribed medication that Mother regularly took. (CF p 6.) On another occasion, Mother locked Father out of the home but did not remember doing so. (CF pp 5, 7, 13-14.) On still another occasion, while police were present, Mother inexplicably believed that one of the Children had left the residence through a door that was occupied by a police officer, and Mother proceeded to call out to the child as though he had gone outside even though it was clear that the Child could not have left the home. (CF p 7.) The Department represented to the court that Mother

> has displayed behaviors of severe paranoia. [Mother] reports that her wifi, food delivery service accounts, bills, emails, social media, and other online accounts have been hacked. [Mother] has not been able to provide any proof of this occurring. [Mother] also has made accusations that DHS workers abused her as a child and that police showing up at her door are not true police officers.

(CF p 76.)

Mother's diagnoses, acknowledged by the Department in its own submissions to the trial court, include schizoaffective disorder,

depressive type; chronic post-traumatic stress disorder ("PTSD"); and schizophrenia. (CF pp 6, 7, 14, 76.) Schizophrenia in particular is known to cause "hallucinations, delusions, and disorganized thinking and behavior" – precisely the sort of symptoms that might explain why, when the rideshare vehicle arrived at Mother's home on the morning of her adjudication trial, she declined to get in the car and therefore did not arrive at the courthouse. *See, e.g.*, Mayo Clinic, *Schizophrenia*, *available at* https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443#:~:text=Overview,aren't%20observed%20by%20others (last accessed Jan. 3, 2025). Schizoaffective disorder is "a mental health condition that is marked by a mix of schizophrenia symptoms, such as hallucinations and delusions, and mood disorder symptoms, such as depression, mania and a milder form of mania called hypomania." Mayo Clinic, *Schizoaffective Disorder*, *available at* https://www.mayoclinic.org/diseases-conditions/schizoaffective-

disorder/symptoms-causes/syc-20354504#:~:text=Overview,form%20of%20mania%20called%20hypomania (last accessed Jan. 3, 2025).

Accordingly, any assessment of Mother's purported "waiver" of her right to a jury trial in this case must begin with the recognition that the decisions that Mother made on the morning of her adjudicatory jury trial likely stemmed, at least in part, from delusions or hallucinations, and were thus not the product of a free and voluntary choice. Although the Joint Answer Brief suggests that phone issues were the cause of Mother's absence, the Joint Answer Brief does not explain how or why phone issues would have prevented Mother from getting in the Department-provided rideshare on the morning of her trial.

ARGUMENT

I. The Court of Appeals erred in concluding that 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.

A. The lower courts erred in applying C.R.C.P. 39 to this case.

The Joint Answer Brief asks this Court to reject as unpreserved Mother's argument that C.R.J.P. 4.3 controls the outcome in this case, rendering application of C.R.C.P. 39 unnecessary. However, Mother argued in her Opening Brief to the Court of Appeals, and in her Petition for Writ of Certiorari to this Court, that "[C.R.J.P.] 4.3 enumerates only one mechanism by which a party can waive a jury trial—by failing to demand one in the first instance." (COA Opening Br. at 14; Pet. for Cert. at 9.)

Additionally, under C.A.R. 53(a)(3), "[t]he statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein." In interpreting C.A.R. 53, this Court has held that, upon granting certiorari, this Court has the authority to review all issues encompassed within the certiorari issue. *See, e.g.*, *Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 21 n.7; *People v. Murphy*,

919 P.2d 191, 195 n.3 (Colo. 1996); *see also People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (finding doctrine of exigent circumstances so "inextricably entwined" with issue upon which certiorari was granted that this Court reviewed and decided it "[e]ven though the parties did not argue nor did the courts below decide the issue").

The question upon which certiorari was granted in this case is "[w]hether the [Court of Appeals] 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." Implicit within that question is the question of whether the lower courts' were correct in deciding to apply C.R.C.P. 39 in the first instance. Answering that question is necessary for this Court to decide this case *and* to establish a workable precedent that will enable trial courts to apply the doctrine consistently in future cases. *See* C.A.R. 49.

Finally, this Court may review an unpreserved issue where doing so is necessary to avoid a miscarriage of justice. *See People in Interest of E.S.*, 2021 COA 79, ¶ 14; *People in Interest of M.B.*, 2020 COA 13, ¶ 21 ("[G]iven the constitutional nature of parental rights, we will recognize a miscarriage of justice exception for review of unpreserved errors."); *In re R.G.B.*, 98 P.3d 958, 959 (Colo. App. 2004) ("Where an error of the trial court . . . involves a miscarriage of justice, we may consider the issue for the first time on appeal.").

Substantively, neither the relevant statute, § 19-3-202(2), C.R.S., nor the applicable rule of juvenile procedure, C.R.J.P. 4.3, suggests that a respondent parent who has properly requested a jury trial subsequently waives the right to a jury trial if he or she is not present at the start of the trial, particularly if the parent's counsel is present and ready to proceed.

The Joint Answer Brief suggests that Mother's interpretation of C.R.J.P. 4.3 would produce absurd results because it would prevent a

parent who previously requested a jury trial from subsequently withdrawing that request. (Joint Answer Br. at 22.) Nothing about Mother's construction, however, would compel this result, as the language of the rule does not state or suggest that a respondent parent cannot withdraw a jury demand that he or she previously made. The rule does, however, enumerate one very specific circumstance in which the right to a jury trial is waived – a parent's decision to decline to exercise the right – to the exclusion of other possible sources of waiver, such as a failure to be present in-person at trial. Accordingly, C.R.J.P. 4.3 is not silent as to the circumstances in which a parent waives his or her right to a trial by jury, but specifies the precise circumstance under which the right may be deemed waived. *See, e.g.*, *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) (applying the principle of *expressio unius exclusio alterius*).

Under C.R.J.P. 1, the Rules of Civil Procedure apply in juvenile cases only in circumstances "not governed by these rules or the

procedures set forth in Title 19." Here, the right to a jury trial in a dependency and neglect case is governed both by the Rules of Juvenile Procedure and Title 19, meaning that there is no reason to look to the Rules of Civil Procedure at all. This Court should so hold, and should find C.R.C.P. 39 inapplicable to this case.

B. The lower courts erred in holding that Mother failed to appear under the meaning of C.R.C.P. 39(a)(3) when Mother's counsel was present and prepared to proceed.

The Joint Answer Brief largely fails to offer a persuasive reason why the phrase "all parties demanding trial by jury fail to appear at trial" in C.R.C.P. 39(a)(3) necessarily requires an *in-person* appearance by the respondent parent, rather than an appearance that is *either* in-person by the respondent parent *or* is accomplished through the presence of the parent's counsel.

In this vein, Joint Answer Brief incorporates the Court of Appeals' reasoning that (a) under C.R.C.P. 39(a)(3), a waiver of the right to an adjudicatory jury trial occurs when a *party* fails to appear," and (b) "[a]

person named a respondent" is defined as "a *party* to the proceeding" under § 19-3-502(5.5)(a), C.R.S. (Joint Answer Br. at 13-14) (citing COA Opinion ¶ 16 (emphasis in COA Opinion)). The implication is that the presence of the "person" of the respondent parent is necessary before a court may conclude that the "party" has appeared. However, subsection (5.5.) of the statute, upon which the Joint Answer Brief and the Court of Appeals rely, was not in effect at the time of the jury trial in this case. Subsection (5.5) was created by Senate Bill 23-039, which became effective on January 1, 2024 – several months after Mother's July 2023 adjudication trial that led to this appeal. *See* Laws 2023, Ch. 191 (S.B. 23-039), § 4, eff. Jan. 1, 2024. The analysis in the Court of Appeals' opinion and the Joint Answer Brief thus relies on a statutory provision that was not in effect at the time that Mother's adjudicatory trial took place.

Thus, assuming *arguendo* that C.R.C.P. 39 applies in this case, maintenance of a properly requested jury trial requires some form of

appearance by a respondent parent. However, neither the Children's Code, the Colorado Rules of Juvenile Procedure, nor the Colorado Rules of Civil Procedure specify the form that such an appearance must take. As Mother noted in her Opening Brief, persuasive authority from other states' appellate courts holds that a failure to appear in this context means a *complete* failure to appear, either in-person or through counsel, thus resulting in a trial that is essentially uncontested.

The Joint Answer Brief also cites the Court of Appeals' opinion to suggest that Mother's proposed interpretation of C.R.C.P. 39(a)(3) implies adding words to the rule – that is, by taking the phrase "all parties demanding trial by jury fail to appear at trial" and adding the phrase "either in-person or through counsel." (Joint Answer Br. at 23.) However, the Joint Answer Brief's proposed interpretation *also* implies additional language that is not in the rule. As noted above, the rule itself is silent as to the form that the respondent parent's appearance at trial must take. The Court of Appeals' and the Joint

Answer Brief's proposed interpretation of the rule involves imagining that the relevant portion of the rule actually reads, "all parties demanding trial by jury fail to appear *in-person* at trial." Put simply, the plain language of C.R.C.P. 39(a)(3) does not resolve, one way or another, the question of whether a failure to appear resulting in the forfeiture of a properly requested jury trial occurs if the parent is not personally present but counsel appears on the parent's behalf and is prepared to proceed.

The Joint Answer Brief also highlights instances in a dependency and neglect case in which a respondent parent's physical presence is required, seemingly implying that permitting appearance through counsel at a jury trial would necessarily justify appearance through counsel in a host of other settings in which such an arrangement would make little sense. This argument, however, depends for its force on the "slippery slope fallacy," and this Court should reject it. The outcome of this appeal (and, indeed, the future application of any precedent that

this case sets) depends on the interpretation of a discrete set of statutes and procedural rules to decide a specific legal question – namely, whether a parent must appear in-person in order to preserve their right to an adjudicatory jury trial. A conclusion by this Court that an appearance through counsel is sufficient to preserve a properly requested jury trial under § 19-3-202(2), C.R.S., C.R.J.P. 4.3, and/or C.R.C.P. 39 would in no way suggest that counsel could act in the parent's stead during family time or substance testing. (*See* Joint Answer Br. at 24.) The relevant rules of civil and juvenile procedure have no application in those settings, and the Joint Answer Brief cites no authority to suggest that they do.

Ultimately, for the reasons described herein and in Mother's Opening Brief, this Court should hold that an appearance through counsel is sufficient to preserve the right to a jury trial under C.R.C.P. 39(a)(3). It should therefore find that the lower courts erred in converting Mother's adjudication trial to a court trial.

C. Existing Court of Appeals precedent (a) compels trial judges to make snap decisions on waiver issues without adequate information, and (b) unlawfully discriminates against parents, like Mother, who face disabilities or other barriers to attendance, in violation of these parents' rights to equal protection of the law and fundamentally fair procedures.

The Joint Answer Brief largely glosses over the difficulties in applying the framework laid out in *People in Interest of C.C.*, 2022 COA 81, upon which the lower courts in this case relied. As the facts of this case suggest, this framework is difficult to apply in practice, is likely to lead to discrimination against parents whose disabilities unexpectedly prevent their in-person attendance at their adjudication trials, and treats similarly situated parents differently, in violation of respondent parents' due process right to fundamentally fair procedures.

The Joint Answer Brief argues that "[this] 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*." (Joint Answer Br. at 17) (emphasis added). This statement,

perhaps made glibly, captures the essence of the problem with the *C.C.* framework.

The division of the Court of Appeals that decided *C.C.* noted that the waiver of a statutory right must be voluntary, *C.C.*, ¶ 12, which means, in this context, that it must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," *People in Interest of B.H.*, 2021 CO 39, ¶ 69 (quoting *Berghuis v. Thompkins,* 560 U.S. 370, 382 (2010) & *Moran v. Burbine,* 475 U.S. 412, 421 (1986)). The determination of voluntariness must be made considering "the totality of the circumstances," *People v. Davis,* 2015 CO 36M, ¶ 18 (quoting *People v. Raffaelli,* 647 P.2d 230, 235 (Colo. 1982)).

Furthermore, as Mother noted in her Opening Brief, while the right to a jury trial in a dependency and neglect case arises by statute, the right to fair procedures in the exercise of that right is constitutional, meaning that a waiver of the right must not only be voluntary, but

must also be knowing and intelligent. *El Paso Cnty. Sch. Dist. No. 11 v. Bunger*, 713 P.2d 935, 937 (Colo. App. 1985).

Under *C.C.*, trial courts must make case-by-case determinations as to whether a parent who is not physically present has decided to be absent as the result of least a "free choice," as well as one that was "knowing and intelligent." As the record in this case demonstrates, this is often not a straightforward endeavor, as a trial court is inherently dependent on information relayed by the parent's attorney, who may or may not have *any* insight into the reason for the parent's absence, let alone a complete account. Even the voluntariness inquiry is problematic. "[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," *B.H.*, ¶ 70, but under *C.C.*, courts must engage in a large measure of speculation as to whether the parent's conduct was "freely chosen" or whether some other barrier, particularly one caused by a disability, caused the parent's absence.

Trial courts will frequently lack sufficient information to make this determination accurately in real time. And courts face even more difficulty in attempting to decide, based on incomplete information, whether a parent's absence was the result of a choice that was "knowing" and "intelligent."

Mother's Opening Brief identifies two significant risks that result from this *ad hoc* framework. One is that trial courts' application of the framework will result in discrimination against persons with disabilities, who often face barriers to in-person attendance that non-disabled parents do not face. The other risk is that the framework will produce inconsistent and unequal outcomes in general, in violation of respondent parents' due process right to fair procedures in the exercise of their right to a trial by jury. *El Paso Cnty. Sch. Dist. No. 11*, 713 P.2d at 937.

Once again, the Joint Answer Brief suggests that these arguments were not properly preserved below. (Joint Answer Br. at 31-32.)

However, the Joint Answer Brief does not dispute that Mother preserved the core contention that this Court, if it applies C.R.C.P. 39(a)(3) at all, should interpret the rule such that an appearance either in-person or through counsel is sufficient to preserve a properly requested jury trial. Mother's Americans with Disabilities Act ("ADA") and equal protection arguments support this position by highlighting significant problems with the *ad hoc*, case-by-case approach required by *C.C.* – namely, that this approach is likely to produce discrimination on the basis of disability against respondent parents whose disabilities make in-person attendance difficult or impossible, and that it will produce unequal and inconsistent outcomes. The better approach, as Mother outlined in her Opening Brief, is to recognize that an appearance through counsel is sufficient to preserve a properly exercised jury trial right under C.R.C.P. 39(a)(3). This Court should interpret C.R.C.P. 39(a)(3) accordingly.

D. Assuming *arguendo* that Mother's failure to be present in person at the scheduled start of her trial constituted a failure to appear under C.R.C.P. 39(a)(3), the trial court nevertheless erred in converting the jury trial to a bench trial under the circumstances presented here.

Even if this Court ultimately elects to apply the *C.C.* framework or something similar to it, it should still conclude that the record does not support the lower courts' conclusion that Mother effected a knowing waiver of her right to a jury trial.

When it comes to assessing the existence of a waiver in this case under the *C.C.* framework, the Joint Answer Brief strongly intimates that Mother simply "[could not] be bothered to attend" her adjudication trial. (Joint Answer Br. at 17.) Mother's mental health diagnoses, as well as the Department's own statements to the trial court about the reasons for intervening in the family, suggest that this was not the case. Again, Mother suffered from schizophrenia and schizoaffective disorder, both of which, if not properly managed, cause hallucinations, delusions, and disorganized thinking and behavior. The Department's own

submissions to the trial court describe Mother as suspicious and paranoid. The record suggests that these conditions were likely the cause of Mother's absence; it certainly does not suggest the contrary.

During the discussion between Mother's counsel, Mother's GAL, and the trial court, no clear explanation emerged for Mother's lack of in-person attendance. The statements of Mother's attorney and GAL did not furnish the court with a firm evidentiary basis for concluding that Mother had voluntarily waived her right to a jury trial, let alone that she had done so knowingly and intelligently. There was, at least, a significant possibility that Mother's mental health conditions caused her to decline the rideshare that the Department provided to transport Mother to court on the morning of her trial. If that was indeed the case, then Mother was denied her right to a trial by jury as a direct result of her disability, in violation of the ADA.

Even if there was no ADA violation in this case, or if this Court concludes that such a violation was not properly argued in the courts

below, the risk of ADA and equal protection violations under the *C.C.* framework is sufficient reason for this court to hold that appearance through counsel is sufficient to preserve a respondent parent's right to a jury trial when such a trial has been properly requested in the first instance. Such an approach avoids the risk of inconsistent application of the rule, which, as this case suggests, is very likely to unfairly disadvantage disabled parents or parents facing other unexpected barriers to in-person attendance.

Accordingly, the lower courts erred in concluding that Mother voluntarily waived her right to a trial by jury, let alone that she did so knowingly and intelligently. Reversal of the order of adjudication is therefore required.

CONCLUSION

This Reply Brief is intended to address specific arguments contained in the Joint Answer Brief. In all other respects, Mother rests

on the arguments presented in her Opening Brief. This Court should reverse the order adjudicating the Children dependent and neglected.

Respectfully submitted this 5th day of January 2025

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CERTIFICATE OF SERVICE

I hereby certify that 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.

/s/ John F. Poor
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