SUMMARY
August 8, 2024

2024COA88

No. 23CA1316, *People in Interest of B.C.B.* — Juvenile Court — Dependency and Neglect — Neglected or Dependent Child — Child Born Affected by Alcohol or Substance Exposure

Interpreting section 19-3-102(1)(g), C.R.S. 2023, for the first time since its amendment in 2020, a division of the court of appeals holds that a child may not be adjudicated dependent or neglected under subsection (1)(g) without a showing by a preponderance of the evidence that the child suffered a physical, developmental, or behavioral response to substance exposure at birth.

COLORADO COURT OF APPEALS **2024COA88**

Court of Appeals No. 23CA1316
El Paso County District Court No. 22JV30307
Honorable Jessica L. Curtis, Judge

The People of the State of Colorado,

Appellee,

In the Interest of B.C.B., a Child,

and Concerning A.B. and J.S.,

Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE GROVE
Sullivan, J., concurs
Fox, J., dissents

Announced August 8, 2024

Kenneth Hodges, County Attorney, Robert W. Kern, Jr., Chief Deputy County Attorney, Melanie Douglas, Contract Attorney, Colorado Springs, Colorado for Appellee

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¶ 1 J.S. (father) and A.B. (mother) appeal the judgment adjudicating B.C.B. (the child) dependent or neglected under section 19-3-102(1)(g), C.R.S. 2023, which provides that a child is dependent or neglected if "[t]he child is born affected by alcohol or substance exposure, except when taken as prescribed or recommended and monitored by a licensed health care provider, and the newborn child's health or welfare is threatened by substance use."

¶ 2 Interpreting this statutory language, we conclude that, to secure an adjudication under subsection (1)(g), the government must establish that, at birth, the child was adversely affected by — rather than merely exposed to — alcohol or substances. Because the People did not present evidence sufficient to support a finding by a preponderance of the evidence that the child suffered a physical, developmental, or behavioral response to substance exposure, the evidence in the record is insufficient to support the child's adjudication as dependent or neglected. We therefore reverse.

I. Background

¶ 3 The El Paso County Department of Human Services (the Department) filed a petition in dependency and neglect, alleging, among other things, that the child had tested positive for methamphetamine at birth and that the parents had a history of substance abuse. The parents denied the allegations in the petition and requested a jury trial.

¶ 4 At trial, mother conceded that she had used methamphetamine during her pregnancy and that the child tested positive for methamphetamine at birth. However, it was undisputed that mother had engaged in substance abuse treatment from the outset of the case and had not tested positive for alcohol or substances since she gave birth. The parties also stipulated that there was "no evidence of illegal drug use by" father.

¶ 5 The jury heard expert testimony from three of the child's pediatricians, who explained, among other things, that the child was healthy and thriving. They also testified that, in general, children exposed to methamphetamine in utero do not experience significant problems at birth. However, the doctors testified that prenatal methamphetamine exposure can lead to major impacts

that arise later in a child's life (i.e., around three to six years old), including problems with attention, learning, cognitive functioning, behavior, motor skills, and growth. (The doctors cautioned, however, that the scientific literature on the effects of methamphetamine exposure in utero is inconclusive, and they acknowledged that some studies do not show any long-term adverse effects.)

¶ 6 At the conclusion of the Department's case, and after the guardian ad litem (GAL) declined to present any evidence, father moved for a directed verdict. As relevant here, he argued that there had been no evidence "that the child has suffered any adverse effects of drug use." The Department opposed the motion, asserting that "there's evidence that the child was born exposed to methamphetamine," which "puts him at risk for later complications that will manifest in the next few years." The juvenile court denied the motion, ruling that "there has been sufficient evidence to

overcome the motion for a directed verdict" under section 19-3-102(1)(g).[1]

¶ 7 At the conclusion of the adjudicatory trial, the court tendered special verdict forms to the jury, asking it to determine whether the child was dependent or neglected under section 19-3-102(1)(b), (c), (d), and (g). The jury returned a verdict finding that the child was dependent or neglected under subsection (1)(g) but not the other subparagraphs. Based on the jury's verdict, the court sustained the petition, entered an adjudication, and adopted treatment plans for both parents.

II. Dependency and Neglect Procedures

¶ 8 Dependency and neglect procedures are governed by article 3 of the Colorado Children's Code. *See* §§ 19-3-100.5 to -905, C.R.S. 2023. "The overriding purpose of the Children's Code is to protect the welfare and safety of children in Colorado by providing procedures through which their best interests can be ascertained and served." *A.M. v. A.C.*, 2013 CO 16, ¶ 10.

[1] The court referenced subsection "(3)(g)" in its ruling. This appears to have been a misstatement, and neither party argues otherwise.

¶ 9 To initiate an action in dependency and neglect, the government files a petition presenting its allegations. § 19-3-502, C.R.S. 2023. If a parent denies the allegations in the petition, the parent may demand a trial by jury. § 19-3-202(2), C.R.S. 2023. At the trial, the government must prove the allegations by a preponderance of the evidence. § 19-3-505(1), C.R.S. 2023. And the government's allegations must establish at least one of the grounds for adjudication in section 19-3-102. *See People in Interest of S.M-L.*, 2016 COA 173, ¶ 29, *aff'd on other grounds sub nom. People in Interest of R.S. v. G.S.*, 2018 CO 31.

¶ 10 If the government fails to carry its burden, then the juvenile court will dismiss the case, vacate all orders with respect to the child, and relinquish its jurisdiction. § 19-3-505(6). However, if the government proves the allegations by a preponderance of the evidence, then the court will sustain the petition, after which it may adjudicate the child dependent or neglected. § 19-3-505(7).

¶ 11 Dependency and neglect adjudications are not made "as to" the parents but relate only to the status of the child on the date of the adjudication. *K.D. v. People*, 139 P.3d 695, 699 (Colo. 2006). "The adjudication represents the court's determination that state

intervention is necessary to protect the child and that the family requires rehabilitative services in order to safely parent the child." *A.M.*, ¶ 12. However, "case law also makes clear that each parent has a right to a jury determination as to whether the disputed factual averments in a dependency and neglect petition are proved." *People in Interest of S.G.L.*, 214 P.3d 580, 585 (Colo. App. 2009).

¶ 12 Because a dependency and neglect proceeding is preventative as well as remedial, an adjudication can be based on past, current, or prospective harm. *People in Interest of D.L.R.*, 638 P.2d 39, 42 (Colo. 1981). When determining if a child is dependent or neglected based on prospective harm, a fact finder is permitted to "consider future situations," *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 12, to predict whether it is "likely or expected" that the child will be dependent or neglected if returned to the parents' care, *People in Interest of S.N.*, 2014 COA 116, ¶ 17. "Thus, it is not necessary that a child be placed with a parent to determine whether that parent can provide proper care, if such a placement might prove detrimental to a child." *S.G.L.*, 214 P.3d at 583.

III. Section 19-3-102(1)(g)

A. Principles of Statutory Interpretation

¶ 13 Statutory interpretation is a question of law that we review de novo. *People in Interest of C.L.S.*, 313 P.3d 662, 665-66 (Colo. App. 2011).

¶ 14 We must liberally construe the Colorado Children's Code to serve the welfare of children and the best interests of society, *People in Interest of S.X.M.*, 271 P.3d 1124, 1130 (Colo. App. 2011), and avoid "any technical reading" that "would disregard [a child's] best interests," *C.S. v. People in Interest of I.S.*, 83 P.3d 627, 635 (Colo. 2004). We favor interpretations that produce a harmonious reading of the statutory scheme, *People in Interest of J.G.*, 2016 CO 39, ¶ 13, presume that the General Assembly intended a just and reasonable result, and avoid interpretations that would lead to an absurdity, *People in Interest of H.*, 74 P.3d 494, 495 (Colo. App. 2003).

¶ 15 In construing statutes, appellate courts must ascertain and give effect to the General Assembly's intent. *J.G.*, ¶ 13. To do this, we look to the language of the statute and give effect to the plain and ordinary meaning of the General Assembly's words. *A.M.*, ¶ 8.

If the language in a statute is clear and unambiguous, we apply it as written. *See State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000).

¶ 16 Only when a statute is ambiguous do we look beyond its plain language and consider other interpretive aids to determine legislative intent. *In re People in Interest of A.A.*, 2013 CO 65, ¶ 10. A statute is ambiguous if it is reasonably susceptible of multiple interpretations. *Id.*; *A.M.*, ¶ 8.

B. The 2020 Amendment and Associated Administrative Rules

¶ 17 Before it was amended in 2020, section 19-3-102(1)(g) "define[d] a child who 'tests positive at birth for either a schedule-I controlled substance . . . or a schedule-II controlled substance' as dependent or neglected." *People in Interest of T.T.*, 128 P.3d 328, 330 (Colo. App. 2005) (quoting § 19-3-102(1)(g), C.R.S. 2005). Under this version of the statute, a positive drug test was enough by itself to support the adjudication of a newborn child. *See, e.g.*, *People in Interest of E.R.*, 2018 COA 58, ¶ 23 (basing dependency and neglect adjudication on child's positive test for a controlled substance at birth).

¶ 18 In 2020, the General Assembly passed S.B. 20-028, which concerned measures to assist an individual's recovery from a

substance use disorder. Ch. 186, 2020 Colo. Sess. Laws 852-55. The bill amended several existing statutes, including section 19-3-102(1)(g), which now provides that a child is dependent or neglected if the child "is born affected by alcohol or substance exposure, except when taken as prescribed or recommended and monitored by a licensed health care provider, and the newborn child's health or welfare is threatened by substance use." § 19-3-102(1)(g). The amended statute has two elements: (1) "[t]he child is born affected by alcohol or substance exposure, except when taken as prescribed or recommended and monitored by a licensed health care provider"; and (2) "the newborn child's health or welfare is threatened by substance use." *Id.* Because subsection (1)(g) is phrased in the conjunctive, the government must satisfy both elements when seeking a dependency and neglect adjudication under this subsection. *See Younger v. City & Cnty. of Denver*, 810 P.2d 647, 649 (Colo. 1991) (holding that, where a statute sets forth non-synonymous elements in the conjunctive, both elements must be met).

¶ 19 "A legislative amendment either clarifies or changes existing law, and we presume that by amending the law the legislature has

intended to change it." *City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007). So even though the General Assembly did not define the key phrases that it added to subsection (1)(g) — namely, "affected by alcohol or substance exposure" and "threatened by substance use" — we presume that it intended for the amended statute to mean something different from the earlier version that required an adjudication of dependency and neglect based on a positive test alone. And that is not our only interpretive guidance. Indeed, although the General Assembly did not include definitions in S.B. 20-028, as part of the same bill, it directed the State Board of Human Services to fill in that statutory gap by "promulgat[ing] rules to determine . . . if a child is neglected or dependent as described in section 19-3-102(1)(g)." Sec. 6, § 19-3-216, 2020 Colo. Sess. Laws at 854.

¶ 20 The State Board of Human Services complied with this statutory directive in 2021 by adopting administrative rules defining the key phrases in both elements of section 19-3-102(1)(g). As defined by regulation, "[a] child is born affected by alcohol or substance exposure when it impacts the child's physical, developmental, and/or behavioral response." Dep't of Soc. Servs.

Rule 7.000.2(A), 12 Code Colo. Regs. 2509-1. Similarly, a "newborn child's health or welfare is threatened by substance use when the medical, physical, and/or developmental needs of the newborn child are likely to be inadequately met or parent and/or caregivers are likely unable to meet the newborn child's needs." *Id.*

¶ 21 Notably, in this case, neither the jury instructions nor the verdict form included either of these definitions; instead, both simply quoted the language of subsection (1)(g) without defining either of the statutory elements.

IV. Sufficiency of the Evidence

¶ 22 Mother contends that the evidence presented to the jury was insufficient to support the child's adjudication under section 19-3-102(1)(g). We agree that the Department did not present evidence sufficient to support a conclusion that the child was born affected by alcohol or substance exposure. We therefore reverse the adjudication on that ground alone, and do not reach either parent's remaining contentions.

A. Standard of Review

¶ 23 "In determining whether the evidence [wa]s sufficient to sustain an adjudication, we review the record in the light most

favorable to the prevailing party" — in this case, the Department — "and we draw every inference fairly deducible from the evidence in favor of" the jury's decision. *S.G.L.*, 214 P.3d at 583. However, while a finder of fact may make inferences based on the evidence presented, such inferences may not be based on mere speculation or conjecture. *People in Interest of M.H-K.*, 2018 COA 178, ¶ 73 (citing *People in Interest of R.D.S.*, 183 Colo. 89, 95, 514 P.2d 772, 775 (1973)).

¶ 24 The purpose of an adjudicatory hearing is to determine (1) whether the factual allegations in the dependency and neglect petition are supported by a preponderance of the evidence and (2) whether the status of the subject child warrants intrusive protective or corrective state intervention into the familial relationship. *People in Interest of A.H.*, 271 P.3d 1116, 1120 (Colo. App. 2011).

B. No Evidence Showed that the Child Was Born Affected by Substance or Alcohol Exposure

¶ 25 Even when viewing the evidence in the light most favorable to the prevailing party, we cannot conclude that the Department met

its burden of proving by a preponderance of the evidence that the child was born affected by substance use.

¶ 26 At the threshold, there is no dispute that mother self-medicated with methamphetamine during her pregnancy, and the parties also agree that the child's umbilical cord and urine both tested positive for amphetamines and methamphetamine less than an hour after his birth. Under the old regime, that positive test would be enough to support a dependency and neglect adjudication. *See E.R.*, ¶ 23. Under the current version of subsection (1)(g), however, the Department could not rely on a showing of in utero exposure alone. It also had to prove by a preponderance of the evidence that the child's exposure to substances impacted his "physical, developmental, and/or behavioral response." Dep't of Soc. Servs. Rule 7.000.2(A), 12 Code Colo. Regs. 2509-1.

¶ 27 The Department and GAL assert that the Department carried this burden in two different ways. First, they point to testimony from three of the child's pediatricians concerning the potential long-term impacts of in utero substance exposure. But even assuming, without deciding, that an adjudication under subsection (1)(g) can

be based on the uncertain, and amorphous, prospect of future impacts on the child's physical or mental health, the evidence was still insufficient to support a finding by a preponderance of the evidence that any such impacts would arise.

¶ 28 To be sure, each of the child's physicians testified that he could have an enhanced risk of adverse developmental outcomes, such as attention deficit hyperactivity disorder and learning deficits. Nonetheless, all of them also agreed that these long-term concerns (1) were not possible to diagnose at birth; (2) if they appeared at all, would not be likely to manifest for several years; and (3) if they manifested, would be difficult to link to the child's prenatal substance exposure. Notably, none of the physicians was able to predict whether the child would actually suffer from these effects, although all of them agreed that he should be monitored.

¶ 29 We acknowledge, as the GAL points out, that each of the pediatricians agreed that methamphetamine exposure can lead to

impacts on the brain.[2] For example, Dr. Heather Welfare testified that "there are differences in imaging studies on brain imaging for exposed babies versus non-exposed." But in response to a follow-up question from the GAL, Dr. Welfare was unable to link any such observed differences to brain development:

> Q: [B]ased on your understanding, we don't know whether [the observed differences in brain imaging between exposed babies and non-exposed babies] will exhibit in behavioral development delays. Is that because there is no impact on the brain or is that because whatever impact [there] is isn't causing those things?
>
> A: That's a very good question and I do not know the answer.

Perhaps more importantly, given the lack of scientific consensus on the effects of in utero exposure, none of the witnesses said that there were any indications that the child had suffered any physical,

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[2] We reject the GAL's argument that there was evidence supporting a conclusion that the child was born affected by substances because "[t]he evidence presented was that exposure to substances in utero changes the brain." Construing the revised version of subsection (1)(g) in that manner would be contrary to the regulatory definitions that we have already discussed, absent a showing that any changes to the brain were accompanied by a "physical, developmental, and/or behavioral response." Dep't of Soc. Servs. Rule 7.000.2(A), 12 Code Colo. Regs. 2509-1.

developmental, or behavioral responses to his methamphetamine exposure. To the contrary, each physician agreed that the child was healthy and thriving at the time that they examined him.

¶ 30 In short, at most, the Department presented evidence that the child *might* suffer from long-term impacts due to substance exposure. It presented no evidence that it was more likely than not that he *would* suffer such impacts, much less that he had already done so. And even if the evidence of future impacts had been more certain, it is not at all clear that, under subsection (1)(g), a child could be "born affected by" alcohol or substance exposure for the purpose of an adjudication when any adverse effects would not appear for several more years. We need not decide that question today. In any event, as one of the physicians put it, "[W]hat we're really talking here in terms of him may[be] being at risk, it's possibilities, not probabilities." An adjudication cannot be premised on conjecture or speculation. *See M.H-K.*, ¶ 73. Thus, the child's adjudication cannot be sustained under the theory that his in utero exposure to methamphetamine increases the risk of adverse developmental consequences to some unknown degree at some unspecified point in the future.

¶ 31 Second, the Department and GAL assert that the evidence is sufficient to support the child's adjudication because the jury heard evidence that he had initial difficulty latching to feed while at the hospital, and exhibited tremors, jitteriness, and overstimulation as reported by the child's caregiver. These challenges, the GAL argues, are "possible symptoms of abstinence syndrome related to substance exposure." The trial evidence, however, does not support that assertion:

- The pediatrician who treated the child at the hospital noted that "there was at some point some problems with latching." She testified that those problems "could be potentially drug related," but "also could be just a newborn baby struggling to learn how to eat with the new task they have to do." And she agreed that she could not say "with any degree of medical certainty that [the child's] latching problem was the result of substance withdrawal."
- The pediatrician who saw the child for his first and second follow-up appointments recalled that the "main concerns" were reports that the child was "having

tremors, [was] easily startled and [had] a little bit of sweating throughout the day." But she did not witness any of these symptoms herself and conceded that they largely "overlap[ped] with normal baby behaviors." When counsel for the Department asked whether the reported symptoms "were more likely than not related to substance exposure," she only responded that "[i]t is possible, but I can't 100 percent confirm that." A close reading of the colloquy reveals that the physician was unable to confirm that the symptoms were *more likely than not* related to substance exposure. And if the physician could not testify as to the most likely source of the child's symptoms, it follows that the jury would be speculating if it were to reach a similar conclusion by a preponderance of the evidence. *See Mile High Cab, Inc. v. Colo. Pub. Utils. Comm'n*, 2013 CO 26, ¶ 16 (distinguishing "reasonable possibility" standard from preponderance of the evidence).

- The third pediatrician, who saw the child at his later follow-up appointments and treated him for a respiratory

infection, testified that she had not observed anything during the course of that treatment that was "consistent with a withdrawal symptom."

¶ 32 While two of the physicians noted that the child had some challenges, neither was able to attribute any such symptoms to his methamphetamine exposure. To the contrary, both agreed that it was just as likely that the child's symptoms could have alternative — and non-drug-related — explanations. It follows that any conclusion that he exhibited a physical, developmental, or behavioral response to substance exposure at birth would be speculative. Given the stakes, *see Troxel v. Granville*, 530 U.S. 57, 65 (2000), an adjudication of dependency and neglect under section 19-3-102(1)(g) requires more certainty than that.

¶ 33 We recognize, and do not mean to understate, the devastating effects that may befall a child after being exposed to methamphetamine or other substances during pregnancy. But the extent to which substance exposure suffices to support a child's adjudication is a policy decision that falls within the General Assembly's exclusive purview, subject only to constitutional restraints. *See In re A.T.M.*, 250 P.3d 703, 705 (Colo. App. 2010).

With the General Assembly having decided that mere exposure is no longer enough to justify a child's adjudication, we may not substitute our judgment for the legislature's policy decision. Accordingly, given the absence of any evidence that it was more likely than not that any symptoms the child exhibited at birth were attributable to substance exposure, we conclude that the evidence was insufficient to support the adjudication.

V. Conclusion

¶ 34 We reverse the judgment and remand the case to the juvenile court with instructions to dismiss the petition, vacate all orders with respect to the child, and relinquish its jurisdiction. *See* § 19-3-505(6).

JUDGE SULLIVAN concurs.

JUDGE FOX dissents.

JUDGE FOX, dissenting.

¶ 35 I reach two conclusions, one that departs from the majority's analysis and a second that the majority does not reach: (1) the plain language of section 19-3-102(1)(g), C.R.S. 2023, does not require the government to present evidence of immediate impacts caused by a child's exposure to alcohol or substances; and (2) the General Assembly did not intend to require the government to prove parental fault under paragraph (g) — such as a premature birth, impaired growth, withdrawal symptoms, or some other form of documented harm — to establish that a "child is born affected by alcohol or substance exposure."

¶ 36 I agree with the majority's recitation of the facts and so will not repeat them except as necessary to explain my position. Where I depart from the majority, however, is in the interpretation of the operative statutory provision. In my view, that this child did not have the more pronounced and immediate signs of distress that medical providers might see in a child born with fetal alcohol syndrome or exposed to cocaine or heroin in utero does not mean that the El Paso County Department of Human Service (the Department) failed to satisfy its burden of proof. *See, e.g.*, *Ferguson*

v. City of Charleston, 532 U.S. 67, 90 (2001) (Kennedy, J., concurring in the judgment) (warning about the dangers of drug use in pregnancy and recognizing that the state, by taking measures to train and rehabilitate addicted new mothers, "acts well within its powers and its civic obligations"); *In re Stephen W.*, 271 Cal. Rptr. 319, 323 (Ct. App. 1990) (the presence of opiates in a newborn's urine, coupled with symptoms of drug withdrawal shortly after birth, was sufficient to sustain a dependency petition; the addicted mother then had the burden of proving that, despite her drug use, she could care for the child); *see also* Sharon G. Elstein, *Children Exposed to Parental Substance Abuse: The Impact*, 34 Colo. Law. 29 (Feb. 2005); Elan D. Louis et al., *Merritt's Neurology* 1584-87 (14th ed. 2022) (discussing prenatal and perinatal effects of substance exposure).

¶ 37 The majority recites the evidence of the child having tremors, being easily startled, and sweating that his caregiver reported, but it does not find those observations dispositive because the doctor to whom these observations were reported could not say with "100 percent" certainty that they were more likely than not related to substance exposure. In my view, under a preponderance standard,

People in Interest of O.E.P., 654 P.2d 312, 316-17 (Colo. 1982), it was enough that Dr. Stephanie Lombardi associated the child's tremors with withdrawal symptoms. *See id.* For that reason, and as explained in greater detail below, I would affirm the judgment.

I. Section 19-3-102(1)(g)

¶ 38 The parents assert, for different reasons, that the evidence presented to the jury did not satisfy the statutory criteria in section 19-3-102(1)(g). I reject their arguments for the following reasons. In doing so, I apply the legal principles regarding dependency and neglect proceedings and the principles of statutory interpretation that the majority recites above in Part II and Part III.A, respectively.

A. Sufficiency of the Evidence

¶ 39 Mother asserts that the Department failed to present sufficient evidence for the jury to find that the child was dependent or neglected under section 19-3-102(1)(g). I disagree.

¶ 40 In determining whether the evidence is sufficient to sustain an adjudication, we review the record in the light most favorable to the prevailing party, drawing all reasonable inferences in favor of the adjudication. *People in Interest of S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009). We will not disturb the jury's verdict if the record

supports it, even if reasonable people might arrive at different conclusions on the same facts. *Id.*; *see also People in Interest of T.T.*, 128 P.3d 328, 331 (Colo. App. 2005) (decided under the prior version of section 19-3-102(1)(g)).

¶ 41 Mother first asserts that, to satisfy the first part of paragraph (g) — "[t]he child is born affected by alcohol or substance exposure" — the Department must show that the exposure caused a negative effect to the child *at birth*, such as a premature birth, impaired growth, withdrawal symptoms, or some other form of actual harm. I disagree.

¶ 42 The General Assembly added paragraph (g) to the grounds for adjudication in 2005. *See* Ch. 166, sec. 2, § 19-3-102, 2005 Colo. Sess. Laws 587-88. The 2005 version of paragraph (g) provided that a child was dependent or neglected if

> [t]he child tests positive at birth for either a schedule I controlled substance, as defined in section 18-18-203, C.R.S., or a schedule II controlled substance, as defined in section 18-18-204, C.R.S., unless the child tests positive for a schedule II controlled substance as a result of the mother's lawful intake of such substance as prescribed.

§ 19-3-102(1)(g), C.R.S. 2005. Put differently, the 2005 version created a rule — that a child was dependent or neglected if the child tested positive for a controlled substance at birth — and an exception to that rule — the child was not dependent or neglected if the positive test resulted from mother's lawful intake of a substance as prescribed.

¶ 43 When the General Assembly amended paragraph (g) fifteen years later with Senate Bill 20-028, *see* Ch. 186, sec. 5, § 19-3-102, 2020 Colo. Sess. Laws 854, it both changed and added to the statute as illustrated below:

2005 Version	**2020 Version**
A child is neglected or dependent if:	A child is neglected or dependent if:
"[t]he child tests positive at birth for either a schedule I controlled substance, as defined in section 18-18-203, C.R.S., or a schedule II controlled substance, as defined in section 18-18-204, C.R.S."	"[t]he child is born affected by alcohol or substance exposure"
"unless the child tests positive for a schedule II controlled substance as a result of the mother's lawful intake of such substance as prescribed"	"except when taken as prescribed or recommended and monitored by a licensed health care provider"

2005 Version	2020 Version
[No prior counterpart]	And "the newborn child's health or welfare is threatened by substance use"

In my opinion, the addition of the new language in paragraph (g) indicates that the General Assembly intended to shift the focus away from a child's exposure to alcohol or substances alone and toward a more comprehensive consideration of whether the child's health or welfare is or will be threatened because of substance use by those in the child's life. *See Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 30 n.2 (noting that statutory history can be considered without first deeming a statute ambiguous); *see also People in Interest of D.L.R.*, 638 P.2d 39, 42 (Colo. 1981) (noting that present tense in section 19-3-102 can be read to include the future tense); § 2-4-104, C.R.S. 2023.

¶ 44 I therefore conclude that the General Assembly created a two-part analysis in the current version of paragraph (g). The first part is a preliminary step, which asks whether the case involves a child who was born affected by alcohol or substance exposure, and if so, whether the exception applies. If the rule applies and the exception

does not, the fact finder then determines whether the newborn child's health or welfare is or will be threatened by substance use.

¶ 45 I now turn to mother's assertion that the preliminary step requires a showing that the exposure caused harm to the child. I disagree for the following reasons.

¶ 46 First, mother's interpretation of paragraph (g) does not comport with the plain language of the statute. As mother notes, the word "affect" means "to produce an effect on" something or someone. Black's Law Dictionary 70 (11th ed. 2019); *see Cowen v. People*, 2018 CO 96, ¶ 14 ("When determining the plain and ordinary meaning of words, we may consider a definition in a recognized dictionary."). In mother's opinion, the thing that is producing the effect is the substance exposure and the effect is, for example, a withdrawal symptom. But the sentence structure suggests that the alcohol or substance exposure is the effect and the thing that produced the effect occurred before the child's birth. Said another way, the *effect* is alcohol or substance exposure, and the *cause* is, for example, a mother's use of methamphetamine while pregnant.

¶ 47 Second, the statutory history described above indicates that the General Assembly intended to replace the 2005 version with the preliminary step, albeit using different language. To be sure, the General Assembly added an additional requirement that the government prove past, current, or prospective harm to the child, but it did so by creating new language about whether the newborn child's health or welfare is or will be threatened by substance use.

¶ 48 Third, mother's interpretation would run counter to the best interests of children. *See C.S. v. People in Interest of I.S.*, 83 P.3d 627, 635 (Colo. 2004); *see also People in Interest of J.G.*, 2016 CO 39, ¶ 37 ("The Children's Code exists to protect children and ensure that they have a safe and healthy environment."). Under mother's construction of the statute, a child would not be adjudicated as dependent or neglected if the government could not establish that the child had experienced negative impacts from the prenatal substance exposure. As the expert witnesses testified in this case, some substances, such as methamphetamine, do not regularly cause significant issues for a child at, or immediately after, birth. That does not mean, of course, that there may not be later effects, as the medical experts testified. So a parent could actively use

methamphetamine throughout a pregnancy (and presumably continue to use methamphetamine after the child's birth), but if the child was not born prematurely, did not have immediate, detectable growth impairments, or was not experiencing withdrawal symptoms, the child would not be a dependent or neglected child under paragraph (g). I do not believe that the General Assembly intended this result. *See People in Interest of H.*, 74 P.3d 494, 495 (Colo. App. 2003).

¶ 49 In sum, I conclude that the preliminary step of paragraph (g) does not require the government to present evidence of an immediate, harmful effect caused by the exposure. To the extent that such evidence is relevant to whether a child is dependent or neglected under paragraph (g), it would be relevant in proving the second part of the statute.

¶ 50 Applying this interpretation, the evidence is sufficient to establish the preliminary step of paragraph (g). Mother admitted that she used methamphetamine during her pregnancy and that the child tested positive for methamphetamine at birth because of her substance use. The parties also presented an instruction to the jury informing it that these facts were undisputed.

¶ 51 I next address whether the evidence was sufficient to establish the second part of paragraph (g) — that the newborn child's health or welfare is threatened by substance use. Here, mother asserts that the evidence that the child might experience problems in the future, including attention deficit issues, behavioral problems, and growth and development limitations, cannot satisfy the statute because that evidence is too speculative. But Dr. Lombardi connected the child's tremors to the prenatal exposure. In any event, the evidence was otherwise sufficient for another reason.

¶ 52 The Department could establish that the child was dependent or neglected based on mother's past substance use, along with evidence that she still needed treatment to address her substance abuse issues before she could safely parent the child. *See People in Interest of S.N.*, 2014 COA 116, ¶ 17; *see also People in Interest of A.W.*, 2015 COA 144M, ¶ 22 ("Because [the child] had not been in mother's care, the jury was required to determine whether [the child] was dependent and neglected based on a prediction of the home environment to which [the child] might be exposed if she were placed in mother's care."). The jury heard, and could consider, the circumstances surrounding the child's birth. Mother and father

had been living in a car for about two months, and the child was born in that car before the parents sought medical care. There was no suggestion that either parent was, as of the adjudicatory trial, in a position to safely care for the child.

¶ 53 The evidence revealed that mother started using methamphetamine a few months before she found out that she was pregnant, continued to use it during her pregnancy, and was diagnosed with amphetamine use disorder. Mother's substance abuse therapists testified that mother had made progress in her treatment, but she had not completed treatment and they would not recommend discharging her. And mother admitted that she still needed treatment for her substance abuse issues.

¶ 54 I recognize that the evidence also showed that mother had not tested positive for any substances for more than five months. But the evidence did not show that mother was "no longer addicted to methamphetamine," as she asserts on appeal. Rather, mother's therapists noted that her recovery could be a lifelong process. Therefore, the evidence described above, including the potential for relapse in her early months of sobriety, established a threat to the child's health or welfare if he were then returned to mother's care.

That is not to say, of course, that mother might not continue to make sufficient progress to allow her to have increased parenting time with the child and perhaps be reunified with him. In any event, it is not our role to reweigh the evidence to reach a different result. *See S.G.L.*, 214 P.3d at 583.

¶ 55 Thus, viewing the evidence in the light most favorable to the Department and drawing every fairly deducible inference in favor of the jury's decision, I conclude that the record contains sufficient evidence to support the jury's determination that the child was dependent or neglected under paragraph (g). *See id.*

¶ 56 Because I would affirm, I proceed to address the remaining issues on appeal, starting with father's contention regarding section 19-3-102(1)(g) and then moving to the parents' other arguments not related to that statute. I conclude that none of them merit reversal.

B. Motion for Directed Verdict

¶ 57 Father contends that the juvenile court erred by denying his motion for a directed verdict. Specifically, he maintains that the Department had to present evidence that he was at fault to establish that the child was dependent or neglected under section 19-3-102(1)(g). I disagree.

¶ 58 A juvenile court's denial of a motion for a directed verdict is reviewed de novo. *Parks v. Edward Dale Parrish LLC*, 2019 COA 19, ¶ 10. In reviewing a denial of a motion for a directed verdict, this court must "view the evidence, and all inferences that may reasonably be drawn therefrom, in the light most favorable to the nonmoving party." *Id.* And the appellate court should not reverse the juvenile court's judgment unless there is no evidence that could support a verdict against the moving party. *Id.*

¶ 59 Father's motion for a directed verdict asserted, among other things, that the Department had not presented any evidence that he had contributed to the child's status as dependent or neglected. The juvenile court found there was enough evidence to overcome the directed verdict motion. As pertinent to this appeal, the court found that whether "the newborn's health was threatened by substance use" was "a no-fault" issue.

¶ 60 In *J.G.*, ¶ 32, our supreme court considered whether a jury had to find parental fault as to each parent for an adjudication under section 19-3-102(1)(c). Paragraph (c) provides that a child is dependent or neglected if "[t]he child's environment is injurious to his or her welfare." § 19-3-102(1)(c). The supreme court noted

that, unlike other provisions of section 19-3-102, paragraph (c) does not implicate a parent's fault and therefore the General Assembly's exclusion of that language must have been "purposeful, meaning it did not intend to require the fact finder to make findings as to the fault of the parents under that paragraph." *J.G.*, ¶ 36. Therefore, the supreme court concluded that a child may be dependent or neglected under paragraph (c) "when he or she is in an injurious environment, regardless of the parents' actions or failures to act." *Id.* at ¶ 40.

¶ 61 Like paragraph (c), paragraph (g) does not explicitly reference parental fault. Rather, the statute focuses on whether *the child* was born affected by alcohol or substance exposure and *the newborn child's* health or welfare is threatened by substance use. Nothing in the statute requires a finding of *who* caused the exposure or whose substance use is threatening the child's health or welfare. *See id.* at ¶ 37 (noting that the parent's interpretation of paragraph (c) "improperly narrow[ed] the statute's scope to focus on the parents' conduct rather than on the child's environment"). As such, and consistent with *J.G.*, we must presume that, because paragraph (g)

does not reference a parent's conduct, the General Assembly's exclusion of such language was "purposeful." *Id.* at ¶ 36.

¶ 62 Because father does not contend that the Department presented insufficient evidence that the child was born affected by substance exposure or that mother's substance use threatened the child's health or welfare, as described in more detail below, the juvenile court did not err in denying father's motion for a directed verdict.

¶ 63 Nonetheless, relying on *J.G.*, father submits that paragraph (g) is a "fault" ground because "it is predicated specifically on the mother's substance use prior to the child's birth." In *J.G.*, our supreme court noted that paragraph (c) is "one of only two paragraphs that does not contain the words 'parent, guardian, or legal custodian,'" the other being paragraph (g). *J.G.*, ¶ 34. The supreme court then stated in a footnote that, although paragraph (g) does not "contain the term 'parent, guardian, or legal custodian,'" it "presume[d] that a child [c]ould not test positive at birth for a controlled substance without some action on the part of the mother." *Id.* at ¶ 34 n.8.

¶ 64 I reject father's assertion, however, because the version of paragraph (g) at issue in this appeal is different from the one in effect when the supreme court decided *J.G.* The part of the statute that the juvenile court said was a "no-fault" provision — the newborn child's health or welfare is threatened by substance use — was an entirely new addition to paragraph (g). And as noted, while the statute requires a finding that the newborn child's health or welfare is threatened by substance use, it says nothing about the person or persons using substances. *See* § 19-3-102(1)(g).

¶ 65 Even accepting father's assertion that the first part of paragraph (g) — "[t]he child is born affected by alcohol or substance exposure" — necessarily requires some parental action by mother, I still reject his assertion. To be sure, the supreme court suggested that the previous version of paragraph (g) implicitly involved some parental conduct, but it did not conclude that a child could not be found dependent or neglected in relation to a father under that provision. Indeed, if that were the case, paragraph (g) could often result in an adjudication against a mother but rarely a father. *See J.G.*, ¶ 39 (noting that due process does not require a finding that "both parents could not or would not provide reasonable parental

care" for an adjudication under paragraph (c)). I do not believe that the General Assembly intended such a result. *See H.*, 74 P.3d at 495.

¶ 66 Finally, I am not otherwise persuaded to reach a different conclusion based on regulations enacted by the State Board of Human Services interpreting the language in paragraph (g). Specifically, father points to the regulation defining "[t]hreatened by substance use" that refers to parental conduct. Dep't of Hum. Servs. Rule 7.000.2.A, 12 Code Colo. Regs. 2509-1. I decline father's invitation to base a decision on a regulatory definition because the statute is unambiguous, *see In re People in Interest of A.A.*, 2013 CO 65, ¶ 10, and an agency interpretation is not binding on us, *see Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 38. The majority references the regulations without suggesting there is ambiguity in the statute such that it should rely on the regulatory definition.

¶ 67 In sum, I conclude that (1) paragraph (g) does not require proof of parental fault and (2) the juvenile court properly denied father's motion for a directed verdict because there was evidence

supporting a verdict against him. I therefore discern no basis under section 19-3-102(1)(g) for reversal.

II. Other Contentions

A. Requests for Admission

¶ 68 Father argues that the juvenile court erred by declining to require the child's guardian ad litem (GAL) to respond to his requests for admission under C.R.C.P. 36 because the GAL was not a "party." As described below, I conclude that any error in the court's decision was harmless. *See* C.A.R. 35(c) ("The appellate court may disregard any error or defect not affecting the substantial rights of the parties.").

¶ 69 Because dependency and neglect proceedings are civil in nature, the Colorado Rules of Civil Procedure apply when a particular procedure is not addressed in the Colorado Children's Code or in the Colorado Rules of Juvenile Procedure. C.R.J.P. 1; *People in Interest of Z.P.*, 167 P.3d 211, 214 (Colo. App. 2007). C.R.C.P. 36(a) allows one party to "serve upon any other party a written request for [an] admission." A request for admission forces an opposing party to formally admit the truth of certain facts and therefore allows the requesting party to avoid potential problems of

proof at a trial. *See Aspen Petroleum Prods., Inc. v. Zedan*, 113 P.3d 1290, 1292 (Colo. App. 2005).

¶ 70 As relevant here, father served the GAL with requests for admission asking the GAL to admit that (1) the child "was never medicated by any of the treating physicians or hospital staff for suffering from substance dependence withdrawals"; (2) the child, "since his birth, has never once been in the care and custody of his father"; (3) "the Department has no evidence of illegal drug use by [father]"; and (4) "the Department has no evidence [father] has ever abused or mistreated [the child]." The GAL objected to father's requests, asserting, in part, that a GAL is not a party within the meaning of C.R.C.P. 36. The juvenile court agreed and found that the GAL was not "required to answer the requests for admission."

¶ 71 At the adjudication trial, father submitted a jury instruction with a list of "admitted" facts, including the four statements described above. The GAL objected to the instruction, noting that she had not admitted to any of these facts. After a lengthy discussion, the court modified the jury instruction, with the agreement of all parties, to remove any reference to an "admission" and instead referred to the listed facts as undisputed.

¶ 72 Because the GAL agreed to the undisputed facts for the purpose of the jury trial, father ultimately achieved his goal — presenting facts to the jury that he did not need to prove with evidence. *See Aspen*, 113 P.3d at 1292. I therefore conclude that any error in the court's decision concluding that the GAL was not a party is harmless. And to the extent that the undisputed facts instruction did not include answers to every request for admission, father does not explain, and I cannot discern, how the GAL's failure to respond to those requests would have changed the outcome of the case. I therefore discern no reversible error.

B. Jury Instructions

¶ 73 Mother argues that the juvenile court erred by declining to give her counsel's proposed jury instructions. I conclude that this issue is waived because mother's counsel agreed to the court's proposed revision. *See Bernache v. Brown*, 2020 COA 106, ¶ 10 (noting that a waiver is the intentional relinquishment of a known right or privilege).

¶ 74 Mother's counsel submitted a proposed instruction that read as follows: "You must determine if the child is currently dependent and neglected as of today's date or will be neglected if returned to

the parents." The Department and GAL objected to the instruction, arguing that, because the child "wasn't born substance exposed today," the instruction could confuse the jury. The juvenile court found that, "as its written now," the instruction was "too confusing in light of the neonatal exposure subsection" and that if mother could "craft an instruction that encompasse[d] [the court's] concern" it would "give it."

¶ 75 After a discussion, the juvenile court proposed incorporating mother's instruction into its instructions for paragraphs (b)-(d) of section 19-3-102(1), but not into an instruction for paragraph (g). For example, the instruction for paragraph (b) read that "[y]ou must determine if [the child] lacks proper parental care through the actions or omissions of the parent as of today's date or will lack such care in the future if returned to the parent." But the instruction for paragraph (g) recited the statutory language verbatim.

¶ 76 After listening to the juvenile court's proposal, mother's counsel responded, "That's fine." In other words, mother agreed to the court's instruction and did not maintain her objection for purposes of appeal. Because mother's counsel acquiesced to the

court's instruction, mother cannot now challenge it on appeal. *See People v. Carter*, 2021 COA 29, ¶ 33 (concluding that a defendant waived his challenge to a jury instruction, where the record showed that defense counsel had "knowledge that the charge had changed" and made "a decision to go along with it"); *cf. Bernache*, ¶ 12 (noting that a party had not waived her right to appeal the trial court's admission of a witness statement by stipulating to it at trial, where the party filed a pretrial motion in limine that was denied).

III. Proposed Disposition

¶ 77 For all the foregoing reasons, I would affirm the judgment.