NEW MEXICO CHILD WELFARE HANDBOOK

A LEGAL MANUAL ON CHILD ABUSE AND NEGLECT

The Handbook Is Dedicated To

SUPREME COURT JUSTICE PETRA JIMENEZ MAES

For Her Bold Leadership and Enduring Commitment to Improving New Mexico's Child Welfare Legal System.

PUBLISHED BY THE CORINNE WOLFE CENTER FOR CHILD AND FAMILY JUSTICE AT THE INSTITUTE OF PUBLIC LAW, UNM SCHOOL OF LAW

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New Mexico Child Welfare Handbook

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This handbook is intended for educational and informational purposes only. The book is not intended to provide legal advice and readers are responsible for consulting the statutes, rules and cases pertinent to the proceeding in which they are involved or the issue they are addressing. Readers must also keep in mind that recent years have seen substantial changes in the laws and procedures governing child abuse and neglect proceedings and that both law and procedure are continuing to change.

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Acknowledgments

The New Mexico Child Welfare Handbook is a publication of the Corinne Wolfe Center for Child and Family Justice at the Institute of Public Law, University of New Mexico School of Law. We are pleased to announce the publication of the sixth edition, the 2018 Handbook.

The Handbook was originally published in 2000 as the first project of what was then called the Corinne Wolfe Children's Law Center, a new training and resource center for judges, attorneys, and other professionals and volunteers who work with children and families in the child welfare legal system. Tremendous gratitude goes to the New Mexico Judicial Education Center and the New Mexico Court Improvement Project, which lent their knowledge, experience and support to the project.

The 2000 Handbook was in many ways a grand experiment. Few states had put together a manual for judges, attorneys, case workers and advocates on child welfare law and practice. With few models to go on and lots of enthusiasm, the Handbook process was ably guided by a talented and hard-working planning committee made up of the following members, who also served as writers and reviewers. The members of the committee are identified by the position they held at the time the handbook was being developed twenty years ago.

- Angela Adams, Chief Children's Court Attorney, Children, Youth & Families Dept.
- Hon. Christina Armijo, New Mexico Court of Appeals
- Patricia Briggs, Project Director, Citizen Review Board
- Hon. Ralph Gallini, Fifth Judicial District
- Toby Grossman, Attorney, American Indian Law Center, Inc.
- Jennifer Davis Hall, Attorney, Albuquerque
- Julie Fallin, Training Director, New Mexico CASA Network
- Edward Schissel, Children's Court Attorney, Children, Youth & Families Dept.
- Hon. Patricio M. Serna, New Mexico Supreme Court
- Susan Simmons, Attorney, Albuquerque

The committee was staffed by Center attorney Judy Flynn-O'Brien, who, together with Pam Lambert of the Judicial Education Center, designed and edited the original Handbook. From the beginning, work on all editions has been expertly led by Ms. Flynn-O'Brien. Although we have worked on the Handbook together for years, first while Judy served as director of the Center and then, more recently, during my tenure as director, credit for the Handbook's creation and continued value goes to Ms. Flynn-O'Brien, who works to keep the Handbook timely, relevant, accessible, and eminently useful.

Numerous other individuals contributed their expertise and time in researching and writing portions of the Handbook or its 2003, 2007, 2011, and 2014 editions, reviewing and editing drafts, and providing help, support, and good cheer along the way. The Handbook could not have been written (or updated) without them.

- Laura Bassein
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- Susan Page
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- Mary Ann Shaening
- Roy Stephenson
- Lisa Trabaudo
- Kelly Waterfall
- Linda Yen

Yet other individuals devoted hours to reviewing text, sharing their own materials, and otherwise helping complete the original Handbook.

- Iris Augusten
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- Brian O'Connell
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- Dan Pearlman
- Andrea Poole
- Jane Printz
- Hon. Jerry Ritter
- Hon. John Romero
- Ed Schissel
- Linda Yen

And finally I want to turn to the latest effort to update the Handbook. I am proud and honored to say that the New Mexico Child Welfare Handbook is now in its sixth edition, the 2018 Handbook. We have talked for a long time about revamping the Handbook completely and that has yet to happen but, as always, even "just an update" touches virtually every page in the document. It is a testament to the evolving, dynamic, and always challenging world of the abuse and neglect legal system and child welfare law and practice.

The work to update the Handbook for the 2018 edition has, again, been a group effort. With their research, writing and editing, three attorneys -- Judy Flynn-O'Brien, Leigh Brunner and Peter Klages, under Judy's direction – have been involved in the update from the first page to the last. They have been assisted by a number of judges, attorney and other talented individuals who have contributed their particular expertise to individual chapters. My gratitude goes to:

Laura Bassein
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Jason deHerrera, Jennifer Marez, Anna Nolasco, Lisa Ortiz, Milissa Soto and other CYFD staff have helped us understand the practical aspects of Title IV-E and shared data with us. Attorney Grace Spulak had the monumental job of proofreading the handbook, while law student Kaela Thomas updated and checked the citations. Institute of Public Law staffer Anna Roybal handled all of the last minute formatting and helped design the cover and spine.

Last but not least -- definitely not least -- the Center wishes to thank attorney Tara Ford and law students Vanessa Guerrero and Rebecca Pottash for their work in writing the new chapter on federal and state education law, Chapter 35. Tara was the co-founder of Pegasus Legal Services for Children here in New Mexico and is now the clinical supervising attorney for the Youth & Education Project at Stanford Law School's Mills Legal Clinic.

The Handbook would not have been possible without the concerted efforts of so many talented and committed individuals. Thank you.

Beth Gillia, Director
Corinne Wolfe Center for Child and Family Justice
July 2018

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INTRODUCTION TO THE HANDBOOK

Purpose of the Handbook

The purpose of the New Mexico Child Welfare Handbook is to provide the judiciary and other members of the child welfare community with a comprehensive resource guide to New Mexico's child abuse and neglect legal process. While designed and written primarily for judges and lawyers, the Handbook should be helpful to other participants in the legal system.

The Handbook incorporates the applicable requirements of the Children's Code, the Children's Court Rules, CYFD regulations, court cases, and federal laws. It summarizes the child abuse and neglect process, describes the roles and responsibilities of certain key participants, explains the hearings that may take place in a case, and addresses other relevant topics, such as evidence and procedure, special provisions for Indian children, education and mental health laws, and related proceedings.

The Handbook is intended to serve as a current, convenient secondary source of law, policy, and practice for child abuse and neglect cases. Do not rely on the Handbook as legal authority; instead, consult primary sources for specific legal language and requirements.

Organization

The Handbook is organized into seven general parts, each divided into chapters addressing the following topics:

Part A: Overview

- Overview of the abuse and neglect process.
- Substantive and procedural rights of parents and children.
- Key concepts involved in the process.

Part B: Roles and Responsibilities

- Roles and responsibilities of such participants as the judge, the attorneys for the various parties (including the child party), the Children, Youth and Families Department, child advocates, and foster parents.
- Note that parents and children are addressed throughout the Handbook and are not the subject of individual chapters in this part.

Part C: Child Abuse and Neglect Proceedings

- Proceedings in order of their occurrence generally, from commencement of a case through appeal.
- Issues such as notification, timelines, standard of proof, required findings, and other substantive and procedural matters.

Part D: Evidentiary and Procedural Issues

- Intervention, discovery and evidence.
- Court orders during a case, case management techniques, and mediation.

Part E: Indian Children

- The Indian Child Welfare Act.
- A chapter is reserved for other topics relating to Indian children and the tribes.

Part F: Other Applicable Laws

- Education law and the law on children's mental health and developmental disabilities as they affect or benefit children in foster care.
- Federal child welfare law as it has developed over the past 40 years.

Part G: Related Proceedings

- Adoption and kinship guardianship, which may overlap with the abuse or neglect case.
- Families in need of court ordered services, a valuable alternative to an abuse or neglect case.
- Delinquency and criminal child abuse, which often affect the same children and families.

In addition, the Handbook contains appendices which include common acronyms, a glossary of terms used in the Children's Code, and lists of statutes and cases cited in the text.

Style and Format

The Handbook is written in a narrative form, with every effort being made to achieve a balance between readability and accuracy in areas that are complex and governed by detailed statutes, rules, and case law. Abbreviations are kept to a minimum and should be readily recognizable when encountered.

Citations to statutes, rules, and cases use the most concise style possible while still providing adequate reference information. Full citations can be found in the statute and case lists in the appendices. In general, citations in the text use the following style:

- Statutes: New Mexico statutes are cited as §__-__-__, such as §32A-4-1, without "NMSA 1978." Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.
- Rules: New Mexico judicial rules and forms are cited as Rule __-___, such as Rule 10-301, or Form __-___, such as Form 10-564, without the addition of "NMRA." Administrative rules are cited as __.__.__.__ NMAC, such as 8.10.7.29 NMAC.

- Cases: New Mexico cases are cited using the vender neutral citation from the New Mexico Appellate Reports, as well as a citation to the New Mexico Reports, if available. The New Mexico Reports ceased publication with volume 150. Complete citations can be found in the Table of Cases in Appendix D. The Table of Cases also indicates where the case is cited in the Handbook.

It is important for attorneys to note that the form of citation in this Handbook is for the sake of brevity and formatting and is not necessarily appropriate for formal citations in briefs. Refer to the Supreme Court General Rules, specifically Rule 23-112, for the proper form of citation for pleadings and papers filed with the court.

Availability of Laws and Cases

While the Handbook contains citations to numerous state and federal statutes, rules, and cases, it does not provide their full text. You can find these legal materials in law libraries and through the Internet. Some examples of no-cost electronic sources are listed below.

Statutes and Court Rules and Forms

- New Mexico statutes/court rules/forms: http://www.nmcompcomm.us
- Federal statutes: http://www.gpo.gov/fdsys/search/home.action

Agency Rules

- New Mexico Administrative Code: http://www.nmcpr.state.nm.us/nmac
- Federal regulations: http://www.gpo.gov/fdsys/search/home.action

Cases

- New Mexico appellate cases: http://www.nmcompcomm.us
- Federal cases: https://www.caselaw.findlaw.com

Effective Date

The 2018 Handbook is generally current through June 2018. As funds and staffing allow, the Handbook will continue to be updated periodically, with the most current version available on the web at http://childlaw.unm.edu/resources.php.

Production

The Handbook was produced under the direction of attorneys Judy Flynn-O'Brien and Pam Lambert in 2000 and 2003 and Ms. Flynn-O'Brien and Beth Gillia in 2007, 2011, 2014, and 2018. Funding has been provided by the following sources over time:

- State Justice Institute
- Children, Youth and Families Department
- New Mexico Judicial Education Center
- Corinne Wolfe Children's Law Center (now the Center for Child and Family Justice)
- Institute of Public Law
- University of New Mexico School of Law
- Court Improvement Project at the New Mexico Administrative Office of the Courts
- Several private foundations.

Access to the Handbook

The 2018 Handbook is available free of charge on the website for the Center for Child and Family Justice, http://childlaw.unm.edu, under Resources. Users are also welcome to print out the Handbook for their personal convenience. For information on the possibility of purchasing hard copies, please contact the Center at the address below.

Permission to Reproduce

For information on the permission and acknowledgements necessary for reproducing portions of the Handbook, please contact the Center for Child and Family Justice at the address in the next section.

Contact

For further information on the Handbook, or to report errors or suggestions for future updates, please contact Center Director Beth Gillia at bgillia@unm.edu or 505-277-0710.

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HIGHLIGHTS OF THE 2018 HANDBOOK

The New Mexico Child Welfare Handbook was last updated in 2014. Over the past four years, the Children's Code has been amended in several ways, the Children's Court Rules have seen a number of changes, and the Children's Court Forms have been recompiled and updated, with several new forms for abuse and neglect cases added. The Supreme Court and the Court of Appeals have issued a number of opinions relevant to Children's Court practice. At the federal level, Congress passed two major pieces of legislation that ultimately affect state child welfare practice. One of the biggest developments of the past four years has been the issuance of regulations and new guidelines under the federal Indian Child Welfare Act.

These changes are incorporated throughout the Handbook and examples are given below. All of the developments are summarized in more detail in the semi-annual updates that were prepared between the publication of the 2014 and 2018 Handbooks and available at http://childlaw.unm.edu.

In addition to the changes to the Handbook to reflect changes in the law, two new chapters have been added, one on the roles and responsibilities of the children's court judge and one on education law as it affects the educational well-being of children in foster care, both long overdue. A short explanation of Title IV-E and what it means for a child to be IV-E eligible has been added to Chapter 1.

The Handbook has been reorganized to some extent, primarily to move the chapter on Indian children and the Indian Child Welfare Act up in the Handbook. The standards and procedures unique to Indian children are integral to the state child welfare proceeding.

Former Part F on medical, psychological and social issues has been deleted from the Handbook. The decision was made to focus the Handbook on legal issues, with the hope that, time and funding permitting, a companion volume or compilation of materials on medical, psychological and social issues can be produced separately.

Finally, given these various changes, the chapters have been renumbered.

Statutory Changes

A number of state laws have been amended and new laws adopted in the subject areas covered by the Handbook. These include the following.

The 2016 Legislature amended several sections of the Abuse and Neglect Act to emphasize the importance of grandparents and other relatives and move the report to the court on grandparents and other relatives up to the disposition hearing. It also added a time frame for transition home plans in §32A-4-25.1, amended the list of individuals who can access records under §32A4-33, and changed the term "treatment plan" to "case plan." *See* 2016 Laws, Ch. 51 (HB 28).

The 2016 Legislature amended the Citizen Substitute Care Review Act to make extensive changes to the way the review process is conducted. The bill also amends the Abuse and Neglect Act, in particular the section on judicial reviews, to reflect these changes. *See* 2016 Laws, Ch. 60 (SB 49). (The Substitute Care Advisory Council adopted rules effective February 2017. *See* 8.26.7 NMAC.)

The 2017 Legislature added a new section to the Public School Code to provide support for students whose education is disrupted as a result of adjudication as an abused or neglected child, placement in treatment foster care, homelessness or certain other factors. *See* 2017 Laws, Ch. 53/Ch. 85 (SB 301/SB 213) (identical bills). A separate bill in 2017 added a section to the Public School Code requiring school districts and state-approved charter schools to designate a point of contact for students in foster care or involved in the juvenile justice system. This law also added a new section to the Abuse and Neglect Act to require the children's court to appoint an educational decision maker at the custody hearing and to review the appointment at every stage of the proceeding. *See* 2017 Laws, Ch. 64 (HB 411).

A few changes were made to the Kinship Guardianship Act in 2015 and 2017, including changes to the Caregiver's Authorization Affidavit form. *See* 2015 Laws, Ch. 28 (HB 277); 2017 Laws, Ch. 62 (HB 394).

There were also a few changes in the Delinquency Act and the criminal statutes on crimes against children. ***See*** Handbook Chapters 40 and 41.

Supreme Court Rule Changes

Changes to the Children's Court Rules include the following:

Rule 10-315 has been amended to require that, at the commencement of the custody hearing, the court ask each party and participant to state under oath whether they know or have reason to know that the child is an Indian child under ICWA. Other subsections go into more detail. Form 10-521 is a form of notice for ICWA cases.

New Rule 10-316 requires that an educational decision maker be appointed at the custody hearing and the appointment reviewed at future hearings. Form 10-564 is the form for the order to be issued at these hearings.

New Rule 10-317 governs notice of change of placement, and should be used with Forms 10-565 and 10-566.

New Rule 10-318 goes into detail about the placement preferences for Indian children, establishing procedures for reviewing whether there is good cause to depart from the placement preferences, as well as factors that the court may and may not consider when making a good cause determination.

New Rules 10-325 and 10-325.1 now require that the youth attorney and the GAL, before every hearing, file a notice with the court stating that they have notified the child of the child's right to attend the hearing. New Forms 570 and 570.1 are notices of advisement.

New Rule 10-340 governs the use of alternative methods for child testimony. Form 10-571 accompanies the rule.

Rule 10-343 has been amended to change requirements for extension of time for adjudicatory hearings.

The Supreme Court extensively amended the abuse and neglect forms, added a number of new forms and recompiled them all into a Part 5 of the Rules and Forms. For example, there are new or amended forms of orders for custody hearings, adjudicatory and dispositional hearings (with separate forms for ICWA and non-ICWA cases), judicial review and permanency hearings, and TPR hearings.

Major changes and additions to the rules and forms for cases under the Delinquency Act have also been made. The most important is that youthful offender proceedings are now governed by the Children's Court Rules, in response to the Supreme Court's decision in *State v. Jones*, 2010-NMSC-012, 148 N.M. 1.

While not described here, the forms for proceedings under the Children's Mental Health and Developmental Disabilities Act have been revised and recompiled into a new Part 6 of the Children's Court Rules and Forms, while new forms for Kinship Guardianship Act proceedings can be found in the domestic relations forms.

CYFD Rule Changes

In 2016, the agency revised its rules on the procedures to be followed in administrative appeals, including appeals of substantiations of abuse and neglect.

CYFD has also amended or repealed and replaced its rules on intake, investigations, placement services, permanency planning, placement, and youth services. See generally Title 8, Chapters 8, 10 and 26, of the New Mexico Administrative Code. Many of the changes have been in response to federal laws passed in recent years. ***See*** Federal Laws, below.

ICWA Regulations and Guidelines

At long last, the U.S. Bureau of Indian Affairs has issued detailed regulations under the Indian Child Welfare Act. Shortly after the regulations were published, the BIA issued revised guidelines to further interpret the Act and regulations. The New Mexico Tribal-State Judicial Consortium has updated its judicial bench card for ICWA cases accordingly.

Case Law

Several cases have been decided by the appellate courts in the areas covered by the Handbook. In the area of abuse or neglect specifically, these cases include:

State ex rel. CYFD v. Keon H., 2018-NMSC-033, on termination of parental rights (TPR) and reasonable efforts.

State ex rel. CYFD v. Djamila, 2015-NMSC-003, on the statutory right of a kinship guardian to have a revocation hearing before being dismissed from an abuse or neglect case and establishing jurisdiction in the children's court to hear such a revocation.

In re Grace H., 2014-NMSC-034, on the two different standards for abandonment in the TPR statute and when they can be used.

State v. Strauch, 2015-NMSC-009, on the scope of the child abuse reporting statute, that is, on who must comply with mandatory reporting under §32A-4-3(A).

State ex rel. CYFD v. Jerry K., 2015-NMCA-047, on TPR of an incarcerated parent, futility due to the length of incarceration, and relinquishment conditioned upon adoption by particular individuals.

State ex rel. CYFD v. Yodell B., 2015-NMCA-029, on active efforts under the Indian Child Welfare Act, and standard of proof for active efforts (clear and convincing evidence).

State ex rel. CYFD v. Melvin C., 2015-NMCA-067, on the differences between abandonment under §32A-4-28(B)(1) and (B)(2).

State ex rel. CYFD v. Casey J., 2015-NMCA-088, on the active efforts and placement preferences required by the Indian Child Welfare Act,

State ex rel. CYFD v. Christina L., 2015-NMCA-115, on the differences between neglect based on "mental disorder or incapacity" under §32A-4-2(E)(4) (now (G)(4)) and a parent's failure or refusal to provide adequate care when able to do so," under §32A-4-2(E)(2) (now (G)(2)).

State ex rel. CYFD v. Alfonso M.E., 2016-NMCA-021, on applying §32A-28-(B)(1) (abandonment) only in cases where a parent is absent, reiterating that CYFD bears the burden of proving abuse or neglect, and expressing reluctance to see "as a general rule, native language disparities between a natural parent and his or her infant child [as] insurmountable obstacles to reunification."

State ex rel. CYFD v. Nathan H., 2016-NMCA-043, on substantial evidence to support TPR, stale evidence, and CYFD's duty to investigate whether a child is eligible for enrollment in an Indian tribe and, if so, to pursue enrollment.

State ex rel. CYFD v. Raymond D., 2017-NMCA-067, on sufficiency of the evidence to show that the causes and conditions of a child's neglect were unlikely to change in the foreseeable future under §32A-4-28(B)(2).

State ex rel. CYFD v. Rosalia, 2017-NMCA-085, applying *Matthews v. Eldridge*, 424 U.S. 319 (1976), to analyze whether a parent's due process rights were violated during the TPR trial when certain witness preparation techniques were used.

State ex rel. CYFD v. Donna E., 2017-NMCA-088, on sufficiency of the evidence to prove that parents caused the disintegration of the parent-child relationship required by §32A-4-28(B)(3), clarifying that reversal of TPR does not lead automatically to return of custody, and outlining the facts and circumstances to be considered when determining whether extraordinary circumstances would warrant depriving the parent of custody even after TPR is reversed.

State ex rel. CYFD v. Michael H., 2018-NMCA-032, on abandonment under §32A-4-2(A)(2) and Father's obligations to either take necessary steps to ensure the child was receiving the necessary care and support or establish that he was not the father if he had doubts about his paternity.

Federal Laws

The Every Student Succeeds Act, enacted in December 2015, primarily reauthorizes the Elementary and Secondary Education Act but also contains a number of provisions aimed at helping to improve educational outcomes for foster children.

The Preventing Sex Trafficking and Strengthening Families Act, enacted in September 2014, has major significance in the area of child welfare. It includes policies and procedures for states to use in determining appropriate services for children in state custody who the state believes are victims of or at risk for sex trafficking. It also focuses attention on the importance of foster children experiencing normalcy by having the opportunity to engage in age and developmentally appropriate activities. The Act requires changes to state plans for this purpose, allowing foster parents to support the interests of the young people in their care without having to seek approval from the state child welfare agency each time. The tool for this is called "reasonable and prudent parenting." The Act also limits the use of "another planned permanent living arrangement" for children under age 16, requires that the case plan for a child age 14 and over be developed with the child, and lowers the age for the life skills plan from 16 to 14. The law also requires that parents of siblings of a child being taken into custody be notified.

The Family First Prevention Services Act, enacted in 2018 as part of the Bipartisan Budget Bill, Pub.L. 115–123, has been described as the biggest change to child welfare since the Title IV-E entitlement was created in 1980. The Act allows states to use Title IV-E money for abuse prevention services, not just for services once a child is taken into custody. The Act also limits the use of congregate care. States are being given some time to decide to participate and revise their state plans accordingly.

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We regret if we have missed any developments that should be reported in the Handbook, and we urge our readers to bring these matters to our attention. As always, of course, we welcome any comments, suggestions, or corrections that will improve the book as a resource for judges and participants in abuse and neglect cases. Contact information is provided in the Introduction to the Handbook.

The Editors

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CHAPTER 1

OVERVIEW OF THE ABUSE AND NEGLECT LEGAL SYSTEM

This chapter provides an overview of:

- The Children's Code.
- Children's Court.
- Stages and proceedings in an abuse or neglect case.
- Required timeline in an abuse or neglect case.

1.1 The Children's Code

The state, in its role as *parens patriae* (protector of vulnerable individuals), has a compelling interest in the welfare of children, particularly when their health and safety may be in jeopardy. This interest is of such significance that it can justify government intrusion into the constitutionally protected autonomy of the family.

The Children's Code is the result of the Legislature's effort to balance the interests of the state and families. The primary purpose of the Code is the protection of the safety and welfare of children. The law creates a range of possible state actions when abuse or neglect is suspected or confirmed, from emergency intervention to permanent placement of the child outside the home.

As part of the Children's Code, the Abuse and Neglect Act authorizes the state to act in these cases through the Children, Youth and Families Department (CYFD). CYFD's decision-making is based on a consensus model involving case workers and children's court attorneys, all of whom are trained and practice exclusively in the area of child protective services. The children's court also plays an essential role, making critical decisions at important junctures in the case. It is the court, for example, that determines whether CYFD will have custody of the child, whether the child is an abused or neglected child, and what the permanency plan for the child will be.

Representing the parties before the court are the attorneys: the children's court attorney for CYFD, the youth attorney for children age 14 and older, the guardian ad litem for children under age 14, and the respondent's attorney for parents. The Children's Code also recognizes the assistance of volunteers through the court appointed special advocate (CASA) program and oversight by substitute care review boards (SCRBs). Extended family members

and substitute caregivers also may contribute both in and out of the courtroom.

The first goal of every proceeding under the Act is to protect the child's health and safety, then to preserve the unity of the family. This involves a comprehensive assessment of family strengths and needs, not in the abstract or according to a prescriptive set of values, but in light of the individual requirements and relationships of the particular child. If temporary removal from the home is necessary, CYFD attempts to place the child in the most familiar setting possible, in physical proximity to relatives and respectful of the child's cultural connections. Siblings should stay together whenever possible, unless there are clinical indications to the contrary. For an Indian child, special procedures require consultation with the child's tribe and the application of placement preferences under the federal Indian Child Welfare Act (ICWA).

Visitation between children and their parents helps to encourage positive participation and maintain healthy relationships, while providing vital information on the child's attachment to the parents and their parenting skills. When family reunification fails, or is not expected to safely succeed, immediate measures must be taken to secure an alternative, permanent placement for the child. This is followed by legal action to modify or replace the parent-child relationship.

1.2 Children's Court

The Children's Code establishes the children's court as a division of the district court, with subject-matter jurisdiction over proceedings arising under the Code in which a child is alleged to be abused or neglected. Jurisdiction over the parent, guardian or custodian of the child is based on the child's presence in the state or an allegation that the abuse or neglect occurred here.

The children's court has broad discretion under the Code, the applicable court rules, and its inherent equitable power to receive information and fashion remedies consistent with the best interest of the child. From beginning to end, every decision of the children's court judge is attended with the due process protections of notice and the opportunity to be heard.

1.3 Anatomy of an Abuse or Neglect Case

1.3.1 Reports and Investigation

Every person is required by law to report suspected abuse or neglect, but only some of these reports reveal circumstances serious enough to result in a court proceeding. In an emergency situation, law enforcement personnel can take a child into custody, while medical personnel can hold a child until law enforcement can take custody. These are the only two professions with authority to take emergency action.

CYFD's Statewide Central Intake (SCI) evaluates reports and assigns a priority for investigation, while also contacting law enforcement if that has not already been done. Specially trained case workers investigate every report, following established criteria to

determine which situations are the most urgent and what needs to be done to assess the risk to the child.

If the report is substantiated or if the child has already been taken into protective custody by law enforcement, the next question is whether there is a way to lower the risk without having to remove the child from the caretaker. State and federal law and best practices require that reasonable efforts be made to prevent removal of the child from the home. CYFD identifies what reasonable efforts could be made to prevent the removal of the child from the home, giving consideration to the health and safety of the child. These efforts could involve the offer of services such as available community services or in home services to assist the parent to care for the child within the home or family unit. Noncustodial parents or other extended family members might be able to provide temporary care while the dangerous or neglectful condition is corrected.

Legal intervention begins only when less intrusive alternatives have been exhausted or when the risk of serious harm is unacceptably great. When the child's situation indicates that informal measures are insufficient to assure safety, or that the parent is unable or unwilling to provide an appropriate level of care, CYFD will request appropriate relief from the court to assure the child's safety and health.

1.3.2 Petition

A case begins with the filing of a petition by CYFD alleging abuse or neglect. If the case worker and supervisor responsible for the investigation of a report decide that CYFD should seek legal custody of the child, they turn to the children's court attorney. The children's court attorney must endorse upon the petition that the filing of the petition is in the best interest of the child. If the child is already in CYFD's emergency custody, the petition and a motion for an *ex parte* custody order must be filed within two working days. CYFD also may file a motion for an *ex parte* custody order if it believes the child's welfare demands it, even if the child is not already in custody.

The district court clerk assigns a docket number and a judge to hear the case. CYFD, the petitioner, must serve the summons personally upon the respondent, along with notice of the hearing and other pertinent papers. In every case, the children's court appoints counsel to represent the respondent and either counsel or an attorney-guardian ad litem (GAL) to represent the child, depending on the child's age. If the court issues an *ex parte* custody order, it will schedule a custody hearing within 10 days.

Once a petition has been filed, the following themes underlie all subsequent actions:

- Timeliness. As the Children's Code has evolved and the federal Adoption and Safe Families Act (ASFA) has been implemented, the timeframes within which important decisions must be made have consistently shortened. This sense of urgency reflects the reality that time is not static to a child. A child separated from his or her family deserves the speediest of resolutions. Foster care is a stopgap measure, never a solution.

- Continuity. An abuse or neglect case is a single entity, from the custody hearing to the adjudication to the permanency hearings and final placement. Although these proceedings are separated into discrete events, each relates to and builds upon its predecessors. The Code recommends that, to maintain continuity, a single judge should hear all of the proceedings involving the child or family whenever possible.
- Remediation. The purpose of the legal action is not punitive but remedial. These cases are unique in that the focus is not on awarding damages or other compensatory relief. Nor is it on conviction and sentencing, although due process protections apply because there are fundamental constitutional rights at stake. Rather, although there must be a determination that the child has been abused or neglected at some point, the goal is to arrive at a plan that will provide permanent protection for the child. The emphasis is on cooperation and rehabilitation instead of conflict.
- Permanency. Every child has a right to a family and every effort towards permanency should have this fundamental proposition as its basis. This includes the child's relationships with siblings, relatives, and other significant adults as well as tribal or other cultural connections. Throughout the case, the primary emphasis should always remain on meeting the needs of the child. At every stage in the proceedings the court addresses the reasonableness of efforts made either to reunite the family or to implement a permanent alternative placement for the child.

By the time the petition is filed, CYFD also knows or is working to determine whether the child is an Indian child. If the child is an Indian child, notice is being given to the child's tribe to inform the tribe of the proceeding and its right to intervene. The case remains a single entity but the different proceedings within the case have different standards. ICWA and the Children's Code together set the framework for cases involving Indian children, a framework that respects tribal sovereignty and the importance of preserving cultural connections.

1.3.3 Custody Hearing

At the custody hearing, the respondents are advised of their legal rights. At this stage the child's need for protection predominates, but no binding determination or remedy can be ordered other than removal of the child from the dangerous condition. Formal rules of evidence do not apply.

Upon the conclusion of the hearing, the court must return the child to the respondent unless it finds probable cause to believe that the child would not receive safe or adequate care. If the court finds such probable cause, it may award legal custody to CYFD or it may return legal custody to the respondent on such conditions as will reasonably ensure the child's safety, including protective supervision by CYFD. If custody is vested in CYFD, it has discretion to decide whether the child needs to be in substitute care outside the home or whether he or she can remain in the home and if so, under what conditions. Often the court orders additional evaluation or assessment of the respondent, the child, or both.

Most often, the ultimate objective is for the child to return home safely. The CYFD permanency planning worker conducts a psychosocial assessment of family functioning and

develops a case plan to address the reasons the child came into custody and the changes the parent, guardian, or custodian needs to make to correct the condition.

Since the case will be continuing to adjudication, certain matters will need to be addressed at the custody hearing whether or not the child is returned home. Early in the hearing, the court will inquire into whether the child is an Indian child. The court will also ask about CYFD's efforts to locate relatives who might be interested in caring for the child. And the court will appoint an educational decision maker, preferably the parent, so that it's clear who can make educational decisions for the child.

If there is reason to know that the child is an Indian child, the custody hearing is considered an emergency proceeding under ICWA. The standard for removal is somewhat different and, if the court awards legal custody to CYFD, the department needs to take care to follow ICWA placement preferences.

1.3.4 Adjudicatory Hearing

The court must commence the adjudicatory hearing within 60 days of service of the petition. This is a trial on the merits at which CYFD must prove by clear and convincing evidence that the child is abused or neglected, as defined by statute. Allegations of aggravated circumstances, if any, should be proved similarly at this time. In practice, many trials are avoided as a result of the mandatory pre-adjudicatory meeting, where the respondent may decide to enter admissions either directly or in the form of a plea of no contest.

It is important that the adjudicatory hearing be timely commenced. While extensions of the time limit to commence may be sought when necessary, every effort is made to commence the hearing within the 60 days.

If the court does not find that the evidence at trial is clear and convincing, the child must be returned to the custody of the respondent and the case dismissed. Otherwise, a finding of abuse or neglect results in a final, appealable order and establishes the factual basis for everything that follows. The court's specific findings as to the causes and conditions of the abuse or neglect become the law of the case. If new factual allegations arise, CYFD must file an amended petition to bring them to the attention of the parties and the court.

If the child is an Indian child, CYFD will have to demonstrate that *active* efforts have been made to provide services designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful. The agency must also prove that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Under ICWA, this must be proven by clear and convincing evidence that includes the testimony of qualified expert witnesses.

1.3.5 Dispositional Hearing

If the adjudication results in a finding of abuse or neglect, the court retains jurisdiction to award custody of the child and to order the implementation of a case plan, which is intended

in part to mitigate and correct the conditions and causes of the abuse or neglect. (This plan used to be called the treatment plan, and often still is, but it covers much more than treatment and the name was changed to reflect this.) These matters are addressed at the dispositional hearing, which may be held in conjunction with the adjudicatory hearing or within 30 days thereafter.

At the dispositional hearing the formal rules of evidence are suspended, primarily to allow the court to consider the results and reports of previous evaluations and assessments. The permanency planning worker will have conducted a detailed study of family needs and strengths, including the impact of the case on the child. Based on this analysis, the CYFD team will propose a case plan, often with input from the other parties and designed first to meet the needs of the child, second to assist the family, and finally to facilitate the child's return to a safe environment as expeditiously as possible. The court may order that plan or modify it.

Among the possible dispositions the court may make at this hearing are to:

- return the child to the parent, with or without protective supervision by CYFD;
- transfer custody of the child to the non-custodial parent; or
- place or continue the child's placement in the legal custody of CYFD.

If the child is placed or will stay in CYFD custody, the court will determine whether CYFD has made reasonable efforts to locate relatives and conduct home studies on relatives who may be interested in caring for the child. It will also inquire into whether CYFD has been able to place siblings together, unless this would be contrary to their safety or well-being.

If the child is an Indian child, the disposition should comply with the placement preferences set forth in ICWA and maintain the child's cultural ties. If the child would be an Indian child if enrolled in the tribe, CYFD should be working to pursue enrollment on the child's behalf.

When the child is placed outside the home, the court may order the respondent to contribute to the child's financial support.

If the court decides that reasonable efforts to reunify the family are not required because of aggravated circumstances or because reunification efforts would be futile, it must schedule a permanency hearing within 30 days. Otherwise, an initial judicial review hearing will be held within 60 days.

1.3.6 Judicial Reviews

The initial judicial review hearing must be held within 60 days of the disposition. This hearing gives the court and the parties an opportunity to review the implementation of the plan, identify any impediments, and adjust the plan as necessary. The hearing also serves as an important reminder that the goals of the treatment aspects of the plan must be achieved within six months or else the permanency plan may change. Finally, the hearing provides an opportunity for the court, the parties, the CASA volunteer, and the citizen review board to

address the child's adjustment to placement along with any other matters that have arisen since the inception of the case. It is important to remember that the child's voice needs to be heard here, whether in person or through the child's GAL or attorney, and that the child is a party and may, as a general rule, attend the hearing. The formal rules of evidence do not apply at this hearing.

In the vast majority of cases, the treatment aspect of the case plan is congruent with a permanency plan of maintaining the child at home or returning the child to the home. In the most severe or intractable situations, however, the court may find that aggravated circumstances exist and may order that no further efforts toward reunification need to be attempted. In those instances, the court must set a permanency hearing within 30 day of that determination. Otherwise, the permanency hearing must be held within six months of the initial judicial review or within 12 months of the child entering foster care, whichever occurs earlier.

Judicial reviews will continue to be held every six months during the life of the case. These periodic reviews are often combined with permanency hearings. For older youth close to aging out, these reviews are also opportunities for the court to adopt a transition plan for the youth and to ensure that CYFD is taking the necessary steps to prepare the young person to leave foster care.

1.3.7 Permanency Hearings

Returning the child home is the plan in most cases. This means that within six months from the judicial review hearing, or within 12 months of the child entering foster care, whichever date comes first, the court must hold a permanency hearing to determine whether reunification remains viable. Prior to the permanency hearing, the parties are required to attend a pre-permanency hearing conference. If the plan for returning the child to the home does not appear to be viable, the parties may explore alternative placement arrangements that could provide for the long term needs of the child while preserving family relationships.

At the permanency hearing, all of the parties have the opportunity to present evidence and to cross-examine witnesses, although the formal rules of evidence do not apply. Again, it is important that the court hear the child's view. At the end of the hearing, the court will order one of the following permanency plans for the child:

- reunification;
- placement for adoption after relinquishment or termination of the parent's rights;
- placement with a person who will be the child's permanent guardian;
- placement in CYFD's legal custody with the child placed in the home of a fit and willing relative; or
- if none of these options are appropriate for the 16 or 17 year old, placement of the child in CYFD's legal custody under a planned permanent living arrangement.

If the court adopts a plan of reunification, it will also adopt a plan for transitioning the child home and schedule a permanency review hearing within three months. If the child is

returned home before the hearing, the hearing will be vacated. If the child has not returned home yet, then the court will take evidence and decide whether it should change the child's plan, return the child to the custody of the parent, guardian, or custodian and dismiss the case, or return the child subject to conditions imposed by the court, including protective supervision and continuation of the case plan.

Important: The court must conduct a permanency hearing and adopt a permanency plan within 12 months of the child entering foster care. A child is considered to have entered foster care on either the date of the first judicial finding that the child has been abused or neglected or 60 days after the date on which the child was removed from the home, whichever is earlier. Hearings will be held to approve a permanency plan for the child at least once every 12 months while the child is in CYFD's legal custody.

1.3.8 Permanent Guardianship

There are a number of cases where the respondent is unable to provide for the child's safety and welfare, even after the offer of services and efforts to assist. Yet the parent-child or other family relationships may still have value and adoption may be unlikely or undesirable under the circumstances. In these cases the special status of permanent guardianship is a possibility for children who have been adjudicated as abused or neglected, and CYFD now has a guardianship assistance program available for children who qualify.

A judgment of permanent guardianship transfers legal responsibility and legal authority for the child to a third party who has offered to become the child's guardian. This person is almost always a relative and ideally one with whom the child is already familiar. Something of a misnomer, this form of guardianship is not necessarily perpetual. It assures that the child will have a consistent adult decision maker, but it does not sever the parent's interests irrevocably. The court retains jurisdiction to revoke the guardianship upon a showing of a significant change in circumstances, if revocation is in the child's best interest.

1.3.9 Termination of Parental Rights; Adoption

For many children in the state's custody, adoption represents the best hope for a permanent family. To free these children for adoption, the state first must terminate the legal rights of any and all persons who have a constitutionally or statutorily protected interest in the custody of the child, even those who may never have been present as parents. Situations also exist in which termination of parental rights is warranted and necessary even if adoption is not going to occur.

Because of the fundamental nature of parental rights, the court must be careful to accord due process to the parties whose rights may be terminated. Notice and meaningful opportunity to be heard are guaranteed, as are the rights to counsel and to appeal.

Each of the elements of one of the three statutory grounds for termination of parental rights must be supported by clear and convincing evidence. The grounds for termination are:

- abandonment;
- abuse or neglect that cannot be cured in the foreseeable future despite the reasonable efforts of CYFD or other agencies (especially where the parent has inflicted serious harm on the child, another child, or a family member); or
- certain situations in which the parent-child relationship has disintegrated and a psychological parent-child relationship with a substitute caregiver has developed.

When the child is an Indian child, ICWA requires evidence beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and expert testimony is required.

In many instances, especially where there is a possibility of an "open adoption," the parent may consent to a voluntary relinquishment of parental rights, although a relinquishment to CYFD cannot be conditioned upon an open adoption. Relinquishment requires counseling and judicial verification that the relinquishment is knowing and voluntary. In cases involving Indian children, ICWA imposes additional requirements.

Timeliness is always important, even when the child is already in a home identified as "pre-adoptive." Until the adoption decree is final, the child and its new family lack security. All legal proceedings to this end should be handled as promptly as possible, consistent with the due process interests of all the parties.

1.3.10 Appellate Proceedings

Under the Children's Code, any party may appeal a judgment of the court. This includes an appeal of a judgment adjudicating a child to be abused or neglected, as well as a judgment terminating parental rights. Under an amendment to the Code in 2014, a party may also appeal an order entered at the custody hearing. An appeal does not stay the judgment or order appealed from, although the court may order a stay under certain conditions. While an appeal is pending, the children's court has jurisdiction to take further action in the case.

The Code specifies that an appeal be heard at the earliest practicable time. The Supreme Court and the Court of Appeals have developed procedures to expedite these appeals to the maximum extent possible consistent with the due process rights of the parties.

1.4 Relationship Between State and Federal Law

1.4.1 Federal Child Welfare Laws

Since 1974, federal law has played a major role in the development of state law and policy on child abuse and neglect proceedings around the country. Some laws, such as the Indian Child Welfare Act, discussed in Chapter 32 of this Handbook, apply directly to state court proceedings. Other laws, like the Adoption and Safe Families Act (ASFA), enacted in 1997, the Fostering Connections to Success and Increasing Adoptions Act, enacted in 2008, and the Preventing Sex Trafficking and Strengthening Families Act, enacted in 2014, affect the states because the availability of federal funds for the state foster care system is conditioned on

state compliance with the policies articulated in them. These federal laws are summarized in Chapter 36.

State Plans. New Mexico and other states have "state plans" that they submit to the federal Administration on Children and Families (ACF) for review and approval. These state plans must conform to the requirements of federal law in order for the states to receive federal foster care dollars. CYFD's 2015 - 2019 Child and Family Services Plan can be reviewed on the CYFD website, http://www.cyfd.org, under Publications.

1.4.2 Title IV-E of the Social Security Act

Perhaps the most influential federal law has been the law creating Title IV-E of the Social Security Act. Federal foster care assistance was available in the 1960s and 70s as part of the Aid to Families with Dependent Children (AFDC) program, or welfare. In 1980, Congress passed the Adoption Assistance and Child Welfare Act, P.L. 96-272, which was intended to shorten the time children spent in foster care, and to encourage permanency planning for children. This Act also replaced the old funding program with an addition to the Social Security Act now known as Title IV-E. Title IV-E makes federal financial assistance available to states with child welfare systems that meet the Act's requirements. The law also provides for the withdrawal or reduction of financial assistance from states that do not comply with federal requirements. ***See*** Handbook §36.3.

Most of the major pieces of legislation passed by Congress to improve the foster care system over the years are amendments to Title IV-E. The most famous is probably the Adoption and Safe Families Act, which tightened the timelines for abuse and neglect proceedings. Another example is the Fostering Connections to Success and Increasing Adoptions Act of 2008, which authorized the use of Title IV-E funds for guardianship assistance programs. It also added requirements to state plans on identifying relatives, improving educational stability, and supporting sibling relationships, among other things. Again, ***see*** Handbook Chapter 36 for more detail.

1.4.3 What Does It Mean to Be IV-E Eligible?

The term "IV-E" is one of the most commonly used terms in child welfare. It's also common to hear that "the child is IV-E eligible" or "is the child IV-E eligible?" or "if such-and-such findings aren't made in time, the child risks losing IV-E funds." What does this mean?

When a child is in foster care, there are a host of services and expenses that the state pays for, including foster care maintenance payments (the payments made to foster parents to cover costs associated with caring for foster children), state administrative costs and staff training If the child is IV-E eligible, the federal agency reimburses the state for approximately 70% of the amount of the foster care maintenance payment and 50% of the state's other costs Children who are not IV-eligible receive the same foster care services but the costs are borne entirely by the state.

Generally speaking, a child is IV-eligible if:

- the removal and foster care placement are in accordance with a judicial determination to the effect that continuation in the home from which the child was removed would be contrary to the welfare of the child and that reasonable efforts have been made to prevent removal; and
- the child's family meets the 1996 AFDC income limits.

AFDC is the welfare program that was in effect before the welfare reforms of 1996, when it was replaced with the Temporary Assistance for Needy Families (TANF) program. At that time, Congress decided to keep Title IV-E foster care funding linked to the old AFDC program, at least temporarily while TANF was new and variable. However, the link is still being made, which means that the 1996 AFDC income limits are used to determine a child's eligibility for Title IV-E.

When a child comes into care, CYFD determines the standard of need for the family. The AFDC guideline begins at $231 for a household size of one and increases by $79 per additional household member. While this task can be difficult under the circumstances, CYFD's investigations and permanency planning staff try to get the information directly from the parents. However, the department also has Title IV-E eligibility determination specialists who are able to use other agency systems, such as Human Services, the Department of Workforce Solutions, and Child Support Enforcement, to obtain information regarding any income or resources the family may be receiving. CYFD has 90 days to conduct this research and make an eligibility determination once a child is removed from the home.

Continued Eligibility. Once a child is established as meeting the initial eligibility requirements for IV-E, the child's status will be reviewed on a regular basis to ensure that the child continues to meet Title IV-E requirements. For example, for a child to remain IV-E eligible, there must be a judicial determination at least every twelve months that the CYFD has made reasonable efforts to finalize the permanency plan in effect.

In addition to foster care expenditures, CYFD offers adoption subsidies to children with special needs and has recently introduced a guardianship assistance program to the state. Title IV-E funds are used to reimburse the state for guardianship assistance when, as with foster care payments, the child meets AFDC guidelines. Title IV-E funds are also used to reimburse the state for adoption subsidies but the Fostering Connections legislation in 2008 began the process of delinking adoption assistance from the AFDC limits over time.

CHAPTER 2

RIGHTS OF PARENTS AND CHILD

This chapter describes:

- The rights of parents in the care, custody and control of their children.
- Procedural due process rights.
- The rights of children.

2.1 Substantive Rights

Long-standing precedent of the United States Supreme Court holds that the Due Process Clause of the Fourteenth Amendment protects the fundamental liberty interest of parents in the care, custody and control of their children. *See Meyer* v. *Nebraska,* 262 U.S. 390, 399-401 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925).

In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the Court again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents." 321 U.S. at 166. Subsequent cases have explained that this constitutional liberty derives from the presumption that "natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.*, 442 U.S. 584, 602 (1979).

In 2000, the U.S. Supreme Court reiterated the importance of this interest in the case of *Troxel v. Granville,* 530 U.S. 57 (2000), ruling that a Washington state statute allowing "any person" to petition for visitation was unconstitutional because it impermissibly infringed on the rights of parents.

In the seminal case of *Stanley v. Illinois,* 405 U.S. 645 (1972), the Supreme Court upheld the principle that an unwed father could not be presumed to be an unfit parent, but was entitled to a hearing pursuant to the Equal Protection Clause of the Fourteenth Amendment. This case thus marks the connection between the substantive rights of parents and the procedural requirements necessary to protect those rights.

Not only are parents entitled to an evidentiary hearing before a determination can be made as to their "fitness" (*i.e.,* whether their parental rights should be terminated permanently), but the Due Process Clause also dictates that the standard of proof in such cases must be clear and convincing evidence, rather than a mere preponderance. *Santosky v. Kramer,* 455 U.S. 745 (1982).

The New Mexico Supreme Court reviewed and endorsed these doctrines in the case of *In re Adoption of J.J.B.,* 1995-NMSC-026, 119 N.M. 638, which voided an adoption after clarifying the standards for termination of parental rights on the grounds of presumptive abandonment. ***See*** §24.4 of this Handbook. That case, however, like the precedents to which it adheres, reiterates that the rights of parents are not absolute. Rather, those rights must be balanced against the best interests of the child when it comes to custody. *Id*. ¶58. In *In re Grace H.,* 2014-NMSC-034, ¶47, the Court again recognized that, although parental rights are fundamental, they yield to the best interests and welfare of the children at issue.

Similarly, in *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445, the Court of Appeals distinguished *Troxel v. Granville* in upholding a district court order granting visitation rights to grandparents over the parents' objection. "*Troxel* may have altered, but it did not eradicate, the kind of balancing process that normally occurs in visitation decisions." The Court concluded that the district court had given appropriate weight to the wishes of parents in determining the child's best interests. *Williams*, ¶¶23-24.

Although the courts have not explicitly articulated the contours of the corresponding rights of children, the truth is self-evident that children also have certain inalienable needs: to be free from physical and emotional harm at the hands of their caretakers and to be provided with the essentials of food, shelter, education and medical care. If the parent cannot ensure that those needs are met, then the state may intervene legally.

While children should be kept safe, removing them from their home and from their parents is traumatic for them and should not be considered lightly. Requiring them to remain in foster care for extended periods of time is also difficult for them. The courts recognize that the parent-child relationship itself is an important relationship and should be part of the consideration of the child's best interest. *J.J.B.*, ¶66.

The legislature has defined in detail the duty and the discretion of parents, guardians and custodians. Under §32A-1-4, a parent has all of the duties and authority of guardianship and legal custody of the child, unless limited by court order. The duties and authority of guardians and custodians are also described. These establish the foundation for all child welfare proceedings.

In the short term, the state can act upon a showing of actual harm or imminent risk to the child, acquiring a greater degree of control in proportion to the proof of parental incapacity. During the pendency of any legal proceeding, the parent retains a statutory right to visitation with the child, unless the court finds that the best interests of the child preclude any visitation. §32A-4-22(D). Likewise, the child has a corresponding interest in maintaining contact with parents, siblings, extended family members, and others with whom the child has a significant, caring relationship, unless such contact is shown to be contrary to the child's best interest. §32A-4-22(E).

Where the state can prove that the parent is unable to care for the child, it may move to terminate, rather than merely suspend, all parental authority. ***See*** Chapter 24. Moreover, if the state does intervene to deprive the parent of all rights regarding the child, then the state

must also assume another function implicit in parenting, namely to provide a permanent and stable set of relationships and sense of family identity for the child.

2.2 Meaning of "Parent"

The word "parent" in the New Mexico Children's Code "includes a biological or adoptive parent *if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child*." §32A-1-4(Q). This definition reflects the holdings of a line of cases from the U.S. Supreme Court that declare that the right to parent is not a mere incident of biology, but requires some sort of familial relationship.

In *Caban v. Mohammed*, 441 U.S. 380 (1979), the U.S. Supreme Court struck down a state law that treated unwed fathers differently than unwed mothers when the spouse of one of the parents petitioned to adopt the child. Referring to the case of *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court suggested that the strength of an unwed father's claim to his child is directly proportional to his efforts to fulfill his parental responsibility. 441 U.S. at 389, 393.

Conversely, in the case of *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court upheld New York's putative father registry, ruling that an unwed father has no guarantee of notice of the adoption of his child, unless he undertakes some affirmative actions to establish a custodial, personal, or financial relationship with her. A biological connection creates the opportunity to become a parent; if a parent does not avail himself of that opportunity, the Constitution will not afford him the right automatically. *Id*. at 249, 262.

Even a father who has both a biological and an established relationship with his child may be denied parental rights by a state statutory presumption that the husband of the mother is the child's legal parent. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The question regarding who has a constitutionally protected liberty interest is answered to some extent in the Adoption Act, which defines the terms "acknowledged father," "presumed father," and "alleged father," and requires that the first two men, but not the last one, consent before an adoption can take place. ***See*** Appendix B for the definitions. These provisions make it clear that biology alone does not confer a constitutionally protected parental status. A father must act affirmatively to acknowledge his paternity before it will be recognized by the courts or protected under the Children's Code. *See In re Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, 143 N.M. 246.

A woman who acts as the child's parent in a same-sex relationship may well be able to establish that she is a presumed natural mother. When addressing the applicability of the term "natural mother" in the Uniform Parentage Act to a lesbian partner, the New Mexico Supreme Court stated:

> In our view, it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their

> lives. This is especially true when both parents are able and willing to care for the child.

Chatterjee v. King, 2012-NMSC-019, ¶37. The Court concluded that Chatterjee had standing to bring an action to establish a parent and child relationship under the UPA because she had alleged sufficient facts to establish that she is a presumed natural parent. Assuming her allegations are true, she would then have standing to seek joint custody as a natural parent. *Id.* ¶50.

A very different question is the extent to which a foster parent might have a constitutionally protected liberty interest. A foster care arrangement generally does not create a protected interest. *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012). However, in *Elwell*, a case out of Kansas, the Tenth Circuit Court of Appeals held that the foster parents, given all the facts of that particular case, had a constitutionally protected interest. There were a number of factors but they included the fact that the Elwells had cared for the child nearly his entire life and were on the verge of adopting him.

2.3 Procedural Rights

Persons who have a constitutionally protected liberty interest in their children cannot be deprived of their rights without due process of law. At a minimum, due process requires notice and the opportunity to be heard. While the Children's Code and the Children's Court Rules establish the mechanism to meet these requirements, it is incumbent upon all of the parties to verify that they are met in fact. In the first instance, this may mean something as mundane as establishing the correctness of addresses and telephone numbers; or it may entail a sophisticated search to identify and locate absent parents. Throughout the proceedings, participants should endeavor to remember and respect the dignity and humanity of all the family members.

To protect these rights in particular, both the Code and the Rules provide for the appointment of counsel to represent respondents who are indigent. Case law has clarified that the right to counsel includes the right to effective assistance of counsel. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶48, 136 N.M. 53; *State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, ¶20, 126 N.M. 664. It also affirms the parent-respondent's right to an appeal. *State ex rel. CYFD v. Alicia P*., 1999-NMCA-098, 127 N.M. 664.

A series of appellate decisions has delineated the dimensions of the opportunity to be heard when respondent is not physically present at trial, whether as a result of incapacity, incarceration or deportation. In such situations, alternative measures must be implemented to preserve the opportunity to testify on one's own behalf, to cross-examine witnesses, and to confer with counsel. *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015; *State ex rel. CYFD v. Maria C*., 2004-NMCA-083; I*n re Ruth Anne E. (State ex rel. CYFD v. Lorena R.),* 1999-NMCA-035, 126 N.M. 670; *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, 127 N.M. 699; *State ex rel. CYFD v. Rosa R.*, 1999-NMCA-141128 N.M. 304.

Due process also requires providing parents with an opportunity to present a defense on all of the allegations in the petition. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, the Court of Appeals held that father's procedural due process rights were violated when the trial court authorized the children's court attorney to amend the petition at the end of the adjudicatory hearing to include a charge of abuse in addition to the neglect charges and made its ruling immediately, without hearing the additional issues. According to the court, the procedure denied father the opportunity to present a defense on the added charge. 2012-NMCA-045, ¶16.

Just as the due process rights of parents are protected, along with their substantive interests, by the presence of counsel, so the rights of children to fair treatment and decent outcomes are protected by their court-appointed guardian ad litem (GAL) or "youth attorney," described in §2.4 below. Case law has also clarified the importance of the GAL role, and its scope in investigating and informing the court, as well as representing to the court the stated position of the child. *State ex rel. CYFD in re Esperanza M.*, 1998-NMCA-039, 124 N.M. 735; *State ex rel. CYFD in re George F.*, 1998-NMCA-119, 125 N.M. 597.

2.4 Statutory Rights

Because of the significance of the interests involved, both the Children's Code and the Children's Court Rules set forth requirements for advisement of parental rights.

At the commencement of the investigation, parents are to be advised of the rights they have during an investigation. These rights include the freedom from being compelled to appear or to produce any papers. §32A-4-4(B). They do not include the freedom to control access to the child or to obstruct or interfere with the investigation. §30-6-4. A child may be interviewed at school or elsewhere without the permission of the parent. §32A-4-5(C). If no petition is filed, a parent has the right to the results of the investigation, may inspect foundational reports in the possession of CYFD, and may petition the court for further disclosure of records and information, provided that identification of individuals be withheld. §32A-4-33(C). At their first appearance before the court, parents are to be advised of their rights under the Children's Code. §32A-4-10(G); Rule 10-314. These include the right to a trial on the allegations of the petition and the right to counsel.

According to the Children's Code, children are afforded the same basic rights as adults except as otherwise provided in the Code. §32A-4-10(A). A child under age 14 is entitled to a guardian ad litem appointed by the court at the inception of the proceeding; the guardian ad litem is an attorney appointed to represent and protect the child's best interest. A child who is 14 or older is entitled to court-appointed counsel (commonly referred to in New Mexico as a youth attorney). The youth attorney provides client-directed representation, with all of the duties and responsibilities of any attorney under the Code of Professional Conduct. §32A-4-10(C), §32A-1-7.1(A).

The child also has a right to participate in the court proceedings, both through the child's GAL or attorney and directly. The Supreme Court has issued rules to ensure that children are informed of their right to attend a hearing. Younger children may be excluded if the court

finds it is in their best interest but older children may only be excluded if the court finds a compelling reason to exclude the youth and states the factual basis for the finding. §32A-4-18(E); Rules 10-325 and 325.1.

Indian parents and children, as well as their tribes, have additional rights that are critical to the court proceeding. The federal Indian Child Welfare Act and the New Mexico Children's Code are replete with ways in which the courts must be attentive to these rights. The requirement for active efforts, the use of qualified expert witnesses, the application of placement preferences, the preservation of cultural ties, and the higher standard of proof at termination of parental rights are examples of the ways in which the state child welfare system recognizes the importance of honoring the Indian child's heritage and the sovereignty of the Indian tribe. ***See*** Handbook Chapter 32 on ICWA.

CHAPTER 3

KEY CONCEPTS

This chapter describes the following key concepts inherent in child abuse and neglect cases:

- Best interests of the child.
- Safety, permanency, and well-being.
- Reasonable efforts.
- Concurrent planning.
- Legal custody and placement.

The Key Principles for Permanency Planning for Children adopted by the National Council on Juvenile and Family Court Judges are reprinted at the end of the chapter.

3.1 Best Interests of the Child

At every stage in the proceedings, the court must make and record findings that the proposed case or permanency plan is in the best interest of the child. While everyone agrees that the child's best interest is the overarching concern in every proceeding, it is a term that is neither defined in the statutes nor easily conceptualized or defined. Rather than a goal to be achieved or a treasure to be discovered, it might be more accurate to think of it as a lens through which the entire proceeding should be viewed, or a touchstone against which to test every decision as to placement and permanency.

It should be mentioned that the court may not be in a position to choose, in some ultimate sense, what is "best" for the child, but rather to determine whether what is proposed would tend more to further, rather than to hinder, the best interest of the child. *See In re Adoption of J.J.B.*, 1995-NMSC-026,119 N.M. 638. Every case commences with a family in crisis, a child in need or even in peril. Some damage is inevitable. Almost invariably, alternatives must be selected and decisions driven on the basis of inflicting the least additional trauma.

Finally, the discretion of the children's court to act in the best interest of the child, although broadly equitable in nature, is not boundless. *See, e.g., In re Adoption of Francisco A.*, 1993-NMCA-144, 116 N.M. 708 (Hartz, J. dissenting in part). While the best interest standard provides an additional safeguard for the child, it is not a substitute for the substantive requirements set forth in the Children's Code. In terms of procedure, the child's best interest

is protected through the appointment of and zealous representation by the GAL or youth attorney, whose duties and responsibilities are described more fully in Chapters 7 and 8. In general, the best interest of the child becomes the common denominator for all of the participants, who may differ in their views of the details or the best way to arrive at the desired result.

3.2 Safety, Permanency, and Well-Being

Core to the federal Adoption and Safe Families Act (ASFA) and the state Children's Code are the three principles of safety, permanency, and well-being. The federal Children's Bureau has used these three principles effectively in measuring the success of the states' child welfare programs, and the National Council of Juvenile and Family Court Judges has incorporated them into its Key Principles for Permanency Planning for Children, found at the end of this chapter.

- **Safety:** Children are, first and foremost, protected from abuse and neglect. At the same time, children are safely maintained in their homes whenever possible and appropriate.

- **Permanency:** Children have permanency and stability in their living situations, and the continuity of family relationships and connections is preserved for families.

- **Well-Being:** Families have enhanced capacity to provide for their children's needs. Children receive appropriate services to meet their educational needs and adequate services to meet their physical and mental health needs.

While safety is always paramount and efforts have been made to accelerate permanency, increasing attention is being paid to the child's well-being as a way to improve outcomes for children impacted by maltreatment.

3.3 Reasonable Efforts

3.3.1 Preventing Removal; Reunification

The Children's Code states that "[t]he child's health and safety shall be the paramount concern" but also mandates that CYFD attempt "to preserve the unity of the family whenever possible." §32A-1-3(A). Even where CYFD makes a decision to seek legal custody of the child, "*reasonable efforts* shall be made to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety." §32A-4-7(D).

The requirement that CYFD make reasonable efforts remains operative throughout much of the life of a case. The court needs to make a finding early in the proceedings regarding what efforts were made, either to prevent removal or to make it possible for the child safely to return to the home. These efforts must be explicitly documented and reflected in the court order. If reasonable efforts are not made, CYFD may, under ASFA, forfeit its federal

funding for foster care for the child. In addition, one of the three grounds for terminating parental rights would not be met if the department has not made "*reasonable efforts* … to assist the parent in adjusting the conditions that render the parent unable to properly care for the child." §32A-4-28(B).

In *State ex rel. CYFD v. Patricia H.*, the Court of Appeals affirmed a termination of parental rights, finding sufficient evidence of reasonable efforts despite some concern about the extent and duration of efforts made by CYFD.

> ASFA has had a significant impact upon the State's responsibility to provide services to children and families, which consequently informs our contemporary understanding of what constitutes a reasonable effort to assist a parent before the State may resort to termination. The fifteen-month period described in ASFA for "time-limited reunification services" provides us some guidance in how we assess the duration of reasonable efforts under state law.

2002-NMCA-61, ¶26, 132 N.M. 299.

3.3.2 Finalizing a Permanency Plan for the Child

As the case progresses, the department's efforts broaden into efforts to finalize a permanency plan for the child. The point is always to establish permanency for the child, whether through the goal of return home or through some other feasible permanency goal, or both in the alternative. Within 12 months of the time the child is considered to have entered foster care, the court must determine a permanency plan for the child. CYFD must also be able to demonstrate to the court that it has been making *reasonable efforts* to finalize the permanency plan in effect. The court must make a determination of reasonable efforts at least once every 12 months that the child is in foster care. This ties in very closely with the discussion of permanency planning and concurrent planning later in this chapter.

3.3.3 Aggravated Circumstances

In ASFA, Congress codified a principle that had been operative in child protection and reflected in judgments for some time, namely, that in some instances it may never be safe for a child to return to the family. Severe or chronic injury to the child, or to another family member, may give rise to an unacceptably high risk of recurrence. The Children's Code sets out specific instances of conduct which, if proven, may eliminate the need to attempt reunification. A finding by the court that aggravated circumstances exist can lead to an order that no further efforts be attempted to return the child to the home and that another plan be identified to provide the child a stable future.

In the first challenge to the state's aggravated circumstances provisions adopted in 1999, the Court of Appeals upheld their constitutionality. The court, citing the legislative history of ASFA and cases from other states, found that the statute does not create a presumption of unfitness at the TPR trial but rather gives the trial court discretion not to require reunification efforts, if warranted by all the relevant facts. "[ASFA], in eliminating the requirement of

reasonable efforts under certain circumstances, and in requiring the states to follow suit …, was responding to the perceived excesses in the application of the reasonable efforts requirement." *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶7, 133 N.M. 136.

3.3.4 Active Efforts in ICWA Cases

If the child is an Indian child, CYFD must demonstrate that *active* efforts have been made to provide services designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful. Under the federal Indian Child Welfare Act (ICWA), this demonstration must take place both before the state can effect a foster care placement and before there can be a termination of parental rights. 45 U.S.C. §1912(d). The New Mexico Supreme Court has held that the "active efforts" finding that must be made to support foster care placement should be made at the adjudicatory hearing. *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶36, 149 N.M. 315.

The term active efforts "connotes a more involved and less passive standard that that of reasonable efforts." *State ex rel. CYFD v. Yodell B.*, 2016-NMCA-029, ¶20 (citation omitted). Federal regulations define "active efforts" as affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. These efforts should take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They should also involve and use the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian caregivers. 25 CFR 23.2.

Neither ASFA nor the Children's Code alters ICWA's active efforts requirement. Even where the Children's Code would relieve the state of engaging in reasonable efforts (as when there are aggravated circumstances), active efforts must still be proved.

3.4 Permanency Planning; Concurrent Planning

Permanency planning is not a new idea in child welfare, but it has been made increasingly important in view of the accelerated timetables established by statute. Historically the emphasis was on protection, and children lingered indefinitely in foster care. Now, every child must have a plan, not just an ideal destination, but a clearly delineated direction and measurable means to get there.

Under the Children's Code, the state implements a permanency plan for the child that has been approved by the court. The hearing at which the permanency plan is brought to the court for review is held within 12 months of the date the child is considered to have entered foster care and at least once every 12 months while the child is in foster care. If the permanency plan is reunification, the court will schedule a permanency review hearing within three months to be sure that real progress is being made.

The state also engages in concurrent planning to effectuate permanency. Concurrent planning is the process of working toward a primary permanency goal of reunification while at the same time working on an alternative goal in the event that the birth parents are unable

to do what is necessary to bring the child home. This approach is intended to move the child more quickly to a safe and more stable permanent family.

In the past, little attention was given to these secondary scenarios, and then only after too much time had elapsed. For example, in the past the adoptive placement process could not commence until the child was legally "freed" for adoption and, even after parental rights had been terminated, a case could continue for months on appeal, postponing any efforts to find the child a permanent home.

The Children's Code now requires concurrent planning by the time a motion to terminate parental rights is filed, although in practice concurrent planning may begin much earlier. Among other things, CYFD works to promptly identify those cases at greatest risk, and to seek placements for those children in homes that could become permanent, whether through adoption or otherwise.

3.5 Legal Custody and Placement

The term "legal custody" is defined in the Children's Code. It should be read in harmony with the definitions of "guardian" and "parent." Whoever has legal custody of a child is empowered to make decisions regarding, among other things, where and with whom the child shall live, that is, the physical placement of that child. If legal custody is given to CYFD, placement is in the discretion of CYFD and not the court; CYFD's placement decisions are reviewable by the courts under the abuse of discretion standard. The term "physical custody" can confuse the two concepts and is no longer used.

The significance of the concept of "legal custody" as distinct from "placement" is that it clarifies the distinction between the caretaker and the decision-maker for the child. In certain situations, a parent may be able to provide one or the other of these functions, but not both. For permanency planning purposes, the participants need to evaluate the two functions separately. For example, a parent who is incarcerated and unable to provide physically for the child may yet be able to remain legally authorized to care for the child. Conversely, a parent could suffer from substance abuse or mental illness rendering him or her incapable of exercising appropriate judgment, but might still have a viable, loving relationship with the child and be able to meet some of that child's needs.

3.6 Key Principles for Permanency Planning for Children

In July of 1999, the National Council of Juvenile and Family Court Judges (NCJFCJ) approved a statement of principles called the Key Principles for Permanency Planning for Children. Broader than a discussion of permanency plans, the statement is a vision intended to help guide the courts and other members of the child welfare community as they strive to serve the best interests of abused and neglected children. The Key Principles were revised and reissued in July of 2011. These Key Principles are set forth on the following pages.

For more information, contact the NCJFCJ at the University of Nevada in Reno (775-507-4777 or contactus@ncjfcj.org) or consult its website at http://www.ncjfcj.org.

NCJFCJ
NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES
est. 1937

Key Principles for Permanency Planning for Children

Judging in juvenile court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage families, professionals, organizations and communities to effectively support child safety, permanency, and well-being. Judges must encourage the court system to respond to children and their families with both a sense of urgency and dignity. These key principles provide a foundation for courts to exercise the critical duties entrusted to them by the people and the laws of the land.

Keep Families Together
Families are the cornerstone of our society, and children have a right to grow up with their families as long as they can be safe. Each child and family deserves to be treated fairly and holistically, regardless of how and why they enter the court system. Judges must ensure that all children and each parent are afforded their constitutional rights to due process. Judicial determinations to remove children from a parent should only be made based on legally sufficient evidence that a child cannot be safe at home. Children and families must be an integral part of the planning and problem solving process.

Ensure Access to Justice
Judges must ensure that the courtroom is a place where all who appear are treated with respect, patience, dignity, courtesy and as part of the problem-solving process. Juvenile courts must be child and family-centered and presumptively open to the public. Children and parents must have the opportunity to be present in court and meaningfully participate in their case planning and in the court process. It is the responsibility of Judges to see that all children and each parent are afforded their constitutional rights to due process.

Cultivate Cultural Responsiveness
Courts must be welcoming and respectful to people of all races, legal, ethnic, and socio-economic statuses, honoring family in all its forms. All members of the court system must recognize, respect, and seek to preserve the ethnic and cultural traditions, mores and strengths of those who appear before the court. Judges must become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect decision making.

Engage Families Through Alternative Dispute Resolution Techniques
Judges should encourage and support the development of family-centered, culturally responsive forms of dispute resolution to allow families to craft effective court-sanctioned solutions to the issues that brought them before the court. Courts should support the development and use of appropriate dispute resolution techniques including mediation, family group conferencing, differential response, and encourage all to utilize the form that will be most beneficial to the children and parents in a particular case.

Ensure Child Safety, Permanency, and Well Being
Children should remain at home as long as they can be safe. Removal of a child from the home should occur only as a last resort. Judges are responsible for proactively monitoring the safety of children and ensuring services are provided to maintain their safety no matter where they are placed. Judges are responsible for ensuring the physical, mental, emotional, reproductive health, and educational success of all children under the supervision of the court. If a parent is a victim of violence from the other parent/spouse/friend, the Judge should sanction plans that keep that victim safe as the best way to keep a child safe. When return to a parent is inappropriate, placement with kin or a responsible person with a significant relationship with the child is the first priority. No child should exit foster care without a life-long connection to a caring and responsible adult.

Ensure Adequate and Appropriate Family Time
Consistent with child safety, relationships between and among children, parents and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child. Sibling family time apart from parental family time should be considered. Family time should not be used as a case compliance reward or consequence.

Provide Judicial Oversight
Judges must provide fair, equal, effective, and timely justice for children and their families throughout the life of the case, continually measuring the progress toward permanency for children. The same judge should oversee all cases impacting the care, placement, and custody of a child. Through frequent and thorough review, without needless delay, judges must regularly exercise their authority to set and monitor the timelines, quantity, quality, and cultural responsiveness of the services for children and families. Judges should ensure that there is communication, collaboration and cooperation among all courts handling cases involving any given family.

Ensure Competent & Adequately Compensated Representation
Judges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys who are committed to these key principles. Children should be parties to their cases. Children are entitled to representation by attorneys and guardians *ad litem* and Judges must ensure the child's wishes are presented to and considered by the court.

Advance the Development of Adequate Resources
Juvenile and family courts must be appropriately supported. Courts must maintain a sufficient number of specially trained and permanently assigned judicial officers, staff, attorneys and guardians *ad litem* to thoroughly and effectively conduct the business of the court. Judges should continually assess the availability and advocate for the development of effective and culturally responsive resources and services that families need.

Demonstrate Judicial Leadership & Foster Collaboration
Judges must convene and engage the community in meaningful partnerships to promote the safety, permanency, and well-being of children and to improve system responses. The juvenile court must model and promote collaboration, mutual respect, and accountability among all participants in the child welfare system and the community at large. To demonstrate the effectiveness of the system and to improve its ability to serve children and families, courts should strive to maintain data on every aspect of the process and use that data to identify and achieve system improvements. Judges must encourage regular and productive review of system-wide processes to foster the continual goal of improvement.

Technical Assistance Brief

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CHAPTER 4

CHILDREN'S COURT JUDGE

This chapter describes the role of the judge in these important proceedings, including:

- Overall role in the child welfare system.
- Affirmative duties to protect due process rights
- Giving voice to the child
- Judicial leadership

4.1 Introduction

Historically, the child welfare system has often been seen as a monolithic system run by a large bureaucratic governmental agency, a big system in which kids get lost and no one is watching. Over time, largely as a result of federal child welfare laws passed in the past 40 years, state and local child welfare agencies around the country have become more and more focused on the safety, permanency and well-being of children who have been abused and neglected.

At the same time, the courts have been given a greater and greater role in the decisions that are made for abused and neglected children. Typically it is the courts themselves that make the biggest decisions in those children's lives. Along with the decision-making role have come duties and responsibilities – to protect the constitutional rights of parents, to protect the rights and best interests of the child, to ensure that the agency is engaging in reasonable efforts and otherwise doing its job, and to see that the Indian Child Welfare Act is applied in cases involving Indian children.

Child welfare law as it exists today is relatively new and it remains an exceptionally dynamic, still evolving area of the law. This unique and challenging area of judicial decision-making has prompted the development of formal and informal networks or associations of children's court judges. The National Council of Juvenile and Family Court Judges (NCJFCJ) has been doing a tremendous amount of work developing best practices and producing guidelines, bench cards and other resources for judges who hear child welfare cases.

4.2 Jurisdiction of the Children's Court

4.2.1 Jurisdiction

The abuse or neglect case under the New Mexico Children's Code is heard by a district court judge sitting as a children's court judge. According to the Code, "[t]here is established in the district court for each county a division to be known as the children's court. The district court of each judicial district shall designate one or more district judges to sit as judge of the children's court." §32A-1-5. Few districts, most notably the Second Judicial District, are large enough to warrant the assignment of judges full time to the Children's Court bench. This means, in part, that most children's court judges hear any number of other types of cases as well. They are "children's court judges" when hearing cases under the Children's Code and judges in the civil, criminal, or family divisions of the court at other times.

Under §32A-1-8(A), the children's court has exclusive original jurisdiction of all proceedings under the Children's Code in which a child is alleged to be:

- A delinquent child (Chapter 32A, Article 2);
- A child in need of court ordered services (Article 3B);
- A neglected child (Article 4);
- An abused child (Article 4);
- A child subject to adoption (Article 5);
- A child subject to placement for a developmental disability or a mental disorder (Article 6).

The children's court also has original exclusive jurisdiction of proceedings under Article 2 in which a person is 18 years of age or older and was a child at the time the alleged act was committed. §32A-1-8(A). In addition, the children's court has original exclusive jurisdiction to emancipate a minor under Chapter 32A, Article 21. §32A-1-8(B).

A number of judicial districts designate district judges to serve as children's court judges over some of these matters and not others. A judge in one county might sit as a children's court judge in delinquency cases while another sits as a children's court judge in abuse or neglect cases. As noted above, they also hear cases in other divisions, whether it be civil, criminal or family.

The Supreme Court has made it clear that the Legislature cannot constitutionally limit the power of the district court in some matters to a particular division of the court. *In re Guardianship of Travis Eugene Arnall*, 1980-NMSC-052, ¶7, 94 N.M. 306. The district court has original jurisdiction in all matters and causes not excepted in the state constitution. *Id*. ¶6. The words "exclusive original jurisdiction" as used in the Children's Code were not intended to limit or abrogate the jurisdiction of the district court. *Id.* ¶8.

The New Mexico Supreme Court decided in 2014 that the children's court may conduct a revocation hearing under the Kinship Guardianship Act and proceed to revoke a guardianship in the course of an abuse or neglect proceeding to which the guardian is a party. *State ex rel.*

CYFD v. Djamila B., 2015-NMSC-003. The Supreme Court held that, while the district (family) court has continuing jurisdiction of the guardianship matter, it does not have exclusive jurisdiction, and the children's court may hear a motion for revocation of guardianship in the abuse or neglect proceeding. *Id.* ¶35. "Consistent with legislative intent, we hold that family courts which appoint kinship guardianships have continuing concurrent jurisdiction over the kinship guardianship, with children's courts presiding over abuse and neglect proceedings." *Id.* ¶37

4.2.2 Rules

Children's Court proceedings are, as a general matter, governed by the Children's Court Rules adopted by the Supreme Court. However, Rule 10-101 of those rules specifies the rules applicable in any particular proceeding or hearing. The primary topic of this Handbook, abuse and neglect, is governed by the Children's Court Rules, as are delinquency and youthful offender proceedings and families in need of court-ordered services cases. Serious youthful offender cases are governed by the Rules of Criminal Procedure, while proceedings under the Adoption Act and the Children's Mental Health and Developmental Disabilities are governed by the Children's Code and the Rules of Civil Procedure. Rule 10-101(A).

The *Djamila B.* case is interesting in that the Rules of Civil Procedure normally apply in a kinship guardianship proceeding. If a revocation of the guardianship were being heard in the abuse or neglect case, it would appear that the court would switch to the Rules of Civil Procedure to answer any procedural questions that arise, but this is not clear.

4.3 Affirmative Duties in an Abuse or Neglect Case

4.3.1 Ensuring Due Process

The court conducts a number of hearings in which the Rules of Evidence do not apply – the custody hearing, the disposition hearing, the permanency hearings and judicial review. Different courts conduct these hearings with differing degrees of formality, especially at the permanency and judicial review stages. It may be a challenge for the court to protect the parent's due process rights under these circumstances.

The Court of Appeals in *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶50, 136 N.M. 53, held that due process protections attach at the permanency hearing. "When a child has been taken away from the parents and into the State's custody, both CYFD and the court have a constitutional duty to ensure that a parent's due process rights are protected at each stage of the proceedings that lead up to and include termination of those rights."

> In the final analysis, however, it is the district court that is charged with protecting a parent's due process rights. [*Ronald A.*, 1990-NMSC-071, ¶ 12] The district court has an affirmative duty to ensure the parents due process rights are protected from the initiation of abuse and neglect proceedings, not just at the end. *See Rosa R.*, 1999-NMCA-141, ¶ 12…. It was insufficient for the court to merely continue the

> permanency hearing so that the parents could attend…. The district court may not assume a passive role in any of these proceedings. Due process requires the district court to inquire explicitly and on the record the reasons for a parent's absence from these hearings. *See Stella P.*, 1999-NMCA-100, ¶ 21…. At minimum, the district court must assess what reasonable efforts were made to arrange for the parents to be present and what corrective measures counsel intends to employ to facilitate their presence in the future. If the court is not satisfied, it may utilize its contempt powers.

Maria C., ¶52.

Early on, the Supreme Court, in *In re Termination of the Parental Rights of Ronald A.*, 1990-NMSC-071, ¶12, 110 N.M. 454, emphasized the importance of taking the time in the proceedings to ensure due process to the parents:

> A too rapid-handling of cases that appear routine must not intervene in our system of justice to prevent our trial courts from investing the requisite time and energy to assure that all parties are accorded the procedural due process that is their due under our state and federal constitutions.

Justice Montgomery specially concurred, emphasizing the significance of the role of the court:

> I concur in the result. There can be no doubt that petitioner's due process rights were violated by the district court's failure…. The **court** terminated petitioner's parental rights without permitting **court-appointed** counsel in a closely related matter to represent his client fully in both the termination and the neglect proceedings. The **court** did not allow a continuance…. Actually, in this instance the **court** was aware that petitioner lacked meaningful notice and yet it terminated his parental rights.

¶16 (emphasis in the original).

There are a number of cases in which the appellate courts have commented positively on the way the children's court judge handled an issue implicating due process. For example, in *State ex rel. CYFD v. Rosalia M.*, 2017-NMCA-085, involving termination of parental rights, CYFD's attorney had provided an outline to a witness prior to the hearing and Mother argued that the attorney improperly coached the witness. ¶4. The Court of Appeals concluded that CYFD's method of preparing the witness did not violate due process but came to its conclusion only after a lengthy discussion of the facts involved and the careful way in which the lower court handled the matter, taking the outline under seal and allowing for voir dire as well as extensive cross-examination. ¶¶10-14.

4.3.2 Supervising Court-Appointed Counsel

While it begins to feel routine, the court's role in appointing counsel for indigent parents gives the judge special responsibility for ensuring that the parent has effective assistance of counsel.

> [W]e reiterate that we strongly encourage trial judges to inquire of Parents who have been represented by appointed counsel in a termination proceeding whether they have any concerns about ineffective assistance of counsel prior to entering a written judgment.

State ex rel. CYFD v. David F., Sr., 1996-NMCA-018, ¶18, 121 N.M. 341.

David F. followed a 1993 case, *In re Termination of Parental Rights of James W.H.*, 1993-NMCA-028, 115 N.M. 256:

> [B]ecause in these cases there is a very important third party – the child – whose interests can be harmed needlessly and irrevocably if a termination proceeding must be reopened, we encourage the trial judge to inquire of a parent, who has been represented by appointed counsel … whether that parent has any concerns about the representation provided by counsel.

James W.H., ¶7.

4.3.3 Ensuring Compliance with the Law

The Children's Code requires that CYFD make reasonable efforts to locate, identify, and consider relatives with whom to place children who are in custody. *See* §32A-4-22(A)(6), formerly at §32A-4-25.1(D).

> On a final note, we emphasize that Section 32A-4-25.1(D) imposes a duty upon the district court to make a serious inquiry into whether the Department has complied with its mandate to locate, identify, and consider relatives.… In future cases, such inquiry will not be satisfied by a pro forma ratification of the Department's assertions that such efforts have been made.

State ex rel. CYFD v. Laura J., 2013-NMCA-057, ¶61.

In a case addressing CYFD's efforts to investigate whether a child is eligible for enrollment in an Indian tribe and, if so, to pursue enrollment on the child's behalf, the Court of Appeals emphasized:

> The district court has an affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child. [Citations omitted.] ….
>
> This case illustrates the important need for district courts to ensure that the Department strictly complies with Section 32A-4-22(I).

State ex rel. CYFD v. Marsalee P., 2013-NMCA-062, ¶¶25-26.

4.4 Unique Role of the Children's Court Judge

4.4.1 Breadth of the Judge's Responsibilities

The role of the judge in abuse and neglect cases is often described as unique. It includes many non-traditional functions, both within and without the courtroom.

The children's court judge performs traditional judicial functions, determining probable cause and custody at the custody hearing, adjudicating the abuse or neglect petition at adjudication, deciding custody and visitation at disposition, and hearing motions to terminate parental rights or grant or revoke permanent guardianship. However, the child's permanency and well-being are also critical if outcomes for foster children are to be improved.

Consider the long list of less than usual -- but, under the Children's Code, essential – responsibilities that the court has in the life of the child. For example:

- Early on, the judge will determine whether CYFD has made reasonable efforts to prevent removal;
- The judge will consider appointing a lay volunteer – a CASA -- to help with the case and connect with the child;
- The judge will appoint an educational decision maker to make educational decisions for the child and revisit the decision at each hearing;
- At disposition, the judge will review a proposed case plan, including proposed treatment needed by the parents or child, and approve a plan that will, in many ways, guide the parties, the department's case workers, the mental health professionals, and others throughout the case. In the course of the court's review, the judge will be paying attention to the educational needs of the child, to the child's developmental and mental health needs, and to the child's sibling and family relationships, among others.
- At the first permanency hearing, the judge will adopt a permanency plan for the child.
- At judicial reviews, the court will be reviewing compliance with the case plan. At every hearing, the court will find out how the child is doing in school, will consider whether reasonable efforts have been made to ensure the child is engaging in age- and developmentally appropriate activities, and, by the time the child is 17, will be reviewing a transition plan that the child has developed with CYFD.

4.4.2 Giving Voice to the Child

Historically, children were rarely seen in the courtroom and the judge was expected to make hugely significant decisions about the children's lives without ever seeing or hearing from the children. In more recent years, guardians ad litem have been required to report the child's viewpoints to the court and in 2005 the Children's Code was amended to entitle children age 14 or older to actual client-directed counsel, appointed to give the youth a more direct voice in the proceedings. *See* §§32A-1-7 and 32A-4-17.1.

The Supreme Court in 2016 and 2017 made it clear that the child, who is a party to the proceeding, has a right to attend the hearings in the case. *See* Rules 10-325 and 10-325.1. The Children's Code, at §32A-4-20(E), provides that children age 14 or older may be excluded from a hearing only if the court finds a compelling reason and states the factual basis for the finding. The younger child may be excluded only if the court finds it is in the child's best interest. Congress also requires, as a condition for receiving federal foster care funds, that the state's case review system include procedural safeguards that ensure that in every permanency hearing, the court consult, in an age appropriate manner, with the child regarding the proposed permanency or transition plan. ***See*** Handbook §36.8.

This is all part of an effort nationally to "give voice to the child" and judges everywhere are exploring ways to most effectively hear from the child. The American Bar Association's Center on Children and the Law has produced bench cards that provide ideas on how the judge might best communicate with the child and make the child more comfortable with the process, which can be found here: https://www.americanbar.org/groups/public_interest/child_law/project-areas/youth-engagement-project/. Suggestions include acknowledging the child, keeping the language simple and age appropriate, asking the child about his or her interests, likes and dislikes, and reading or looking at anything the child gives to the court while the child is in the courtroom and thanking the child. While this may be difficult in the crush of business, allowing sufficient time to do these things at the hearing gives the child a chance to be engaged in the process.

It is important for the judge to see the proceeding "through the eyes of the child." A child's sense of time is very different than that of an adult, and a month or two in the life of a young child means a lot more to the child or for the child's development than the same month or two for adults. *See, e.g.*, Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, p. 29 (link given in §4.7 below). This is one of the many reasons given for "frontloading" the case, that is, for addressing the issues that prevent parents from reunification as early as possible in the proceeding. *See* Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families (link given in §4.7).

4.5 Special Considerations

4.5.1 Managing the Case and the Courtroom

Abuse and neglect cases in children's court are cases in which the constitutional rights of the parents to the care and custody of their children have to be balanced by the judge against the safety of the children themselves. Chances are, too, that if the child is indeed abused or neglected, the parents themselves suffered from adverse childhood experiences, or ACEs. Moreover, the judge is presiding over cases in which the parties (outside CYFD) are often indigent and where counsel is significantly underfunded, with extremely limited or no funds for expert witnesses, little or no access to investigators and social workers, and rarely with partners or associates who can help research and try a case.

At the same time, the cases are complex, often involving several parties, at the minimum, CYFD, one or more parents, guardians or custodians, and one or more children, all with counsel or guardians ad litem. Rarely, though, are the resources available in the courtroom to accommodate this complexity and the large number of participants and rarely, if ever, does counsel have the time and resources to do the extensive pre-trial work that is done outside the courtroom in complex business litigation, for example.

Even the physical space can be a challenge. The courtroom may be small, which could be desirable in terms of making children and parents feel comfortable but could also feel very crowded given the number of participants.

Despite these challenges, the court must manage the case, the parties, and the courtroom so that parties are heard and cases move forward in a timely and effective manner. One excellent source of information and ideas is the Enhanced Resource Guidelines, cited above. ***See*** Chapter 31of this Handbook for some basic suggestions as well.

4.5.2 Special Masters

A special master may be appointed by a children's court judge pursuant to Rule 10-163 to assist in any children's court proceeding, although the concurrence of the parties is required for adjudications and terminations of parental rights. Special masters face the same challenges as judges when conducting hearings in abuse and neglect cases -- managing a large number of parties and counsel, often in a small space – but they can be of enormous assistance in ensuring that the judge is able to devote significant time and attention to the most critical hearings.

4.5.3 Balancing Roles and Considering Ethics

4.5.3.1 Family Drug Court.

It is well-known that substance abuse can negatively affect a parent's ability to provide a safe and stable home, such that many of the children in the child welfare system have a parent dealing with substance abuse. Family drug court is considered an effective tool for addressing the issues these parents face.

One challenge for judges is balancing their roles in family drug court and children's court. The judge plays a number of important roles in drug court, and "the judge's personal engagement with each participant is the keystone of the drug court model." *See* the Drug Court Judicial Benchbook, p. 199 (link given below). However, ethical issues may arise for the judge. For example, when talking with the judge in drug court, parents may start delving into issues that they have with their social worker or their case plan or they may want to tell their side of the story on a matter discussed at a recent abuse or neglect hearing. The judge can try to focus the parents on their substance abuse, treatment and drug testing during the drug court hearing but the issues often interrelate. One suggestion has been to send the parent to the drug court staff to coordinate issues with social workers. Other suggestions are to ask the parents to share their concerns with their attorney in the children's court case or to

set a status conference in the children's court case so that everyone can be present when the parents tell the judge their concerns.

The Drug Court Judicial Benchbook, published by the National Drug Court Institute, can be found at: https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf. The role of the judge and the ethical issues that may arise are discussed at pages 197 to 212.

4.5.3.2 Dually Adjudicated Youth.

Young people who are both adjudicated abused or neglected and adjudicated a delinquent child are often referred to as dually adjudicated or crossover youth. The one family-one court model suggests that the same judge should hear both cases. Knowing the larger picture in the child's life may promote better decision-making and a more informed approach to the child and his or her family. As with other multi-system approach, however, the judge will need to pay attention to the evidentiary rules and to the due process rights of the parties.

4.5.3.3 Criminal Proceedings.

It is not uncommon for a parent in a civil abuse or neglect case in children's court to have a criminal proceeding pending for the same or similar conduct. This may mean, for example, that a no contact order is issued on the criminal side at the same time that, on the civil side, the court is ordering visitation. The parent is likely to be represented by different lawyers in the two cases, and of course the prosecutor in the criminal case is different than the CYFD children's court attorney in the civil case. Communication may be lacking. May the judge in the children's court case reach out to the judge on the criminal bench? At the least, procedures could be in place to ensure that the judges are aware of the official findings and decisions in each other's case.

4.5.4 Preventing Bias and Prejudice

Rule 21-203 of the Rules of Judicial Conduct provides that a judge shall not by words or conduct manifest bias or prejudice, whether based on race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or serious medical condition and may not permit court staff, court officials or others subject to the judge's direction or control to do so. The judge must also require that the lawyers before the court refrain from manifesting bias or prejudice.

Furthermore, one of the purposes of the Children's Code is to reduce overrepresentation of minority children and families in the abuse and neglect system through early intervention, linkages to community support services and the elimination of discrimination. §32A-4-3.

Judges and their staff make decision after decision about parents and children and interact with attorneys and experts who are all of different races and ethnicities as well as different ages, genders, and other categories. In the article "The Lens of Implicit Bias", published in Juvenile and Family Justice Today, Summer 2009, social psychologist Shawn Marsh wrote: "Evidence suggests that implicit bias exists for nearly everyone and can shape our decisions."

At one point, he notes: "It operates outside our awareness; we don't even know it's there." Dr. Marsh provides a number of approaches to reducing implicit bias in judicial decision-making in juvenile court. *See* http://www.ncjfcj.org/sites/default/files/ImplicitBias.pdf.

4.5.5 Trauma-Responsive Practice

The mere fact that the case is before the court means that the children are alleged to be abused or neglected children, which means that the child is likely to have experienced significant trauma in their young lives. Many of their parents also suffered extensive trauma when they were young, and these parents are continuing to experience trauma or suffer the effects of trauma. The term "adverse childhood experiences (or ACEs)" is being used to describe experiences, or an accumulation of experiences, that can result in poor physical and social outcomes.

The National Child Traumatic Stress Network has published a number of short publications for judges or useful to judges presiding over abuse or neglect cases. For example, the NCTSN and the NCJFCJ joined forces to publish a bench card for judges: https://www.nctsn.org/resources/nctsn-bench-cards-trauma-informed-judge.

One important carry away from the materials on trauma is that the judge should ensure that any child or parent who may be suffering the mental and emotional effects of trauma receive assessments and treatment that are themselves trauma-informed.

Judges (and attorneys and case workers) also run the risk of suffering secondary or vicarious traumatic stress, sometimes called compassion fatigue. This may occur for the judge following extensive exposure to the retelling of the traumatic experiences of children and adults and the reviewing of medical records and other evidence in the case. Judges should be aware of any difficulties they may be having and seek advice and treatment. Indicators that may indicate increased risk for developing secondary trauma include anger, sadness, rage, depression, anxiety, physical complaints (like headaches, stomach aches, and lethargy), nightmares, and impaired work habits. *See* https://childtrauma.org/wp-content/uploads/2014/01/Cost_of_Caring_Secondary_Traumatic_Stress_Perry_s.pdf.

4.6 Judicial Leadership

Rule 21-001, the Preamble to the Code of Judicial Conduct, requires judges to aspire to conduct that assures the greatest possible public confidence in their independence, impartiality, integrity, and competence. At the same time, the Code recognizes that a judge's participation in community activities provides important benefits both to society and to the judge personally. This may be especially important in the area of child welfare.

Looking at the nontraditional judicial roles played by the children's court judge and listed in part in §4.4.1, there is much the judge can learn about service availability, about the educational system, about different communities. Maybe more importantly, the judge has a front row seat in the world of child and family welfare and can lend his or her knowledge and

insight to efforts to improve outcomes for children and families.

4.7 Recommended Reading and Other Resources

The National Council of Juvenile and Family Court Judges offers a number of publications to assist the children's court judge. In 2016, the Council published the Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, a detailed manual on the different stages of the proceeding, with bench cards for each of the hearings. The Resource Guidelines can be accessed at http://www.ncjfcj.org/resource-library/enhanced-resource-guidelines. The NCJFCJ has also adopted a set of Key Principles for Permanency Planning for Children, which are reprinted in §3.6 of this Handbook.

The Children's Court Improvement Commission, appointed by the New Mexico Supreme Court, includes a number of district court and appellate judges, as well as CYFD representatives and attorneys who represent parties in these abuse and neglect cases, among others. The CCIC directs the work of the New Mexico Court Improvement Project, https://cip.nmcourts.gov/resources.aspx, and is the lead sponsor of the Children's Law Institute every January.

Similarly, the New Mexico Tribal-State Judicial Consortium, whose members are appointed variously by the New Mexico Supreme Court and the different Tribes and Pueblos in the state, devotes a good deal of attention to child welfare issues, including implementation of the Indian Child Welfare Act. The Consortium's mission is to encourage and facilitate communication and collaboration between state and tribal court judges on common issues, such as child welfare, domestic relations, and juvenile justice and drug/wellness courts. Extensive information and links to other resources can be found on the Consortium's website, https://tribalstate.nmcourts.gov/.

The Administrative of the Courts offers information and resources on drug courts and other problem-solving courts: https://pscourts.nmcourts.gov/default.aspx.

The article "Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families" was authored by J. Cohen & M. Cortese and published in Child Law Practice (Vol. 28 No. 3, May 2009). The article can be found at: http://www.cfrny.org/wp-content/uploads/2012/04/Cornerstone-Advocacy-in-the-First-60-Days-ABA-May-2009.pdf.

CHAPTER 5

CHILDREN'S COURT ATTORNEY

This chapter covers the following with regard to the children's court attorney:

- Overall role.
- Administrative alignment within CYFD.
- Consultation and decision-making responsibilities.
- Specific responsibilities during a case.

5.1 Introduction

The children's court attorney in a civil abuse or neglect case is an attorney selected by and representing the Children, Youth and Families Department (CYFD). §32A-1-6(C). The children's court attorney:

- Represents CYFD in every phase of an abuse or neglect proceeding, from the initial determination regarding whether to file a petition through dismissal.
- Provides Protective Services' case and social workers with information about state and federal law related to children's court and interpretation of federal and state law and regulations.
- Provides general assistance to CYFD in the provision of child protective services.

A number of appellate cases have emphasized the role of the children's court attorney in ensuring the fundamental fairness of the proceedings with respect to all parties. *In re Pamela A. G.*, 2006-NMSC-019, ¶19, 139 N.M. 459; *In re Termination of Parental Rights of Ronald A.*, 1990-NMSC-071, 110 N.M. 454; *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶51, 136 N.M. 53. The Supreme Court in *Ronald A.* concluded that when pursuing termination of parental rights, the children's court attorney "must seek not only to protect the children involved; they must see to it also that the parents are dealt with in scrupulous fairness." *Ronald A.*, ¶11. In *Pamela A. G.* the Supreme Court extended that analysis to the adjudicatory hearing and other early stages of an abuse or neglect case. The Court of Appeals further emphasized this aspect of the children's court attorney's role in *Maria C.*, where it explained that CYFD has "a constitutional duty to ensure that a parent's due process rights are protected …." *Maria C.*, ¶50.

5.2 Structure

The children's court attorneys are employees of CYFD. The Director of Protective Services is the immediate supervisor of the Chief Children's Court Attorney, who serves as lead children's court attorney and supervises the managing attorneys in the department's five regions – Northwest, Northeast, Southwest, Southeast, and Metro. Children's court attorneys are housed in most CYFD county offices.

CYFD also has a general counsel's office, which handles general legal issues and represents the department in other types of matters. The general counsel's office does not supervise or direct the activities of the children's court attorneys.

5.3 Filing an Abuse or Neglect Petition

When CYFD is contemplating filing an abuse or neglect petition, the case worker must consult with the children's court attorney. Consultation generally occurs at an internal meeting that includes the investigative case worker and may include the permanency planning worker who would be assigned to the case if filed, the investigative and permanency planning workers' supervisors, the county office manager, and the children's court attorney. If the children's court attorney is not present at the meeting, the case worker will consult with the attorney after the meeting.

The children's court attorney must sign each abuse or neglect petition and determine and endorse on the petition that filing it is in the best interests of the child. §32A-1-10 and §32A-4-15. In order to make the threshold best interest determination, the children's court attorney will consider the case worker's personal observations, the worker's interviews of the parents, the children and other collateral sources (e.g., witnesses, extended family), the history regarding the family, and the safety and risk assessment tools completed by the worker.

Working with the case worker, the children's court attorney ensures that all appropriate persons are named as respondents in the petition. Appropriate persons include those persons with a legal right to the child, who generally will be the child's mother and father but can include a legal guardian if there is one. In addition, CYFD may name as a respondent a custodian of the child. A custodian is defined in §32A-1-4 as "an adult with whom the child lives who is not a parent or guardian of the child."

Reflecting a determination that the CCA should move promptly after a judge is assigned to the case, and certainly before the custody hearing, Rule 10-162 requires children's court attorneys to file any peremptory election to excuse a judge within two days of filing the petition. Other parties have a longer period in which to file a preemptory election.

5.4 Representation at Hearings

The children's court attorney represents CYFD at every hearing in a child protective services case. Working closely with the permanency planning worker, the children's court attorney is

guided by the safety and best interest of the child and the applicable professional standards for attorneys. In the event that the children's court attorney and the permanency planning worker cannot agree on the most appropriate course of action in a particular case, CYFD has an internal process for resolving the dispute.

Preparing the worker to testify is an important and challenging function of the children's court attorney. In *State ex rel. CYFD v. Rosalia M.*, 2017-NMCA-085, involving termination of parental rights, Mother argued that CYFD's attorney improperly coached a witness prior to the termination hearing by providing her with an outline that included the information she would testify to, the information other witnesses for CYFD would testify to, and CYFD's opening and closing arguments. ¶4. The Court of Appeals concluded that CYFD's method of preparing the witness did not violate due process but came to its conclusion only after a lengthy discussion of the facts involved and the careful way in which the lower court handled the matter, taking the outline under seal and allowing for voir dire as well as extensive cross-examination. *Id.* ¶¶10-14.

5.5 Termination of Parental Rights and Permanent Guardianships

When it appears that a child's permanency plan should be changed from reunification to adoption or permanent guardianship, a meeting is held which includes the permanency planning worker, the supervisor, and the children's court attorney. If CYFD proposes to change the child's permanency plan to adoption, the children's court attorney files and represents CYFD on a motion for termination of parental rights. If the child's permanency plan is being changed to permanent guardianship, the children's court attorney files and represents CYFD on a motion for permanent guardianship.

The case worker and the children's court attorney work together to identify any person who has not been named in the abuse or neglect case yet but who has a constitutionally protected liberty interest in the care and custody of the child. If CYFD determines that a previously unnamed person has a protected liberty interest in a relationship with the child, the children's court attorney will add that person to the motion as a respondent.

5.6 Legal Risk Placement

A legal risk placement occurs when a child who is not legally free for adoption is placed for potential adoption with an approved adoptive family. If the case worker and the prospective adoptive parents want to proceed with a legal risk placement, the children's court attorney prepares a legal risk agreement to be entered into between CYFD and the prospective adoptive parents. This agreement sets out the legal barriers that could interfere with the adoption, as in the situation where the termination of parental rights motion has not been heard by the court or a judgment terminating parental rights is on appeal.

5.7 Use Immunity and Protective Orders

The Abuse and Neglect Act authorizes the children's court attorney to apply for use immunity for a respondent during an abuse or neglect proceeding. Use immunity under the statute may be sought for in-court testimony, records, documents or other physical objects produced by the immunized respondent, or for statements that the respondent makes in the course of a court-ordered psychological evaluation or treatment program. §32A-4-11. The children's court attorney may also apply for a protective order to restrict the release of immunized testimony, immunized statements or records, documents or other physical objects produced by an immunized respondent pursuant to court order. §32-4-12.

Early in 2013, the Supreme Court amended its rule on use immunity, Rule 10-341, to allow the court, on application of *any party* or on its own motion, to grant use immunity for *any person* who has been or may be called to testify or produce records, documents or other objects. Under the rule as amended, not only the children's court attorney, but any party may make such an application. Moreover, the application may be made to immunize *any person,* not just the respondent as set out in immunity section of the Abuse and Neglect Act. At this point, the rule and the statute are in conflict when it comes to immunization of respondents -- the statute allowing it only on application of the children's court attorney, and the rule allowing the application from any party. However, the Supreme Court's decision in *State v. Belanger,* 2009-NMSC-025, ¶17, while a criminal case, gives strong support to the argument in the children's court context that the rule would control under the court's "rule making power ... within the realm of pleading, practice and procedure."

5.8 Disclosure of Information under Rule 10-331

Children's Court Rule 10-331 requires that CYFD disclose certain information to the parties at least 15 days before an adjudicatory hearing or a termination of parental rights hearing. The children's court attorney must file a certificate stating that the required information has been produced and acknowledging a continuing duty to disclose. ***See*** Handbook §28.3.2 for more detail. Failure to comply with disclosure subjects CYFD to possible sanctions. *See* Rules 10-165(D) and 10-137(B).

5.9 Involuntary Placement for Mental Health or Developmental Disabilities Services

When involuntary mental health or developmental disabilities residential services are appropriate for a child in CYFD's custody, the case worker will ask the children's court attorney to file a petition for involuntary placement under the Children's Mental Health and Developmental Disabilities Act, §§32A-6A-1 to 32A-6-30. The Abuse and Neglect Act provides that, when an abuse or neglect case is pending, the hearing on the involuntary placement petition may be held as part of the abuse or neglect case or may be heard in a separate proceeding. §32A-4-23(D). ***See*** Handbook §34.9 for more detail.

CHAPTER 6

RESPONDENT'S ATTORNEY

This chapter covers the following with regard to the respondent's attorney:

- Respondent's right to counsel.
- Effective assistance of counsel:
  - appointed counsel
  - conflicts of interest
  - working with non-English speaking clients
  - Americans with Disabilities Act
  - standard of review
  - the court's role.
- Responsibilities of the respondent's attorney.
- Performance standards and other resources.

6.1 Respondent's Right to Counsel

The interest of natural parents in the care and custody of their children is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A parent's right to custody is constitutionally protected. *In re Termination of Parental Rights of Ronald A.*, 1990-NMSC-071, ¶3,110 N.M. 454.

The Children's Code requires that the court appoint counsel for the parent or parents "[a]t the inception of an abuse or neglect proceeding," which means as soon as the petition alleging abuse or neglect is filed. §32A-4-10(B) Appointed counsel serves until the custody hearing, at which time the court makes an indigency determination and appoints counsel for parents in financial need. *See* Rule 10-5104 for the Supreme Court-approved form for indigency determinations. The Code also provides for appointment of counsel if, in the court's discretion, appointment of counsel is required in the interest of justice. §32A-4-10(B).

6.2 Effective Assistance of Counsel

6.2.1 Right to Effective Assistance

As a matter of due process, parents have a right to effective assistance of counsel in abuse and neglect cases. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶48, 136 N.M. 53. This

includes the right to effective assistance when counsel is appointed by the court. *State ex rel. HSD in re Termination of Parental Rights of James W. H.*, 1993-NMCA-028, ¶4, 115 N.M. 256; *State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, ¶20, 126 N.M. 664. A claim that trial counsel was ineffective may be raised on direct appeal. *James W. H.*, 1993-NMCA-028, ¶5.

Maria C., a case in which the Court of Appeals expressed "grave concerns over the conduct of counsel in the proceedings below," may shed some light on the responsibilities of respondents' counsel and the meaning of effective assistance. 2004-NMCA-083, ¶48. In *Maria C.*, both parents were incarcerated as federal prisoners throughout the proceedings. After the dispositional hearing, the court appointed new counsel for mother. Counsel did not speak to mother for almost a year after being appointed, failed a number of times to obtain a writ of habeas corpus to allow mother to attend the judicial review and permanency hearings, allowed father's counsel to make representations on her behalf to the court, and in certain proceedings did not speak on mother's behalf at all. Father's counsel also failed to secure his client's presence at the hearings.

The Court in *Maria C.* wrote: "It cannot be over emphasized that counsel must be a zealous advocate for his client, including making reasonable efforts to locate and facilitate their attendance at neglect and abuse proceedings, 'despite opposition, obstruction or personal inconvenience.' " *Id.* ¶48 (citations omitted). "Parties are not required to 'move heaven and earth' to notify parents…, but they must make reasonable efforts to do so…." *Id.* ¶52, citing *State ex rel. CYFD v. Rosa R.*, 1999-NMCA-141, ¶17, 128 N.M. 304.

6.2.2 Possible Conflicts of Interest

As a general matter, the court must appoint separate counsel for each respondent. Rule 10-314(B) provides that "[i]n any proceeding or case that may result in the termination of parental rights, an attorney may not be appointed to represent more than one respondent." "It is well established in New Mexico that counsel has a duty to avoid a conflict of interest." *Tammy S.*, 1999-NMCA-009, ¶21.

Tammy S. was an appeal based on ineffective assistance of counsel in a joint counsel situation. The court looked to see whether there was an actual conflict, not just a possibility of conflict. The test was whether counsel actively represented conflicting interests that adversely affected his or her performance. "Differently stated, a conflict of interest exists if some plausible defense might have been pursued were it not damaging to another's interest." *Id.* ¶22.

Rule 16-107(A) of the Rules of Professional Conduct provides that:

> Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Notwithstanding the existence of a concurrent conflict of interest, a lawyer may, under Rule 16-107(B), represent a client if:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent, confirmed in writing.

Because of the relatively few attorneys who are court-appointed in this field, an attorney may also find him or herself being appointed in a case in which the attorney previously represented another party. According to Rule 16-109, a lawyer who formerly represented a client in a matter may not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

6.2.3 Non-English Speaking or Hearing Impaired Clients

A respondent's attorney should attempt to independently determine the ability of a client to understand and respond in English. A client may have some understanding of English but important, subtle points can be lost without careful interpretation. Rule 10-167 and Forms 10-611 through 10-614 of the Children's Court forms set forth detailed procedures for the use of interpreters in court proceedings. Under the rules, the parties are generally responsible for notifying the court if they or their witnesses will need a court interpreter. ***See*** Rule 10-167 (Committee commentary).

Rule 10-167 essentially provides that a "need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding," and a court interpreter must be appointed if requested. Rule 10-167(B)(1). The Committee commentary to Rule 10-167 offers specific advice for instances when court interpretation services are required for deaf or hard-of-hearing individuals.

While the rule sets forth procedures and priorities for the appointment of court interpreters and procedures for the use of court interpreters in the courtroom, a respondent parent does not have an absolute right to translated documents or representation in his or her language in an abuse or neglect case, and there is no constitutional right requiring the assistance of a court-appointed interpreter to supplement the right to counsel. *State ex rel. CYFD v. William M.*, 2007-NMCA-055, ¶¶40-43, 141 N.M. 765. However, due process does require that the parent receive notice and a meaningful opportunity to participate in the proceedings. *Ronald A.*, 1990-NMSC-071, ¶13. It is also reasonably clear that courts will consider a claim of ineffective assistance of counsel based on inadequate communication between a non-English speaking client and his or her attorney, although such a claim was unsuccessful in *William M.*, where the attorney spoke

Spanish, translated portions of the documents for the client, and made sure that certified interpreters assisted the client in proceedings. *Id*. ¶¶52-57.

A respondent's attorney should ensure that an interpreter is present for court proceedings and meetings involving a client who does not speak or understand English well enough to participate in the proceedings. The court will pay for interpreters for hearings and statutorily-required meetings, such as pre-permanency meetings, but the attorney should make sure that the interpreter is present. The court generally will not pay for confidential attorney-client communications during a court proceeding or for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. Rule 10-167 (Committee commentary). If the respondent is represented by court-appointed counsel, the Indigent Defense Act may provide for payment of the costs of court interpretation services for attorney-client communications. *See* Rule 10-167(E)(6).

The respondent's attorney should also clarify with the case worker what steps have been taken to ensure that the parent is able to fully communicate with CYFD and the service providers in the case. The agency should make efforts to accommodate the parent's language needs so that the parent can participate meaningfully in the treatment plan. *See William M.*, ¶¶44-46.

6.2.4 Americans with Disabilities Act (ADA)

The responsibility for raising and proving applicability of the ADA in termination of parental rights cases rests with respondents and their counsel. *State ex rel. CYFD v. Johnny S.*, 2009-NMCA-032, ¶¶8-10, 145 N.M. 754. In *Johnny S.* the Court of Appeals stated:

> We decline to place on district judges the obligation to initiate inquiry into the applicability of the ADA in particular cases. District judges are simply not in a good position to recognize the potential application of the ADA, in particular in the early stages of termination proceedings when the inquiry would be best raised. Counsel, who should be most aware of their clients' situation, are best equipped to determine whether the ADA might apply and whether it would be of value to pursue it.
>
> To preserve issues concerning violations of the ADA, the parent bears the initial burden of asserting that the parent is a qualified individual with a disability under 42 U.S.C. Section 12131(2). Thereafter, the parent must create a factual and legal record sufficient to allow meaningful appellate review of the district court decision on the issue. What constitutes a sufficient record is, of course, different for each case. At a minimum, however, there must be a request for relief citing the ADA backed by facts developed in the record.
>
> Determining what accommodation may be reasonable once the ADA is found to apply will call for a more collaborative effort between the parents, CYFD, and the district court. But the initial burden to raise and argue the issues--as early in the case as possible--lies with the parents and their counsel.

Id. ¶¶7-9.

6.2.5 Standard of Review

In reviewing a claim of ineffective assistance of counsel, the Court of Appeals looks at the proceedings as a whole. *William M.*, 2007-NMCA-055, ¶53, citing *State ex rel. CYFD v. David F. Sr.*, 1996-NMCA-018, ¶24, 121 N.M. 341. "'Litigants alleging ineffective assistance of counsel have the burden of establishing the claim and are required to show not only that trial counsel was ineffective, but that trial counsel's inadequacies prejudiced them.'" *Id*.

6.2.6 Court's and CYFD's Role in Protecting Respondents' Due Process Rights and Assuring Effective Assistance of Counsel

The duty to protect respondents' due process rights and to assure effective assistance of counsel does not lie solely with respondents' counsel. Rather, the court and CYFD also have obligations to parents in abuse or neglect cases.

CYFD has the duty to ensure that the parents are dealt with fairly. "(The Department) must seek not only to protect the children involved; they must see to it also that the parents are dealt with in scrupulous fairness. *Ronald A.*, 1990-NMSC-071, ¶11. "It is also incumbent on the State to ensure that scrupulously fair procedures are followed when it interferes with a parent's right to raise their children." *Maria C*, 2004-NMCA-083, ¶50, citing *In re Ruth Anne E.*, 1999-NMCA-035, ¶19, 126 N.M. 670.

In *Maria C.*, the Court of Appeals emphasized that, "[i]n the final analysis … it is the district court that is charged with protecting a parent's due process rights." The district court has "an affirmative duty to ensure the parent's due process rights are protected from the initiation of abuse and neglect proceedings, not just at the end." 2004-NMCA-083, ¶52. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, ¶11, the Court of Appeals found that father's due process rights were violated when the judge allowed the children's court attorney to amend the petition at the end of the adjudicatory hearing to include a claim of abuse in addition to neglect and immediately made its ruling without proceeding to hear the additional issues as required by §32A-1-18(A).

Due process requires:

> timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

Ruth Anne E., 1999-NMCA-035, ¶26, 126 N.M. 670 (quoting *In re Interest of L.V.*, 482 N.W.2d 250, 257 (Neb. 1992)). In particular, the district court must "inquire explicitly and on the record the reasons for a parent's absence from [the review, permanency, and TPR] hearings. At a minimum, the district court must assess what reasonable efforts were made to arrange for

the parents to be present and what corrective measures counsel intends to employ to facilitate their presence in the future." *Maria C.*, 2004-NMCA-083, ¶52 (citation omitted). The appellate court criticized the district court's delay in addressing counsel's failure to secure the presence of their clients and reminded the district court that it could use its contempt power when the efforts of respondents' counsel are not reasonable. *Id.*

Similarly, at the conclusion of a TPR hearing, the court should routinely question respondents about their satisfaction with counsel. Because an important party – the child – may be harmed if the case has to be reopened,

> we encourage the trial judge to inquire of a parent, who has been represented by appointed counsel, immediately after terminating parental rights whether that parent has any concerns about the representation provided by counsel…. [W]e conclude that the trial judge has an obligation to facilitate the resolution of the issue of whether that parent has received effective assistance of counsel by holding an evidentiary hearing if he or she expresses concerns that merit such a hearing.

James W.H., 1993-NMCA-028, ¶7.

6.3 Duties of Respondent's Attorney

An attorney has a duty to zealously advocate his or her client's express or implied wishes. *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, ¶28, 127 N.M. 699. In the case of a client with a mental impairment, an attorney must maintain a normal lawyer-client relationship so far as is reasonably possible, even in light of the client's impaired capacity. Rule 16-114.

Attorneys have a unique role with the client. A different level of communication is available when there is a guarantee of confidentiality, which is not available to the respondent in other contexts in an abuse/neglect case. A client may take advice offered in such a confidential setting by his or her counsel more seriously.

In the *Tammy S.* case, the Court of Appeals emphasized the counseling role that the respondent's attorney plays:

> Mother testified that someone had explained her options to her. However, there is no evidence that her attorney counseled her on the ramifications of her continued relationship with Father. Contrary to the Department's suggestion on appeal, the counseling role is not properly left solely to a social worker. Rather, it is the practical reality in certain types of poverty law cases, particularly cases similar to those involved here. In such instances, an attorney's advice regarding the law and how it impacts upon a client's life choices may be at least as important as the attorney's performance in the litigation.

Tammy S., 1999-NMCA-009, ¶24.

Practice Note: One way that a respondent's attorney can help his or her client is to emphasize to the client the shortness of the timeline and the importance of becoming involved with the treatment plan early on. Although often an uncomfortable task, it is the job of the respondent's attorney to be honest and straightforward with the client and not just tell the client what the client wants to hear.

The duties of a respondent's attorney may include, for example:

- Ensuring that the client has an opportunity to confer privately with the attorney.
- Counseling the respondent on the law and how it impacts his or her life choices.
- Making diligent efforts to locate the client and facilitate attendance at hearings.
- Arranging for meaningful participation by the client at the different hearings when the client is incarcerated.
- Arranging for the appearance of witnesses on behalf of the client at any hearing, including any necessary expert witness (*see State ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018, ¶¶16-18, 141 N.M. 535, and the guidelines of the Administrative Office of the Courts with regard to situations in which the state will pay for an expert).
- Presenting evidence or testimony describing or expressing the client's wishes throughout the proceedings.
- Requiring CYFD to meet its statutory obligation to provide reports and treatment plans five days ahead of all hearings, in order to afford counsel an opportunity to review these reports with the client and to prepare for the hearing.
- Making timely objections to the admission of evidence, as appropriate (*see, e.g. State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶21, 142 N.M. 705, and *State ex rel. CYFD v. Raymond D.*,2017-NMCA-067, ¶17 n.1).
- Demanding at a hearing to terminate parental rights that CYFD prove by clear and convincing evidence (or beyond a reasonable doubt in cases involving Indian children) that the client's parental rights should be terminated, even when the client is absent from the hearing, if appropriate.
- Filing requested findings of fact or conclusions of law, even in cases where the client does not appear to contest the termination proceedings.
- Filing an appeal at the request of the respondent following an adjudication or after TPR, *even if the attorney does not feel an appeal is justified. See State ex rel. CYFD v. Alicia P.*, 1999-NMCA-098, ¶9, 127 N.M. 664. However, it is important for counsel and the client to stay in touch because, with limited exceptions, Rule 10-352 requires that the client **sign** the appeal.

Practice Note: Timely objections to evidence are important, as well as ensuring that the record reflects ongoing objections. In *Raymond D.*, 2017-NMCA-067, ¶17 n.1, the Court of Appeals noted "If a proper objection is not made, the evidence may be considered in the same manner as any other relevant evidence and has sufficient probative value to support a finding.... Failure to object to the admission of evidence operates as a waiver."

In *Mafin M.*, which involved a mother with severe mental illness and acute substance abuse, the Supreme Court commented favorably that mother was represented by a competent

attorney who vigorously litigated her case. The Court noted that he confronted and cross-examined the department's witnesses, challenged the department's evidence, and was allowed to present witnesses and evidence on mother's behalf, including a statement from mother. *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶25, 133 N.M. 827.

It has been observed that the responsibilities of a respondent's attorney seem to be moving toward those of an attorney representing a person accused of a criminal act. The court needs to ascertain whether a purported decision on the part of the respondent is voluntarily, intelligently and knowingly made. *Stella P.*, ¶¶22-24. In counseling the client, a respondent's attorney should attempt to communicate effectively with the client about the possible ramifications of a given decision.

Practice Note: Respondents' counsel should consider the extent to which they need to be aware of their client's immigration status and whether and how that status might affect or be affected by the case, or related criminal proceedings.

Children's Court Rule 10-332 requires that the respondent disclose certain information to the other parties at least 15 days before an adjudicatory hearing or a termination of parental rights hearing. CYFD and the child's guardian ad litem or attorney must make similar disclosures under Rule 10-331 and Rule 10-333 respectively. ***See*** Handbook §28.3.

6.4 Performance Standards

The Supreme Court has adopted performance standards for court-appointed attorneys in child abuse and neglect cases. The standards for respondents' attorneys begin on the next page.

6.5 Recommended Reading

One of the project areas of the ABA Center for Children and the Law is parent representation. The ABA makes a number of excellent resources available at: http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html.

The National Child Traumatic Stress Network, Justice Consortium Attorney Workgroup Subcommittee has produced a useful guide entitled Trauma: What Child Welfare Attorneys Should Know. This document offers practice tips for attorneys representing parents and children with histories of trauma, as well as other information on trauma. https://www.nctsn.org/resources/trauma-what-child-welfare-attorneys-should-know.

In 2016, the National Association of Counsel for Children published the third edition of its Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases. This treatise covers a broader range of topics than the New Mexico Child Welfare Handbook and is available for purchase.

Respondent Attorney Performance Standards

Practice Standards

- The RA zealously represents the expressed interests of the respondent;
- The RA represents and protects the respondent's expressed cultural needs;
- The RA represents the respondent in accordance with the Rules of Professional Conduct, Rules 16-100 through 16-805 (2008), and all other applicable laws;
- The RA represents the respondent in accordance with the confidentiality requirements of the New Mexico Children's Code, Section 32A-4-33 NMSA 1978.

Training Standards

- The RA participates in at least ten (10) hours of relevant annual training.

Contact and Continuity of Counsel Standards

After consultation with the respondent/client

- The RA meets with the respondent in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the RA also meets with the respondent prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The RA counsels the respondent, in a manner understandable to the client, on the subject matter of the litigation, the rights of the custodial and non-custodial parent, the court system, the proceedings, the RA's role, and what to expect in the legal process;
- The RA explains court orders and their consequences to the respondent;
- The RA is accessible to the respondent through office hours, telephone/voicemail, fax, or email;
- The RA attends treatment team meetings, administrative hearings, Citizen Review Board meetings, and other conferences and staffings concerning the respondent or the respondents' child, whenever possible;
- The RA informs the client of the right to appeal and discuss the nature of an appeal; if the client chooses to appeal, the RA continues representation through the filing of the docketing statement and requests the appointment of an appellate attorney;

- If there is no appeal, the RA continues representation through dismissal, unless removed or relieved by the court; and
- In the event of a change of venue, the originating RA remains on the case until a new RA is appointed by the court in the new venue and the new RA has communicated with the former RA.

Standards for Gathering and Reviewing Information

After consultation with the respondent/client:

- The RA is responsible for gathering and reviewing information, including:
  - Interviews with parents, caseworkers, and service providers; and interviews as appropriate with foster parents and other caretakers, school personnel, neighbors, relatives, clergy, law enforcement and others;
  - Contact with lawyers for other parties and the CASA;
  - Review of the respondent's, child's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, as available;
  - Review of the court files of the respondent, child, and family, and case-related records of the social service agency and other service providers; and
  - Review of photographs, videos, or audiotapes and other evidence.
- The RA obtains the necessary authority for the release of information;
- The RA personally observes the child's interaction with parents, or with whomever the child may be reunited, when reunification is anticipated, as needed.

Case Planning Standards

After consultation with the respondent/client:

- The RA consults with the social worker, and health care, mental health care, and other professionals involved with the respondent's service plan;
- The RA requests services (by court order if necessary) to meet the respondent's needs, to protect the respondent's interests, and to ensure a comprehensive service plan.
- These services may include but are not limited to:
  - Screening and diagnostic services

- Family preservation and reunification services
- Family visitation
- Medical and mental health care
- Drug and alcohol treatment
- Domestic violence prevention, intervention, or treatment;
- Home-based services
- Parenting education
- Inclusion of the respondent in IEP and other special education services as the responsible signatory, if appropriate
- Education and training
- Social Security Income (SSI) to help support needed services
- Recreational or social services
- Housing

- The RA monitors implementation of the case plan;
- The RA communicates with the Court Appointed Special Advocate (CASA); and
- The RA communicates with the court the respondent's position on the service plans for the respondent and child; issues about the child's placement and the respondent's goals.

Court Performance Standards

After consultation with the respondent/client:

- The RA participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The RA reports to the court on the respondent's compliance with the prior court orders and treatment plans;
- The RA presents evidence of the reasonableness or unreasonableness of the Department's efforts and on alternative efforts that could have been made;
- The RA participates in mediation;
- The RA stays informed of the child and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The RA files petitions, motions, and responses and makes objections as necessary to represent the respondent. If appropriate, the RA files briefs in support of evidentiary issues. During all hearings, the RA

preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:

- Obtaining necessary services;
- A mental or physical examination of a party;
- A parenting, custody or visitation evaluation;
- An increase or decrease of contact or visitation;
- Contempt for non-compliance with a court order; and
- Dismissal of petitions or motions

- The RA presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;
- The RA prepares the respondent to testify; the RA familiarizes the respondent with court procedures, and what to expect during direct and cross-examination;
- The RA requests orders that are clear, specific, and where appropriate, include a timeline for assessment, services, and evaluation;
- The RA reviews all written orders to ensure they conform with the court's verbal orders and statutorily requires findings and notices;
- The RA monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the RA makes a closing argument and provides proposed findings of fact and conclusions of law. The RA ensures that a written order is entered and;
- The RA works diligently to avoid continuances and reduce delays in court proceedings.

CHAPTER 7

GUARDIAN AD LITEM FOR CHILD UNDER 14 (GAL)

This chapter covers the following with regard to the guardian ad litem for a child under the age of 14:

- Role of the GAL.
- Appointment.
- Duties and responsibilities.
- Relationship to others in the case, including the child, other parties, and the court.
- Performance standards and other resources.

7.1 Introduction

The child who is the subject of an abuse or neglect proceeding is a party to the case. Rule 10-121(B)(3). Under the Children's Code, this child is entitled to representation by a guardian ad litem (GAL) or youth attorney, depending on the age of the child.

Children under the age of 14 are represented in the case by a GAL appointed by the court. §32A-4-10 The GAL is a licensed attorney who represents the "best interests" of the child. §§32A-1-4(K) and 32A-1-7(B). The GAL also informs the court of the child's expressed wishes, which may or may not be the same as the child's best interests. §32A-1-7(D).

7.2 Role of the GAL

A GAL is an attorney appointed by the children's court to represent and protect the best interests of the child in the court proceeding. §32A-1-4(K). Indeed, the GAL "zealously represents" the child's best interests. §§32A-1-7(A) and 32A-4-10(F). The GAL must also inform the court of the child's declared position at every hearing. §32A-1-7(D).

The Supreme Court has adopted performance standards that describe the responsibilities of the GAL in some detail. This chapter highlights certain aspects of the GAL's role but it is important for attorneys to review the standards carefully when they are appointed in a case. The standards can be found at the end of the chapter.

7.3 Appointment

7.3.1 General Rule

The court appoints a GAL for a child under the age of 14 at the inception of the proceeding, as soon as the petition alleging abuse or neglect of the child is filed. §32A-4-10(C); *see also* Rule 10-312(D). Only an attorney with appropriate experience may be appointed as a GAL. §32A-4-10(C). When reasonable and appropriate, the court must appoint a GAL who is knowledgeable about the child's particular cultural background.

An officer or employee of an agency that has legal custody of the child may not serve as the child's GAL. §32A-4-10(C). In addition, no party to the proceeding, or employee or representative of a party, is permitted to serve as a child's GAL. §32A-1-4(K).

Once the child turns 14, the child is entitled to an attorney who represents the child as an attorney rather than a GAL. As the child approaches the age of 14, the GAL should discuss with the child the change in the form of representation that will take place. The GAL must file either a notice of continued representation as attorney for the child or a motion to request the appointment of a different attorney for the child. §32A-4-10(E) and Rule 10-313(A).

The law contemplates that the GAL will continue as the child's attorney, or "youth attorney." §32A-4-10(E). When the concept was being developed, there was concern that younger children not lose the continuity of their relationship with their GAL. Hence, the law was drafted to allow the same attorney to continue representing the child after age 14, albeit as counsel rather than GAL. However, the law also recognizes that this is not suitable in all cases. Hence, §32A-4-10(E) requires that the court appoint a different attorney to serve as the youth attorney if:

- the child requests different counsel;
- the GAL requests removal; or
- the court determines that appointment of a different attorney is appropriate.

A new appointment is mandatory, not discretionary, if any one of these three conditions is met. *State ex rel. CYFD v. John R., In the Matter of Sabrina R.*, 2009-NMCA-025 ¶¶19-23, 145 N.M. 636.

7.3.2 Sibling Representation

The GAL needs to be alert to possible conflicts of interest when appointed to represent multiple siblings, whether in his or her role as GAL for all of the siblings or as a GAL for the younger children and attorney for the older children in the sibling group. Rule 10-313.1 provides guidance to judges and attorneys in these situations.

When there is a sibling group, Rule 10-313.1 permits the court to appoint the same lawyer to serve as GAL for the children under 14 and youth attorney for the children aged 14 or over.

In this situation, the lawyer would be representing the best interests of the children under age 14 while representing the older youth directly as their attorney. Rule 10-313.1 makes it clear that serving in different roles does not by itself constitute a conflict of interest. The rule also provides a list of circumstances which do not, standing alone, demonstrate a conflict. For example, the fact that the children have different permanency plans or that they express conflicting desires on issues that are not material to the case does not, standing alone, demonstrate a conflict. *See* Rule 10-313.1(C).

With some exceptions, the attorney must decline to represent one or more siblings if, at the outset, a concurrent conflict of interest exists. A concurrent conflict exists "if the representation of one child will be directly adverse to another child or there is a significant risk that the representation of one or more of the children will be materially limited by the attorney's responsibilities to another client, a former client, or a third person, or by a personal interest of the attorney." Rule 10-313.1(A)(2); *see also* Rule 16-107 of the Rules of Professional Conduct.

An attorney representing siblings has an ongoing duty to evaluate the interests of each sibling and assess and act on any conflicts of interest that develop. *See* Rule 10-313.1(B).

7.3.3 Limits on Serving as Child's Delinquency Attorney

The GAL is prohibited from serving simultaneously as the child's GAL in an abuse or neglect case and as the child's attorney in a delinquency case. §32A-1-7(I). *See also State v. Joanna V.*, 2004-NMSC-024, 136 N.M. 40.

7.4 Specific Duties and Responsibilities

7.4.1 Statutory Duties

The GAL's powers and duties are outlined in §32A-1-7. The GAL is required to "zealously represent the child's best interests in the proceeding for which the guardian ad litem has been appointed and in any subsequent appeals." §32A-1-7(A). The court must assure that the child receives zealous representation by the GAL in accordance with these statutory provisions. §32A-4-10(F).

After consultation with the child, the GAL must convey the child's declared position to the court at every hearing. §32A-1-7(D).

Unless "the child's circumstances render these duties and responsibilities unreasonable," the GAL is required by §32A-1-7(E) to:

- meet with and interview the child prior to custody, adjudicatory, and dispositional hearings, judicial reviews, and any other hearings under the Children's Code;
- communicate with health care, mental health care, and other professionals involved in the child's case;

- review medical and psychological reports relating to the child and the respondents;
- contact the child before and after any changes in placement, s*ee also* §32A-4-14;
- attend any substitute care review board (SCRB) meetings concerning the child and, if unable to attend, provide a letter informing the board of the child's status and including an assessment of the permanency and treatment plans;
- report to the court on the child's adjustment to placement, CYFD's and the respondent's compliance with court orders and treatment plans, and the child's degree of participation during visitation; and
- represent and protect the child's cultural needs. (Among other things, the GAL will need to be familiar with the Indian Child Welfare Act in the case of an Indian child. ***See*** Handbook Chapter 32. In the case of immigrant children, the GAL should be aware of §32A-4-23.1, relating to specific dispositional requirements for undocumented children. ***See*** Handbook §18.11.)

7.4.2 Duties under the Rules

Under Children's Court Rule 10-325.1, in advance of each hearing the GAL must file a notice with the court stating that (1) based on the child's development, the child has been advised of the right to attend the hearing, (3) the child's wishes as to attending the hearing and (3) the GAL's position as to why attendance is or is not in the best interest of the child. The notice is mandated to be filed fifteen (15) days before the hearing and circulated to all parties, any CASA and the foster parents. Rule 10-325.1(C). The notice should substantially conform with Form 10-570.1.

Under Rule 10-333(A), the GAL has an obligation to disclose certain information at least 15 days before any adjudicatory hearing or termination of parental rights hearing. *See* Rule 10-333, summarized at Handbook §28.3.4. The information to be disclosed includes both the child's declared position and the GAL's position.

7.4.3 Representation on Appeal

The GAL in an abuse or neglect case is obligated to represent the child during any appellate proceedings unless excused by the court. §32A-1-7(B). This includes initiating an appeal on the child's behalf or filing an answer brief. On appeal, the GAL continues to represent the child's best interest but must present the child's declared position as well. *In re Esperanza M.*, 1998-NMCA-039, ¶40, 124 N.M. 735.

7.4.4 Attorney Fees on TPR Motion

The GAL may request in writing that CYFD move for the termination of parental rights and notify the department that, if it does not move for termination, the child will do so and seek an award of attorney fees. §32A-4-30. If CYFD refuses to litigate the motion or fails to act in a timely manner and the GAL moves successfully for TPR, the court may grant the GAL an award of attorney fees. *Id*.

7.4.5 Retaining Separate Counsel

The GAL may retain separate counsel to represent the child in a tort action or any other action outside the jurisdiction of the Children's Court. The GAL must provide written notice to the court within 10 days of retaining separate counsel. The GAL is prohibited from having any pecuniary interest in the separate action. §32A-1-7(F).

7.4.6 Mental Health and Developmental Disabilities Residential Placement Decisions

It is important that GALs become familiar with the Children's Mental Health and Developmental Disabilities Act, §§32A-6A-1 to 32A-6A-30. Under §32A-4-23(E), the GAL in an abuse or neglect case serves as GAL for the child for the purposes of the Act until the child turns 14. ***See*** Handbook Chapter 34 for a summary of the Act.

When a child in CYFD's custody is admitted to a residential facility for mental health treatment or developmental disabilities habilitation, the GAL, representing the child's best interests, has the duty of certifying to the court whether admission to the facility is appropriate. §32A-6A-20(G) and (H). The admission will be considered appropriate if the GAL certifies that:

- The parent, guardian, or custodian understands and consents to the admission.
- The admission is in the child's best interests.
- The admission is appropriate for the child and consistent with the least restrictive means principle.

If the GAL makes this certification to the court, there is no involuntary placement hearing even if the child disagrees with the placement. The placement is reviewed every 60 days. §32A-6A-20(K). *See* Forms 10-601 and 10-602.

If the GAL does not certify that the admission is appropriate, the child must be released or involuntary placement procedures under §32A-6A-22 must be initiated. §32A-6A-20(L). The child's rights at the involuntary placement hearing are set out in §32A-6A-22(H).

7.5 Other Responsibilities

Although not specifically enumerated in the Children's Code, other activities may be reasonable and appropriate in the context of the case, for example:

- Advocacy in other forums, such as attending treatment team meetings if the child is in a residential mental health placement or in treatment foster care, participating in Individualized Education Plan meetings for special education services at school, or working through administrative channels to secure other health or social services.

  The GAL should be familiar with the federal laws that may affect the child's rights in

these areas. Examples include the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Family Educational Rights and Privacy Act (FERPA). ***See also*** Handbook Chapter 35 on education.

- Participating in planning for the child for discharge from mental health treatment, such as from one level of care to another, and in permanency planning, where the child is moving from foster care to a permanent placement. The GAL's knowledge of therapeutic intervention models, pharmacological interventions, child development, and state and federal adoption subsidies can be an important resource for the child in those discussions.

- Engage in planning with and for the child, based on the wishes of the child, in relation to the "reasonable and prudent parenting" standard. The federal Preventing Sex Trafficking and Strengthening Families Act (***see*** Handbook §36.10) requires that states adopt standards to promote foster children's participation in normal childhood activities. CYFD has adopted regulations to require Protective Services (PSD) to "make efforts to normalize the lives of children in PSD's custody and to empower caregivers to approve a child's participation in activities, based on the caregiver's own assessment using a reasonable and prudent parent standard, without prior approval of PSD." 8.26.2.13(A) NMAC. The caregiver must consider a number of factors, which include, among other things the wishes of the child, the wishes of the birth parents, the developmental needs of the child, and court orders. The activities allowed include participation in school and social activities and sleepovers. The full list of factors and activities are found in the rule.

- Pay attention to immigration issues. §32A-4-23.1 requires CYFD to determine the child's immigration status. If the child is an undocumented immigrant, CYFD must consider whether the permanency plan includes reunification with the parents and whether it is in the child's best interest to be returned to the child's country of origin. If the permanency plan is not reunification, the department must consider whether the child may be eligible for special immigrant juvenile status (SIJS) and, if so, move the court for an SIJS order. After consulting with the child and the child's GAL, CYFD will then determine whether the child's best interests would be served by filing a petition with the federal immigration agency to secure SIJS for the child. It will be CYFD's responsibility to file the petition, and the department has adopted extensive procedures for doing so. ***See*** Handbook §18.11 for more details on SIJS.

As a practical matter, the GAL should cooperate and share expertise with the court appointed special advocate (CASA) in the case, with each benefiting from the other's knowledge.

7.6 The GAL in Court

It is important to remember that the child is a party in the case. Rule 10-121(B)(3). The GAL should actively participate in all court proceedings. This participation includes:

- making pretrial motions;
- making opening and closing statements;
- calling and adequately examining witnesses;
- preparing and offering evidence and exhibits;
- making proper objections or responding to objections raised by opposing counsel;
- preserving issues for appeal;
- filing briefs; and
- providing proposed findings of fact and conclusions of law.

"Passive representation" that does not include these activities may be materially deficient and fail to meet the standards prescribed by §32A-1-7. *State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, ¶41. Any party may petition the court for an order to remove a GAL who has a conflict of interest or is unwilling or unable to zealously represent the child's best interests. §32A-1-7(C).

7.7 Relationship to Others in the Case

7.7.1 Relationship to the Child

The Children's Code sets forth a dual role for GALs in relation to the child, who is a party to the case. Rule 10-121(B)(3). The GAL must "zealously represent the child's best interests," §32A-1-7(A), and must "convey the child's declared position to the court at every hearing." §32A-1-7(D). The GAL therefore could be in a position of presenting contrary positions to the court. The court in *Esperanza M.* recognized these dual responsibilities and stated: "The guardian ad litem is required to advocate the child's expressed position only to the extent that the child's desires are, in the guardian ad litem's professional opinion, in the child's best interests. The guardian ad litem may properly present the child's wishes to the court, and at the same time advise the court of those facts and matters which the guardian believes bear upon and affect the child's best interests." *Esperanza M.*, 1998-NMCA-039, ¶37. Even in a situation where the relationship between the GAL and the child deteriorates and the GAL advances a position with which the child does not agree, the GAL may still fulfill the mandated role. *State ex rel. CYFD v. Patricia N.*, 2000-NMCA-035, ¶¶28-33, 128 N.M. 813.

In most cases, a GAL is expected to represent both the child's best interest and the child's position: "Unless the guardian ad litem's perception of the child's best interests is so incongruous with the child's position that the guardian ad litem absolutely refuses to present the child's position, we see no need for the guardian ad litem to withdraw as counsel." *Id.* ¶40.

7.7.2 Relationship to Other Parties

The child's GAL may contact the CYFD social worker outside the presence of CYFD's attorneys to discover factual information relevant to the representation of the child. *State ex rel. CYFD in re George F.*, 1998-NMCA-119, ¶15-16, 125 N.M. 597. When investigating the facts affecting the child in order to report to the court as required by §32A-1-7, the GAL

"is acting to 'assist the court in carrying out its duty' and is not functioning solely as an attorney advocating the child's wishes, nor in the traditional manner of an attorney who represents a client with a single-minded duty solely to that client." *Id.*. Accordingly, "the Rules of Professional Conduct that are designed strictly for the traditional role of attorneys do not fit this circumstance" and "the GAL is not prohibited by Rule 16-402 from contacting social workers outside the presence of the Department attorneys." *Id.* ¶16.

7.7.3 Relationship to the Court

The children's court judge "has an affirmative duty to assure that the best interests of a child are legally represented" as part of "the court's traditional role of protecting the child's best interests." *Esperanza M.*, 1998-NMCA-039, ¶42. This includes "a duty to elicit the guardian ad litem's position on substantive issues throughout the course of the abuse and neglect proceeding." *Id.* ¶43. If a GAL is not adequately representing the child's best interests, the court may want to consider replacing the GAL with a different attorney. §32A-1-7(C).

The GAL's role in assisting the court in carrying out its duties, discussed in *George F*. (***see*** §7.7.2 above), was revisited briefly by the Court of Appeals in *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057. In *Laura J.*, the court held that CYFD had not complied with its mandate under §32A-4-25.1(D) to identify, locate, and consider relatives who may serve as an appropriate placement for the child. As a "final note," the court proceeded to "emphasize that the statute imposes a duty on the district court to make a serious inquiry into whether the Department has complied with its mandate." It continued:

> Nor will the court's *or the child's guardian ad litem's* duty of inquiry be satisfied by leaving the full burden of locating and identifying relatives to the parents of children in departmental custody who may, for any number of reasons, be unable or unwilling to provide information about relatives.

Id. ¶61 (emphasis added).

For a discussion of the role of a GAL as an arm of the court, see the Supreme Court's opinion in *Kimbrell v. Kimbrell*, 2014-NMSC-027. *Kimbrell* involved a GAL who was appointed under Rule 1-053.3 to serve in a custody dispute. The GAL was sued by the father in tort, alleging that the GAL's conduct had injured the child. The Court held, among other things, that a Rule 1-053.3 GAL is protected by absolute quasi-judicial immunity from suit arising from the performance of his or her duties, unless the GAL's alleged tortious conduct is clearly and completely outside the scope of the appointment. *Id*. ¶2. In deciding that a Rule 1-053.3 GAL is generally entitled to immunity, the Court explained that the GAL "serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests." Rule 1-053.3(A).

The Court in *Kimbrell* quoted at length from Rule 1-053.3, which describes in detail the role, duties, and responsibilities of a GAL appointed as an arm of the court under it. Both the rule and the discussion in *Kimbrell*, while not directly applicable to abuse and neglect cases, may

be helpful in considering the GAL's role or roles under the Children's Code.

7.8 Performance Standards

As noted earlier, the New Mexico Supreme Court has adopted performance standards for attorneys representing children as GALs in abuse and neglect cases in children's court. The standards are reprinted, beginning on the next page

7.9 Recommended Reading

The National Child Traumatic Stress Network has published a useful guide entitled Trauma: What Child Welfare Attorneys Should Know. This document offers practice tips for attorneys representing parents and children with histories of trauma, as well as other information on trauma. https://www.nctsn.org/resources/trauma-what-child-welfare-attorneys-should-know.

Other resources include:

- Duquette, Donald N. et al., Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases, Third Edition, National Association of Counsel for Children, 2016.
- Peters, Jean Koh, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, International Third Edition. Matthew Bender & Company, Inc., a member of the LexisNexis Group, 2007.
- Renne, Jennifer L., Legal Ethics in Child Welfare Cases. American Bar Association, 2004.

GUARDIAN AD LITEM PERFORMANCE STANDARDS

Practice Standards

- The GAL zealously represents the child's best interests with respect to matters arising pursuant to the provisions of the New Mexico Children's Code, Section 32A-1-1 NMSA 1978 et. seq.;
- The GAL determines the best interests of the child through an objective evaluation that takes into account such factors as age, sense of time, level of maturity, culture and ethnicity, degree of attachment to family members including siblings, as well as continuity, consistency, and sense of belonging and identity;
- The GAL represents and protects the child's cultural needs;
- In the event that the child's best interests are different than the child's expressed wishes, the GAL informs the court of these differences;
- The GAL represents the child's best interests in accordance with the Rules of Professional Conduct, Rules 16-100 through 16-805 NMRA (2008), and all other applicable laws; and
- The GAL represents the child's best interests in accordance with the confidentiality requirements of the New Mexico Children's Code, Section 32A-4-33 NMSA (2009).

Training Standards

- The GAL participates in at least ten (10) hours of relevant annual training.

Contact and Continuity of Counsel Standards

- The GAL meets with the child and the child's caregiver in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the GAL also meets with the child and the child's caregiver prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The GAL counsels the child, in a developmentally appropriate manner, concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the GAL's role, and what to expect in the legal process;
- The GAL facilitates the child's participation in court hearings, especially if the child is 12 or older, unless it is determined to not be in the child's best interest;
- The GAL explains court orders and their consequences to the child;

- The GAL contacts the child prior to and after any change in the child's placement, whenever possible;
- The GAL contacts the child in the event of an emergency or significant event impacting the child;
- The GAL is accessible to the child through office hours, telephone/voice mail, fax or email;
- The GAL attends treatment team meetings, administrative hearings, school case conferences and staffings concerning the child whenever possible;
- As appropriate, the GAL pursues issues on behalf of the child, administratively or judicially, even if those issue do not specifically arise from the court appointment; for example: school/education issues, especially a child with disabilities; and mental health proceedings;
- In the event of a change of venue, the originating GAL remains on the case until a new GAL is appointed by the court in the new venue and the new GAL has communicated with the former GAL;
- The GAL discusses with the child, as developmentally appropriate, the nature of an appeal. If the appeal has merit, the GAL takes all necessary steps to perfect the appeal and seeks appropriate temporary orders or extraordinary writs to protect the interests of the child during the pendency of appeal;
- Whenever an appeal is taken, the GAL enters an appearance and GAL representation continues through any appellate proceedings unless representation is otherwise arranged;
- If there is no appeal, GAL representation continues through dismissal unless removed or relieved by the court; and
- At cessation of representation, the GAL discusses the end of the legal representation and determines what contacts, if any, he/she and the child will continue to have

Case Planning Standards

- The GAL consults with the social worker, and health care, mental health, and other professionals involved with the child's care;
- The GAL requests services (by court order if necessary) to meet the child's needs, to protect the child's interests, and to ensure a comprehensive service plan. These services may include but are not limited to:
    - Screening and diagnostic services
    - Family preservation or reunification services
    - Home-based services
    - Sibling and family visitation

- Child support
- Domestic violence prevention, intervention and treatment
- Medical and mental health care
- Drug and alcohol treatment
- Parenting education
- Semi-independent and independent living services
- Long-term foster care
- Termination of parental rights action
- Adoption related services
- Education
- Recreational or social services
- Housing
- Special education and related services
- Supplemental security income (SSI) to help support needed services

- The GAL attends local Citizen Review Board hearings concerning the child and, if unable to attend the hearings, forwards to the board a letter stating the child's status during the period since the last review and an assessment of CYFD's permanency and treatment plans;

- The GAL communicates with the Court-Appointed Special Advocate (CASA); and

- The GAL monitors implementation of the case plan.

Standards for Gathering and Reviewing Information

- The GAL is responsible for gathering and reviewing information, including:

  - Interviews with the child, foster parents and other caretakers, caseworkers, and service providers; and interviews as appropriate with the parents, school personnel, neighbors, relatives, clergy, law enforcement, and others;
  - Contact with lawyers for other parties and the CASA;
  - Review of the child's, respondent's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, as available;
  - Review of the court files of the child, respondent, and family; and case-related records of the social service agency and other service providers; and
  - Review of photographs, videos, or audiotapes and other evidence.

- The GAL obtains the necessary authority for the release of information;
- The GAL personally observes the child's interaction with parents, or with whomever the child may be reunited, when reunification is anticipated; and
- The GAL personally observes every residence at which the child is placed promptly after the child is placed at the residence to determine and facilitate the safety

and well-being of the child.

Court Performance Standards

- The GAL participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The GAL reports to the court on the child's adjustment to placement, the Department's and the respondent's compliance with prior court orders and treatment plans, and the child/parent interaction during visitation;
- The GAL participates in mediation;
- The GAL stays informed of the child and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The GAL files petitions, motions, and responses and make objections as necessary to represent the child's best interests. If appropriate, the GAL files briefs in support of evidentiary issues. During all hearings, the GAL preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:
    - Obtaining necessary services;
    - A mental or physical examination of a party or the child;
    - A parenting, custody, or visitation evaluation;
    - An increase, decrease, or termination of contact or visitation;
    - Requesting, restraining, or enjoining a change of placement;
    - Contempt for non-compliance with a court order;
    - Termination of the parent-child relationship;
    - Child support;
    - A protective order concerning the child's privileged communication or tangible property; and
    - Dismissal of petitions or motions.
- The GAL presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;

- The GAL prepares the child to testify, when appropriate. The GAL familiarizes the child with the courtroom, court procedures, and what to expect during direct and cross-examination. The GAL makes an effort to ensure (including making objections) that testifying will cause minimum harm to the child;
- The GAL requests orders that are clear, specific, and, where appropriate, include a timeline for assessment, evaluation, services, placement, treatment, and evaluation of the child and family;
- The GAL reviews all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices;
- The GAL monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the GAL makes a closing argument and provides proposed findings of fact and conclusions of law. The GAL ensures that a written order is entered; and
- The GAL works diligently to avoid continuances and reduce delays in court proceedings.

CHAPTER 8

ATTORNEY FOR CHILD AGE 14 OR OLDER (YOUTH ATTORNEY)

This chapter covers the following with regard to the "youth attorney" for the child age 14 or older:

- Overview of statutory changes.
- Role of the youth attorney.
- Appointment.
- Duties and responsibilities.
- Relationship to others in the case.
- Performance standards and other resources.

8.1 Introduction

Until 2005, all children were appointed guardians ad item (GALs) in abuse and neglect cases regardless of age. GALs are attorneys by profession but are charged with representing the child's best interest. Under the 2005 amendments to the Children's Code, children over the age of 14 are represented by attorneys under the traditional client-directed model of representation. The attorney advocates for the young person's position after counseling the young person on his or her choices. §32A-1-7.1 and Rule 16-102(A).

The Handbook uses the term "youth attorney" to describe the attorney appointed for a child 14 or older in abuse or neglect cases. Although this term is not found in the statute, it is the term commonly used by judges and practitioners throughout New Mexico. It distinguishes between the attorney GAL for the younger child and the attorney serving as attorney for the older child.

In 2009, the Legislature made it clear that children age 14 or over receive a youth attorney in proceedings to revoke permanent guardianship, §32A-4-32(J), as well as in proceedings under the Families in Need of Court-Ordered Services Act, §32A-3B-8(C) and (D). The Adoption Act was also amended to acknowledge the youth attorney in the abuse and neglect case and provide for this attorney to represent the youth in certain proceedings under the Act. *See* §32A-5-16(F) (termination), §32A-5-24(B) (relinquishment) and §32A-5-33 (adoption).

8.2 Role of the Youth Attorney

Section 32A-4-10 provides that the court shall appoint an attorney for children 14 and older and that the attorney must zealously represent the child. Section 32A-1-7.1(A) explains that this attorney "shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct." Such representation extends through any subsequent appeals. §32A-1-7.1(B).

While the Rules of Professional Conduct serve as the primary guidance for attorneys appearing on behalf of older children in abuse and neglect cases, the Supreme Court has also adopted performance standards for these attorneys. Among other things, these standards require the youth attorney to consult with the child before hearings, to zealously represent the expressed interests and expressed cultural needs of the child, and to comply with the Children's Code confidentiality requirements. The standards can be found at the end of this chapter.

8.3 Appointment

When a petition alleging abuse or neglect of a child age 14 or older is filed, the court will appoint an attorney to represent the child. §32A-4-10(C); *see also* Rule 10-312(D).

When a child, who already has a GAL appointed, reaches age 14, the child's GAL must file either a notice of continued representation as attorney for the child or a motion to request the appointment of a different attorney for the child. Rule 10-313(A). At the child's first appearance in court after turning 14, the court must inquire as to whether the child is represented by an attorney and appoint one if not. Rule 10-313(B).

Although the law contemplates that the GAL will continue as the child's attorney, the court must appoint a different attorney if:

- the child requests different counsel,
- the GAL requests removal, or
- the court determines that appointment of a different attorney is appropriate. §32A-4-10(E).

The requirement to appoint counsel is mandatory rather than discretionary and the court must appoint a different attorney for the child if any one of the three statutory conditions is satisfied. *State ex rel. CYFD v. John R.*, 2009-NMCA-025, ¶22, 145 N.M. 636. Once "[a]lerted to the potential that Child's interests were not fully protected, the district court's obligation was to remedy the deficiency by appointing separate counsel for Child. Absent separate counsel, Child's position was not fully developed, and Child was therefore prejudiced by not being afforded her full right to representation." *Id.* ¶24. Additionally, references to age are to actual age, not mental age. A child's mental age should not be a factor in determining whether or not to appoint a separate attorney. *Id.* ¶25.

Practice Note: As a practical matter, the issue in the *John R.* case might have been avoided if the GAL had recognized the child's right to have an attorney once she turned 14. Since the duty to file a motion to request new counsel or a notice of continued representation as the attorney for the child arises at the time the child turns 14, it becomes necessary to begin having the discussion about the change in representation with the child before the child turns 14. Had that been done, it is possible that the issue could have been addressed fully before the commencement of the TPR trial. Although the court and CYFD have duties to ensure fundamental fairness of the proceedings for all parties, it is incumbent upon the GAL whose child is close to turning 14 years of age to address the issue promptly.

Only an attorney with appropriate experience may be appointed as a youth attorney. §32A-4-10(C). When reasonable and appropriate, the court must appoint an attorney who is also knowledgeable about the child's particular cultural background. §32A-4-10(D). An officer or employee of an agency that has legal custody of the child may not serve as the child's attorney. §32A-4-10(C).

Historical Note: When the concept of a youth attorney was being developed, there was concern that younger children not lose the continuity of their relationship with their GAL. Hence, the law was drafted to allow the same attorney to continue representing the child after age 14, albeit as counsel rather than GAL. It was thought that the interests and desires of the younger and older siblings would not conflict in many cases and that the attorney would be able to continue serving as GAL for the younger children and attorney for the older children.

Rule 10-313.1 provides guidance to courts and attorneys when siblings are involved. The rule permits the court to appoint the same attorney to serve as GAL for the younger children and attorney for the older children. The difference in role is not itself a conflict of interest. The rule also provides a list of circumstances which do not, standing alone, demonstrate a conflict. For example, the fact that the children have different permanency plans or that they express conflicting desires or give different accounts regarding issues that are not material to the case does not, standing alone, demonstrate a conflict. *See* Rule 10-313.1(C).

With some exceptions, the attorney must decline to represent one or more siblings if, at the outset, a concurrent conflict of interest exists. A concurrent conflict exists "if the representation of one child will be directly adverse to another child or there is a significant risk that the representation of one or more of the children will be materially limited by the attorney's responsibilities to another client, a former client or a third person, or by a personal interest of the attorney." Rule 10-313.1(A)(2); *see also* Rule 16-107 of the Rules of Professional Conduct.

An attorney representing siblings has an ongoing duty to evaluate the interests of each sibling and assess and act on any conflicts of interest that develop. *See* Rule 10-313.1(B).

8.4 Specific Duties

8.4.1 Duties under the Rules

Under Children's Court Rule 10-325, in advance of each hearing the youth attorney must file a notice with the court stating that the child has been advised of the right to attend the hearing. The notice is mandated to be filed fifteen (15) days before the hearing and circulated to all parties, any CASA and the foster parents. Rule 10-325.1(C). The notice should substantially conform with Form 10-570.

Under Children's Court Rule 10-333(A), the youth attorney has an obligation to disclose certain information at least 15 days before any adjudicatory hearing or termination of parental rights hearing. *See* Rule 10-333, summarized at Handbook §28.3.4. The information to be disclosed includes the child's declared position.

8.4.2 Representation on Appeal

The youth attorney in an abuse or neglect case is obligated to represent the child during any appellate proceedings unless excused by the court. §32A-1-7.1(B). This includes initiating an appeal on the child's behalf by filing the notice of appeal and docketing statement, or filing an answer brief. The youth attorney should continue to advocate the child's position consistent with the attorney's duties under the Rules of Professional Conduct. Note that Rule 10-352(B)(2) states that if the child is the appellant, the attorney for the child does not have to obtain the signature of the child before filing the notice of appeal.

8.4.3 Attorney Fees on TPR Motion

The attorney representing an older child in the proceeding may request in writing that CYFD move for the termination of parental rights and notify the department that, if it does not move for termination, the child will do so and seek an award of attorney fees. The court may order CYFD to pay attorney fees if the child, through the attorney, moves successfully for TPR and the department refuses to litigate the motion or fails to act in a timely manner. §32A-4-30.

8.4.4 Retaining Separate Counsel

The youth attorney may retain separate counsel to represent the child in a tort action or any other action outside the jurisdiction of the children's court. The youth attorney must provide written notice to the court within ten days of retaining separate counsel and is prohibited from having any pecuniary interest in the separate action. §32A-1-7.1(C).

8.4.5 Mental Health and Developmental Disabilities Residential Placement Decisions

Under the Children's Mental Health and Developmental Disabilities (CMHDD) Act, a child 14 years of age or older may voluntarily admit him or herself to a residential treatment or

habilitation program, with the informed consent of the child's legal custodian. §32A-6A-21(B). The law also entitles the child to an attorney. §32A-6A-21(D). In the case of a child subject to the Abuse and Neglect Act, the child's attorney in the abuse or neglect proceeding continues to serve in the CMHDD Act proceeding. However, the child may, after consultation with this attorney, elect to be represented by counsel appointed under the CMHDD Act instead. §32A-4-23(E).

Because children 14 years of age or older have the independent right to consent to residential placement, the child's attorney must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. §32A-6A-21(I). At the meeting, the attorney must first explain to the child:

- the child's right to an attorney;
- the child's right to terminate his voluntary admission and the procedures to effect termination;
- the effect of terminating the child's voluntary admission and the options of the physician and other interested parties to the petition for involuntary admission; and
- the child's rights under the CMHDD Act, including the right to:
    - legal representation;
    - a presumption of competence;
    - receive daily visitors of the child's choice;
    - receive and send uncensored mail;
    - have access to telephones;
    - follow or abstain from the practice of religion;
    - a humane and safe environment;
    - physical exercise and outdoor exercise;
    - a nourishing, well-balanced, varied, and appetizing diet;
    - medical treatment;
    - educational services;
    - freedom from unnecessary or excessive medication;
    - individualized treatment and habilitation; and
    - participation in the development of the individualized treatment plan and access to that plan on request. §32A-6A-21(I) and §32A-6A-12.

If the attorney determines that the child understands his or her rights and voluntarily and knowingly desires to remain as a patient in the residential program, the attorney will so certify on a form designated by the Supreme Court within seven days of the child's admission. §32A-6A-21(J); Form 10-603. A child voluntarily admitted has the right to immediate discharge upon his or her request, except in those situations in which involuntary placement proceedings are commenced. §32A-6A-21(L). If involuntary proceedings are commenced, the child shall at all times be represented by counsel. §32A-6A-22(H).

8.5 Other Responsibilities

The youth attorney will want to consult with the youth's case worker as well as the health care, mental health care, and other professionals involved with the youth's treatment plan.

This will permit the attorney to request services to meet the youth's needs, to protect the youth's interests, and to ensure a comprehensive plan.

It may also be reasonable and appropriate, for example, to:

- Engage in advocacy in other forums, such as attending treatment team meetings if the child is in a residential mental health placement or in treatment foster care; participate in Individualized Education Plan meetings for special education services at school; or work through administrative channels to secure other health or social services. The youth attorney should be familiar with federal statutes that may affect the child's rights, such as the Americans with Disabilities Act, Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Family Education Rights and Privacy Act. ***See*** Handbook Chapter 35 on education.

- Participate in planning for the child for discharge from mental health treatment, such as from one level of care to another, and in permanency planning where the child is moving from foster care to a permanent placement, or at the time of emancipation. The youth attorney's knowledge of therapeutic intervention models, pharmacological interventions, child development, and state and federal adoption subsidies can be an important resource for the child in those discussions.

- Engage in planning with the child about participating in normal childhood activities. The federal Preventing Sex Trafficking and Strengthening Families Act (***see*** Handbook §36.10) requires that states adopt standards to promote foster children's participation in normal childhood activities. CYFD has adopted regulations to require Protective Services (PSD) to "make efforts to normalize the lives of children in PSD's custody and to empower caregivers to approve a child's participation in activities, based on the caregiver's own assessment using a reasonable and prudent parent standard, without prior approval of PSD." 8.26.2.13(A) NMAC. The caregiver must consider a number of specified factors, which include among other things the wishes of the child, the wishes of the birth parents, the developmental needs of the child and court orders. The activities allowed include, among others, participation in school and social activities, sleepovers, owning a cell phone, and obtaining a driver's license. The full list of factors and activities is found in the rule

- Be attentive to any need the youth may have to seek emancipation from his or her parents for one or more of the purposes set forth in the Emancipation of Minors Act, §§32A-21-1 through 32A-21-7, discussed at length in *Diamond v. Diamond,* 2012-NMSC-022. In *Diamond,* the New Mexico Supreme Court held that the Emancipation of Minors Act authorizes the court to declare a minor emancipated "for some rather than all of" the enumerated purposes in §32A-21-5. *Id*. ¶1. The Court ruled that the district court could, under the Act, order the minor in that case to be "an emancipated minor in all respects, except that she shall retain the right to support from [Mother]." *Id*. ¶¶13, 50.

- Pay attention to immigration issues. §32A-4-23.1 requires CYFD to determine the child's immigration status. If the child is an undocumented immigrant, CYFD must consider whether the permanency plan includes reunification with the parents and whether it is in the child's best interest to be returned to the child's country of origin. If the permanency plan is not reunification, the department must also consider whether the child may be eligible for special immigrant juvenile status (SIJS) and, if so, to move the court for an SIJS order. After consulting with the child and his or her attorney, CYFD will then determine whether the child's best interests would be served by filing a petition with the federal immigration agency to secure SIJS for the child. It will be CYFD's responsibility to file the petition, and the department has adopted extensive procedures for doing so. ***See*** Handbook §18.11 for more details on SIJS.

  If an SIJS application should be filed, it is critical that it be filed before the child turns 18. If it has not been granted by the time the child is 18, the children's court may retain jurisdiction of the abuse or neglect case beyond the child's 18th birthday. The youth attorney will need to get the attention of the court if the youth is approaching 18 and has an SIJS petition pending. Jurisdiction is not retained automatically but by order of the court. *See* §32A-4-23.1(E).

8.6 Life Skills Plan, Transition Plan and Discharge Planning

8.6.1 Age 14 – Case Plan, Life Skills and Education

It will be especially important to advocate for the child as he or she prepares for adulthood. This planning begins when the child reaches the age of 14 (if not earlier), when the child is brought into the case planning process. If the child is 14 or older, the case plan must be developed in consultation with the child and, at the option of the child, with up to two members of the case planning team who are chosen by the child. 8.10.8.13 NMAC; *see also* the federal Preventing Sex Trafficking and Strengthening Families Act ("Strengthening Families Act"), summarized at Handbook §36.10.

The Strengthening Families Act also lowers the age for transition planning from 16 to 14. CYFD has adopted regulations providing for an independent living (IL) assessment that youth 14 or older must complete with the permanency planning worker (PPW). 8.10.9.10 NMAC. In conjunction with the IL assessment, each child over the age of 14 must have a life skills plan, which is included in the case plan and which is presented to the court beginning with the first hearing after the child turns 14 and at every hearing thereafter. 8.10.9.11 NMAC. This life skills plan will identify the activities, tasks, and services needed for the youth to develop the life skills necessary to successfully transition into independent living as an adult, regardless of whether the child is returned to the parent's home. §32A-4-21(B)(11); 8.10.9.11 NMAC.

As the child enters high school, there is a focus on educational planning. The predisposition study must include "a case plan that sets forth steps to ensure that the child's educational needs are met and, for a child fourteen years of age or older, a case plan that specifically sets

forth the child's educational and post-secondary goals." §32A-4-21(B)(12). ***See also*** Handbook Chapter 35 on Education.

All of these taken together should inform the case planning for the youth.

8.6.2 Transition Plan

The transition plan is somewhat different from the plans described above. As defined in §32A-4-2:

> "transition plan" means an individualized written plan for a child, based on the unique needs of the child, that outlines all appropriate services to be provided to the child to increase independent living skills. The plan must also include responsibilities of the child, and any other party as appropriate, to enable the child to be self-sufficient upon emancipation.

Before the child turns 17, the department will meet with the child, *the child's attorney* and others of the child's choosing to develop this transition plan and will present the plan to the court at the first hearing after the child's 17th birthday. §32A-4-25.2(C).

The transition plan should identify the youth's needs, strengths and goals in the areas of safety, housing, education, employment or income, health and mental health, local opportunities for mentors and continuing support services. The plan must identify activities, responsibilities and timeframes to address the goals in the plan. 8.10.9.16 NMAC.

8.6.3 Discharge Hearing

At the last hearing before the child turns 18, the court will both review the transition plan and determine whether CYFD made reasonable efforts to provide certain information and documents to the youth, assist the youth in obtaining Medicaid, if the youth is eligible, and refer the youth for guardianship if the youth is incapacitated. §32A-4-25.3; 8.10.9.17 NMAC. The youth attorney will want to ensure that the court considers all appropriate issues and hears the views of the youth before ordering a transition plan, reviewing the transition plan, or determining whether the department has made reasonable efforts.

If the court finds that CYFD has not made reasonable efforts to meet all of the requirements of §32A-4-25.3(B) and that ending jurisdiction would be harmful to the child, the court can continue jurisdiction over the case for a period of up to one year. The young adult must consent to this continued jurisdiction. §32A-4-25.3(C). It will be necessary for the attorney to discuss these provisions and the options with the youth so that the youth can make an informed decision in this situation.

8.7 Youth Attorney in Court

The child who is the subject of an abuse or neglect petition is a party to the case. Rule 10-121(B)(3). As such, the child is entitled to full representation of the child's expressed

wishes. §32A-1-7.1; Rule 16-102(A); *State ex rel. CYFD v. John R.*, 2009-NMCA-025 ¶24, 145 N.M. 636.

The youth attorney should actively participate in all court proceedings. This participation includes:

- making pretrial motions;
- making opening and closing statements;
- calling and adequately examining witnesses;
- preparing and offering evidence and exhibits;
- making proper objections or responding to objections raised by opposing counsel;
- preserving issues for appeal;
- filing briefs; and
- submitting proposed findings of fact and conclusions of law.

To do otherwise would amount to the passive representation that the Court of Appeals in *Esperanza M*. described as "materially deficient." The Court in that case pointed out that the attorney (serving as a GAL) did not make any pretrial motions, make an opening statement, call witnesses, adequately examine witnesses called, make proper objections, or take a position on a majority of the objections made by opposing counsel. *State ex rel. CYFD in re Esperanza M.*, 1998-NMCA-039, ¶41, 124 N.M. 735.

8.8 Relationship to Others in the Case

8.8.1 Relationship to the Child

The youth attorney's relationship to the child client is that of any lawyer to his or her client. §32A-1-7.1(A). As such, the youth attorney is required to perform a number of roles, including advisor, counselor, and advocate. Rule 16-201; Preamble to the Rules of Professional Conduct. Depending on the child's age, maturity, and sophistication, the youth attorney's role as advisor and counselor may be especially significant. The youth attorney must candidly advise the child about his or her rights, the strengths and weaknesses of the child's expressed positions, and the possible outcomes of the case, and must do so in a manner that is meaningful to the child. In counseling the child, the youth attorney may -- and probably should -- discuss more than just the legal aspects of the case, such as the child's future family relationships and social and economic factors that may be relevant to the child's situation. Rule 16-201. Once the child has been fully advised and counseled, the youth attorney must abide by the child's "decisions concerning the objectives of representation" and be a zealous advocate for the child. Rule 16-102.

8.8.2 Relationship to Other Parties

The extent to which the youth attorney may communicate directly with CYFD workers without the children's court attorney being present or consenting is unclear. Whereas the GAL plays a unique role not typical of traditional attorneys in abuse and neglect cases (*see*

State ex rel. CYFD in re George F., 1998-NMCA-119, ¶5, 125 N.M. 597), the youth attorney is explicitly required to "provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, *in accordance with the rules of professional conduct*." §32A-1-7.1(A) (emphasis added). Presumably this includes Rule 16-402, which provides that a lawyer may not "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

CYFD regulations provide that the primary decision-maker on the case is the CYFD worker for the purpose of the attorney-client relationship. 8.10.7.12(A) NMAC. Per CYFD regulations, PSD "routinely informs … child's attorney about important decisions relating to the child." 8.10.7.9(E)(2) NMAC. CYFD regulations are also clear that no attorney should discuss settlement or disposition with CYFD personnel without the CCA being present. 8.10.7.9(E) NMAC.

The youth attorney should not make direct contact with the respondents when they are represented by counsel, outside of the presence of such counsel, unless the respondents and their counsel agree to the contact.

8.8.3 Relationship to the Court

While the court must assure that the GAL zealously represents the child's best interest, it must assure that the youth attorney zealously represents the child. §32A-4-10(F). The court does not have the same relationship with the youth attorney that it does with the GAL who, at least in part, is acting to assist the court in carrying out *its* duty to determine the child's best interest. ***See*** Handbook §7.7.3.

8.9 Performance Standards

The performance standards adopted by the New Mexico Supreme Court for attorneys who represent older youth in abuse or neglect proceedings in children's court are reprinted here, after §8.10 of the Handbook.

8.10 Recommended Reading

The National Child Traumatic Stress Network has published a useful guide entitled Trauma: What Child Welfare Attorneys Should Know. This document offers practice tips for attorneys representing parents and children with histories of trauma, as well as other information on trauma. https://www.nctsn.org/resources/trauma-what-child-welfare-attorneys-should-know.

Other publications include:

- Duquette, Donald N. et al., Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases, Third Edition,

National Association of Counsel for Children, 2016.

- Peters, Jean Koh, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, Third Edition. Matthew Bender & Company, Inc., a member of the LexisNexis Group, 2007.
- Renne, Jennifer L., Legal Ethics in Child Welfare Cases. American Bar Association, 2004.

YOUTH ATTORNEY PERFORMANCE STANDARDS

Practice Standards

- The YA zealously represents the expressed interests of the youth;
- The YA represents and protects the youth's expressed cultural needs;
- The YA represents the youth in accordance with the Rules of Professional Conduct, Rules 16-100 through 16-805 NMRA (2008), and all other applicable laws; and
- The YA represents the youth in accordance with the confidentiality requirements of the New Mexico Children's Code, Section 32A-4-33 NMSA 1978.

Training Standards

- The YA participates in at least ten (10) hours of relevant annual training.

Contact and Continuity of Counsel Standards

After consultation with the youth/client:

- The YA contacts the youth in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the YA contacts the youth prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The YA counsels the youth, in a manner understandable to the client, on the subject matter of the litigation, the rights of the custodial and non-custodial parent, the court system, the proceedings, the YA's role, and what to expect in the legal process;
- The YA ensures the youth has proper notice of every hearing, and advises that the youth has a right to be present at every hearing
- The YA explains court orders and their consequences to the youth;
- The YA is accessible to the youth through office hours, telephone/voice mail, fax or email;
- The YA attends treatment team meetings, administrative hearings, Citizen Review Board meetings, and other conferences and staffings concerning the youth, whenever appropriate;

- The YA discusses with the youth the nature of an appeal. If the appeal has merit, the YA takes all necessary steps to perfect the appeal and seeks appropriate temporary orders or extraordinary writs to protect the interests of the child during the pendency of appeal;
- Whenever an appeal is taken, the YA enters an appearance and YA representation continues through any appellate proceedings unless representation is otherwise arranged;
- If there is no appeal, YA representation continues through dismissal unless removed or relieved by the court; and
- At cessation of representation, the YA discusses the end of the legal representation and determines what contacts, if any, he/she and the youth will continue to have.

Standards for Gathering and Reviewing Information

After consultation with the youth/client:

- The YA is responsible for gathering and reviewing information, including:
    - Interviews with the youth, foster parents and other caretakers, caseworkers, and service providers; and interviews as appropriate with the parents, school personnel, neighbors, relatives, clergy, law enforcement, and others;
    - Contact with lawyers for other parties and the CASA;
    - Review of the youth's, respondent's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, including placement records, as available;
    - Review of the court files of the youth, respondent, and family; and case-related records of the social service agency and other service providers; and
    - Review of photographs, videos, or audiotapes and other evidence.
- The YA obtains the necessary authority for the release of information; and
- The YA personally observes the youth's interaction with parents, or with whomever the youth may be reunited, when reunification is anticipated, as needed.

Case Planning Standards

After consultation with the youth/client:

- The YA consults with the social worker, and health care, mental health care, and other professionals involved with the youth's service plan;

- The YA requests services (by court order if necessary) to meet the youth's needs, to protect the youth's interests, and to ensure a comprehensive service plan. These services may include but are not limited to:

    - o Screening and diagnostic services
    - o Family preservation or reunification services; o Home-based services;
    - o Sibling and family visitation;
    - o Child Support;
    - o Domestic violence prevention, intervention and treatment;
    - o Medical and mental health care;
    - o Drug and alcohol treatment;
    - o Parenting education;
    - o Semi-independent and independent living services;
    - o Long-term foster care;
    - o Termination of parental rights action; o Adoption-related services;
    - o Education;
    - o Recreational or social services;
    - o Housing;
    - o Special education and related services; and
    - o Supplemental security income (SSI) to help support needed services.

- The YA determines the appropriateness of the youth and/or the YA attending local Citizen Review Board hearings concerning the youth; if neither the youth nor YA attend, the YA forwards to the board a letter stating the youth's status during the period since the last review and an assessment of CYFD's permanency and treatment plans;

- The YA monitors implementation of the case plan;

- The YA communicates with the Court-Appointed Special Advocate (CASA); and

- The YA communicates to the Court the youth's position on the service plans for the youth and respondent; issues about the youth's placement; and the youth's goals.

Court Performance Standards

After consultation with the youth/client:

- The YA participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre- adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;

- The YA reports to the court on the youth's compliance with prior court orders and treatment plans;

- The YA presents evidence of the reasonableness or unreasonableness of the Department's efforts and on alternative efforts that could have been made;
- The YA participates in mediation;
- The YA stays informed of the youth and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The YA files petitions, motions, and responses and makes objections as necessary to represent the youth. If appropriate, the YA files briefs in support of evidentiary issues. During all hearings, the YA preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:
    - Obtaining necessary services;
    - A mental or physical examination of a party or the youth; o A parenting, custody, or visitation evaluation;
    - An increase, decrease, or termination of contact or visitation;
    - Requesting, restraining, or enjoining a change of placement; o Contempt for non-compliance with a court order;
    - Termination of the parent-child relationship;
    - Child support;
    - Dismissal of petitions or motions; and
    - A protective order concerning the youth's privileged communication or tangible property
- The YA presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;
- The YA prepares the youth to testify; the YA familiarizes the youth with court procedures, and what to expect during direct and cross-examination;
- The YA requests orders that are clear, specific, and, where appropriate, include a timeline for assessment, services, and evaluation;
- The YA reviews all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices;
- The YA monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the YA makes a closing argument and provides proposed findings of fact and conclusions of law. The YA ensures that a written order is entered;
- The YA works diligently to avoid continuances and reduce delays in court proceedings.

CHAPTER 9

GUARDIAN AD LITEM FOR RESPONDENT OR YOUTH WITH DIMINISHED CAPACITY

This chapter covers the following with regard to the guardian ad litem for a respondent with diminished capacity:

- Appointment, including appropriate circumstances and court authority.
- Responsibilities, including Americans with Disabilities Act.

9.1 Appointment

9.1.1 Rules

Both the Children's Code and the Children's Court Rules are silent on the appointment of a guardian ad litem for a respondent or a youth whose capacity to make decisions in connection with his or her representation is diminished. Nevertheless, guardians ad litem are occasionally appointed for respondents and youths with diminished capacity in child welfare cases.

Guidance on when a guardian ad litem may be appointed can be found in the Rules of Professional Conduct, the statutes on trials, and the Rules of Civil Procedure.

Rule 16-114 of the Rules of Professional Conduct addresses situations in which an attorney is representing a respondent whose capacity is diminished:

A. Client-lawyer relationship. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

B. Protective action. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The Committee Commentary suggests that, in determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's

ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision. It further suggests that, in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. Rule 16-114 Committee Commentary, ¶6.

The statutory law on trials authorizes the appointment of a guardian ad litem for an "incapacitated" person who is sued. §38-4-15. The definition of "incapacitated person" in §38-4-14 offers further guidance to courts and practitioners considering the possible need for assistance for a respondent or a youth. The definition is broad in the sense that it covers a wide range of causes for the incapacity, but narrow in the sense that the extent of the inability required is great. An "incapacitated person" is defined in §38-4-14 as:

> any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he is unable to manage his personal care or he is unable to manage his property and financial affairs.

While not directly applicable to Children's Court cases under Rule 10-101, the Rules of Civil Procedure provide for the court to "appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or … make such other order as it deems proper for the protection of the infant or incompetent person." Rule 1-017(D).

9.1.2 Case Law

In *State ex rel. CYFD v. Lilli L.*, 1996-NMCA-014, 121 N.M. 376, a mother appealed the termination of her parental rights and argued that, because she was a minor, the children's court should have appointed both a guardian ad litem and an attorney to represent her. The court stated:

> As a general rule, the court, upon being apprised that a minor is unrepresented by counsel, has a duty to appoint a guardian ad litem *or* an attorney to protect the interests of such child…. *Id.* ¶11
>
> [W]hile it is a general practice under SCRA 1-017(C) for a guardian ad litem to be appointed to represent a minor who is a defendant in a civil case, it is clear the court is not required to appoint a guardian ad litem where the child is represented by counsel in such action. Id. ¶13

In *In the Matter of Jason Y.*, 1987-NMCA-120, ¶10, 106 N.M. 406, a mother appealed the termination of her parental rights and argued that, because there were issues of her mental incompetence, she was denied equal protection in relation to the protections provided to criminal defendants. The Court of Appeals rejected her argument, citing the different considerations to be balanced in a civil case, in particular the needs of the child, as opposed to those in a criminal case. The court, at ¶16, stated:

> While criminal proceedings may be suspended where a defendant is not competent, different rules apply in civil cases. An infant or an incompetent person may sue or be sued. SCRA 1986, 1-017(C) provides in part: '[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.' Mother was at all times material to the proceeding represented by counsel. No claim is advanced that the court erred either by failing to enter an order for the protection of respondent or by failing to appoint a separate guardian ad litem.

A review of these authorities makes it clear that representation by counsel is generally sufficient for most clients. Indeed, counsel must, as far as reasonably possible, maintain a normal attorney-client relationship with the impaired client. However, counsel may request protective action if counsel reasonably believes that the client cannot adequately act in the client's own interest. Rule 16-114.

Appointment of a guardian ad litem rests in the equitable discretion of the court. If a guardian ad litem is appointed, it should be clear that both the GAL and counsel remain in the case, but with different roles.

Practice Note. Counsel might consider requesting the appointment of a guardian ad litem when the respondent client appears unable to participate meaningfully in the process due to developmental disability or mental illness. When deciding whether to request appointment of a GAL, however, counsel should consider the question it might raise in the court's mind about the client's ability to parent. For just this reason, some respondents' attorneys will not, as a general rule, consider asking for a guardian ad litem.

As noted in the Committee Commentary to Rule 16-114, ¶8, there are cases in which raising the question of diminished capacity can adversely affect the client's interests. The lawyer's position in such cases is "an unavoidably difficult one."

Under §38-4-15 there is no restriction on who can bring the issue of capacity to the attention of the court. Indeed, it contemplates that a relative or friend of the incapacitated person can make an application and, failing that, any other party may make an application. Given that CYFD has a duty to ensure that the proceedings are conducted in a manner that is scrupulously fair to respondents, *Ronald A. v. State ex rel. HSD*, 1990-NMSC-071, ¶11, 110 N.M. 454, it is likely that CYFD has a duty to bring this issue to the attention of the court in cases under the Children's Code.

9.2 Responsibilities

9.2.1 General Responsibilities

The role of the guardian ad litem for a client with diminished capacity is not defined in New Mexico law and undoubtedly depends on the nature and extent of the diminished capacity and what assistance the client needs in order to participate effectively in the case. Since the

client will already be represented by counsel, it will be a different situation than that of the GAL appointed to represent a child's best interest under the Children's Code. The order of appointment will have to guide the GAL and set forth the GAL's roles and responsibilities.

Case law provides some guidance on the possible roles and responsibilities of a GAL appointed for a client who is incapacitated or of diminished capacity. For example, the role of the guardian ad litem for a mentally ill parent in a TPR proceeding is discussed briefly but forcefully in *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, 127 N.M. 699. The attorney for the respondent mother had requested that the children's court appoint a guardian ad litem for the mother, who was mentally ill, "in order to address the issue of her best interests herein." The children's court appointed the GAL but did not define his role in the order appointing him. *Id.* ¶4.

The Court of Appeals was critical of the fact that the respondent's attorney and her GAL "only passively participated" in the TPR trial, did not present to the children's court any evidence or testimony or express Mother's wishes regarding the proceedings, and did not require CYFD to prove by clear and convincing evidence that her rights should be terminated. *Id.* ¶¶.30-31. Quoting from different cases, the Court of Appeals wrote:

> Mother's GAL is "not a mere figurehead, but is required to take all steps reasonably necessary to protect and promote the interests of his ward in litigation."
>
> "Appointment as guardian ad litem of a minor is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved."
>
> [A]ppointment of [a] GAL "for an incompetent is not a bare technicality,... [T]he office involves more than perfunctory and shadowy duties."
>
> "A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof."

Id. ¶¶29-30 (citations omitted).

Two Supreme Court cases have addressed the question of immunity for court-appointed guardians ad litem and in the course of their analysis discussed various roles of a GAL at some length. Unfortunately, both cases involve GALs appointed to help the court determine the best interest of children in situations involving a financial settlement in a tort case and a custody dispute, respectively. Neither involved a GAL appointed in a situation where the individual is represented by counsel already. Nevertheless, both cases offer some guidance in articulating the role of a GAL in a case.

In *Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, 111 N.M. 391, the court discussed the dual role of a GAL as an advocate for the client and as an arm of the court.

> [I]t is clear that in New Mexico, and probably elsewhere, a guardian ad litem *does* represent the interests of his or her ward, but the guardian may at the same time assist the court in carrying out its duty of protecting the interests of the child…. The guardian ad litem thus may fulfill the dual role of providing information to the court to enable it to pass on the reasonableness of a settlement, while at the same time protecting the ward's interests by zealous advocacy and thorough, competent representation.

Id. ¶31. The court determined that, when deciding whether a GAL is functioning as an arm of the court and therefore cloaked with quasi-judicial immunity, "a limited factual inquiry is necessary to determine the nature of Tabet's appointment and the extent to which he functioned within the scope of that appointment," suggesting that the role of a GAL could vary from case to case. *Id*. ¶¶1, 42. As in *Stella P.*, the trial court had not defined the role of the GAL in the proceeding when it made the appointment. Collins, ¶7.

In *Kimbrell v. Kimbrell*, 2014-NMSC-027, ¶¶2, 17, the Court held that a guardian ad litem appointed under Rule 1-053.3 in a custody dispute was protected by quasi-judicial immunity when acting as an arm of the court. The Court distinguished *Collins* because in *Collins* the record did not show clearly whether the guardian was appointed as an arm of the court or as a "conflict/guardian ad litem" in a settlement involving a minor. Rule 1-053.3, on the other hand, spells out in great detail what it means to be an arm of the court in a particular context.

Practice Note. When and if the court appoints a GAL for a respondent with diminished capacity, whether at counsel's request or otherwise, it is important that the court define the role of the GAL in the order. This will allow for more effective assistance to the client, client's counsel, and the court in the proceeding.

9.2.2 Americans with Disabilities Act

Both the GAL and counsel would have the responsibility for raising and proving applicability of the Americans with Disabilities Act (ADA) in termination of parental rights cases. *State ex rel. CYFD v. Johnny S.*, 2009-NMCA-032, ¶10, 145 N.M. 754. The *Johnny S.* court stated:

> We decline to place on district judges the obligation to initiate inquiry into the applicability of the ADA in particular cases. District judges are simply not in a good position to recognize the potential application of the ADA, in particular in the early stages of termination proceedings when the inquiry would be best raised. Counsel, who should be most aware of their clients' situation, are best equipped to determine whether the ADA might apply and whether it would be of value to pursue it.
>
> To preserve issues concerning violations of the ADA, the parent bears the initial burden of asserting that the parent is a qualified individual with a disability under 42 U.S.C. Section 12131(2). Thereafter, the parent must create a factual and legal record sufficient to allow meaningful appellate review of the district court decision on the issue. What constitutes a sufficient record is, of course, different for each case. At a

> minimum, however, there must be a request for relief citing the ADA backed by facts developed in the record.
>
> Determining what accommodation may be reasonable once the ADA is found to apply will call for a more collaborative effort between the parents, CYFD, and the district court. But the initial burden to raise and argue the issues--as early in the case as possible--lies with the parents and their counsel.

Johnny S., ¶¶7-9.

CHAPTER 10

CHILDREN, YOUTH AND FAMILIES DEPARTMENT (CYFD)

This chapter covers the following with regard to the Children, Youth and Families Department:

- Structure and funding.
- Responsibilities, including:
  - receiving and investigating reports of child abuse and neglect
  - making reasonable efforts to prevent the child's removal from the home
  - serving as the child's legal custodian
  - working with the child and family
  - undertaking permanency planning.

10.1 Introduction

The Children, Youth and Families Department (CYFD) is the child welfare agency responsible for child protective services in New Mexico. CYFD receives a combination of state and federal funds. Most of the federal funds are allocated to CYFD under Title IV of the Social Security Act and require the submission of state plans. The U.S. Department of Health and Human Services, through its regional office in Dallas, Texas, monitors and audits New Mexico's use of the funds. The regional office is responsible for approving CYFD state plans and for conducting compliance reviews in relation to national outcome standards.

CYFD includes the following program divisions: Protective Services, Juvenile Justice Services, and Early Childhood Services. The Protective Services Division (PSD) is directly responsible for fulfilling the responsibilities delegated to CYFD under Article 4 of the Children's Code, the Abuse and Neglect Act.

CYFD has authority to promulgate administrative rules. §9-2A-7(D). The rules that relate to child protective services are located in Chapter 10 of Title 8 of the New Mexico Administrative Code (NMAC). CYFD refers to these as policies. 8.8.2.11 NMAC. CYFD has policies that relate to the various stages of an abuse/neglect case, starting from the initial referral. They are organized as follows:

Chapter 10 Child Protective Services
- Part 1 [Reserved]
- Part 2 Protective Services Intake
- Part 3 Protective Services Investigation

Part 4 Child Protective Services Voluntary Family Services
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CYFD also has policies relating to foster care and adoption. These are found in Chapter 26 of Title 8 and include Part 2 Placement Services, Part 3 Adoption Act Regulations and Part 4 Licensing Requirements for Foster and Adoptive Homes.

Once CYFD policies are properly promulgated and published as a rule in the NMAC, they have the full force of law and can be enforced so long as they do not conflict with the Children's Code itself.

In addition, Protective Services has developed procedures that provide guidance to case and social workers and children's court attorneys on issues that arise in their daily practice. The procedures, which are not published in the same manner as the policies, give direction on how to implement the policies. They are structured in the same manner that the policies are and have sections relating to each part of the policies. CYFD updates them regularly to adjust to new CYFD requirements and practices.

CYFD policies and procedures are available for public inspection in PSD county offices; reasonable copying charges are assessed for duplication. 8.8.2.11(E). CYFD policies are also available with the rest of the New Mexico Administrative Code at http://www.nmcpr.state.nm.us/NMAC. The procedures are available only through the CYFD offices.

10.2 Responsibilities

CYFD's responsibilities under the abuse and neglect article of the Children's Code include:

- Accepting and investigating reports of child abuse and neglect. §§32A-4-3, 32A-4-4.
- Making reasonable efforts to prevent the need to remove the child from the home. §32A-4-7.
- Making reasonable efforts to preserve and reunify the family. §§32A-4-22, 32A-4-25, 32A-4-28.
- Serving as the legal custodian for children. §§32A-4-7, 32A-4-18, 32A-4-22, 32A-4-25.
- Determining whether a child who is the subject of investigation is eligible for enrollment as a member of an Indian tribe and if so, pursuing enrollment on the child's behalf. §32A-4-22(I).
- Identifying, locating, and considering relatives who may serve as an appropriate placement for the child. §32A-4-18(E).
- Providing protective supervision when the court returns a child to the parent's legal custody, under certain circumstances. §§32A-1-4, 32A-4-18, 32A-4-25, 32A-4-25.1.

- Developing and facilitating case plans for parents and children. §§32A-4-21, 32A-4-22, 32A-4-25.
- Developing plans to teach independent living skills to children 16 and older and to help them transition to adulthood. §32A-4-21(B)(11); 32A-4-25.2. By policy, CYFD has committed to developing life skills plans with children 14 and older. 8.10.9.11 NMAC.
- Developing permanency plans for children. §§32A-4-22(J), 32A-4-25.1.
- Making reasonable efforts to implement the child's permanency plan. §§32A-4-22 and 32A-4-25.1.

CYFD's permanency planning workers are primarily responsible for implementing service plans for families involved in the child protective services system. In larger geographic areas, staff for Protective Services work in specialized areas such as intake, investigation, treatment, placement, or in-home services.

CYFD's legal responsibilities include filing abuse or neglect petitions, filing motions to terminate parental rights, filing motions for permanent guardianship, and prosecution of cases. These duties are handled by children's court attorneys. ***See*** Handbook Chapter 5.

CYFD also has a responsibility to make findings concerning investigations when no abuse/neglect petition is filed. These are separate from the abuse or neglect proceeding in court and trigger an administrative process. ***See*** §10.2.1 below.

10.2.1 Receiving and Investigating Reports of Abuse or Neglect

All reports of child abuse and neglect are received by Statewide Central Intake (SCI), which is staffed by intake case workers 24 hours a day, 7 days a week. The telephone number for SCI is 1-855-333-SAFE (7233) or #SAFE from any cell phone.

The intake case worker assesses the report to determine whether the report falls within the agency's authority to investigate, collects ancillary information, and cross reports to law enforcement. An intake supervisor reviews the information and determines the time frame for response, which can range from immediate to a period of days.

The reports that require investigations are transferred to the local Protective Services office for this purpose. Investigative case workers conduct interviews, review records, and collect information to determine whether the reported abuse or neglect allegations can be substantiated and to assess for safety threats, the child's vulnerability to those threats, and the protective capacities that may mitigate existing safety threats. If a decision is made to file an abuse or neglect petition and seek emergency custody, the investigative case worker is generally the person who prepares the affidavit in support of an *ex parte* custody order.

CYFD may decide not to file an abuse or neglect petition and to make recommendations to the family for voluntary interventions instead. CYFD will still complete its investigation and make a determination that the referral is substantiated or unsubstantiated. 8.10.3.17 NMAC. Substantiated means that CYFD determines that there is credible evidence to support the

conclusion that the child has been abused or neglected. *Id*. If CYFD finds that the referral is substantiated but there is no children's court case pending, the worker will notify the parents or guardians who were the subject of the investigation in writing that they may request an administrative review of the decision to substantiate. 8.10.3.22 NMAC. This request must be made in writing within 10 days of the notice of the CYFD decision. *Id*. A more formal administrative hearing may be requested if the family is not satisfied with the result of the administrative review. *Id*. How administrative appeals are handled is set forth in 8.8.4 NMAC.

Administrative Proceedings. In 2016, the Court of Appeals held that the doctrine of claim preclusion did not bar CYFD from substantiating allegations of abuse or neglect in its own administrative proceedings when the court case had been dismissed with prejudice per agreement. "By expressly identifying different decision-makers, different purposes, and different standards of proof, the statues and regulations appear to contemplate inclusion of substantiated reports in CYFD's child abuse database, even where abuse cannot be proven by clear and convincing evidence in children's court." *State ex rel. CYFD v. Scott C.* 2016-NMCA-012, ¶18.

10.2.2 Efforts to Prevent Removal

The efforts made to prevent a child's removal from the home depend on the case worker's assessment of the child's safety. Reasonable efforts must be made to prevent removal in every case, with the paramount concern being the child's safety. The investigating case worker may be able to facilitate the parent's placement of the child with a relative, refer the parent to a child care provider, or work with the parent in other ways to prevent the child from being removed from the home.

In cases where the child can be safely maintained at home with more intensive services, CYFD offers in-home services. These services are provided by clinicians who are trained in intensive crisis intervention and family preservation services. These clinicians work with the family in their home by providing counseling, parenting training, practical assistance with the family's needs, and referrals to community-based services. In-home services may be provided for up to 12 months. CYFD also contracts with agencies for mid-level in-home services. This is a less intensive service.

10.2.3 Legal Custodian

CYFD can become the legal custodian of a child by court order or by operation of statute. §§32A-4-7, 32A-4-16 and 32A-4-18. Accordingly, when law enforcement places children in CYFD's care in emergency situations and the agency does not release the child to the child's parent, guardian, or custodian under §32A-4-7(B) and (C), CYFD has obtained legal custody by operation of statute. If CYFD wants to retain custody, it must file a petition in district court within two business days of the date that the child came into its custody. §32A-4-7(D). The status of legal custodian carries with it a number of statutory duties and responsibilities, including the right to determine where and with whom a child will live. §32A-1-4(P). This

right is limited by the court's ability to review a placement decision for abuse of discretion. §32A-4-25(I)(6). *State ex rel. CYFD v. Jerry K.*, 2015-NMCA-047, ¶¶30, 31.

CYFD places children in its custody in licensed foster homes, certified treatment facilities, or shelters. §32A-4-8. Children can be placed with relatives, who become licensed foster homes. *Id.* Protective Services is responsible for licensing foster homes and approving adoptive homes under the Child Placement Agency Licensing Act, §§40-7A-1 to 40-7A-8. CYFD has promulgated regulations concerning foster care and adoption placements at 8.26.4 N.M.A.C. Placement workers carry out these responsibilities by recruiting families, providing training, conducting home studies, and working with foster and adoptive families. Placement workers also provide post-placement adoptive services.

In 2013, the Legislature added a section on emergency placement to the Family Services Act. This law allows CYFD to place a child in the home of private individuals, including neighbors, friends or relatives as a result of the sudden unavailability of the child's primary caretaker. In this situation, CYFD will request a federal name-based criminal history record check of each adult residing in a home where a child will be placed in an emergency due to the absence of the child's parents or custodians. The law is designed to provide more timely access to federal criminal records histories in an emergency placement situation than was previously available and to ensure the safety of children. §32A-3A-11.

10.2.4 Working with Parents and the Child

Child protective services cases are transferred to the permanency planning worker around the time of the initial assessment planning conference, which occurs within 10 days of filing the abuse or neglect petition in children's court. The permanency planning worker's primary responsibilities are to:

- provide ongoing assessment of the child's safety;
- develop the case plan for the child and family;
- manage the treatment services needed to correct the causes and conditions of the abuse or neglect and enhance parental protective capacities;
- work directly with the child and family;
- facilitate the permanency plan goal identified for the child; and
- address the well-being needs of the child.

Case plans focus on the causes and conditions of the abuse or neglect and the problems with parental capacity that resulted in the removal of the child. Even though parental compliance with the case plan is critical, it is not determinative of whether the child can be returned to the parent. *State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, 140 N.M. 390. Circumstances may change in such a way that allows the child to return home safely, even though the parent has not fully complied with the plan. For example, the safety threat may have been eliminated (e.g., the perpetrator of the abuse may have left the home), the child may no longer be vulnerable to the safety threat or the parent has developed protective capacities that mitigate the safety threat.

Change in Terminology. Until recently, the case plan has been referred to as a "treatment plan." In 2015, CYFD amended its policies to change the term to "case plan" since the plan covers more than treatment. The Legislature followed suit in 2016 when it amended sections of the Children's Code for other reasons. *See, e.g.* §32A-4-33 and §32A-4-25.1. The hope is that, over time, the term "case plan" will become common practice.

Permanency planning workers make critical decisions that may forever affect the family, but these decisions are not made alone. Most decisions are made at internal "staffings," some of which are attended by the family, the respondents' attorneys, the guardian ad litem/youth attorney and the CASA. The permanency planning worker supervisor and county office manager are also involved in important decisions. The county office manager is the supervisor of all of the protective services staff in the county office and responsible for the case decisions made there. The county office manager often attends important meetings, such as change of plan meetings.

10.2.5 Permanency Planning

Permanency planning is the process of identifying a permanency goal for a child and then developing and implementing plans to accomplish that goal. CYFD establishes a permanency planning goal at the time the child is placed in its custody. 8.10.8.13(G) NMAC. The department works to implement that goal unless and until the court has an opportunity to determine the goal for the child at a permanency hearing. §§ 32A-4-22(J) and 32A-4-25.1.

CYFD often engages in concurrent planning, which allows it to make reasonable efforts to reunify a family while simultaneously planning for other permanency options should reunification become impossible. 8.10.8.13(G) NMAC. CYFD must engage in concurrent planning when a motion for termination of parental rights is filed, if it had not begun doing so earlier. §32A-4-29(F).

10.2.6 Protective Supervision

After hearing evidence in the permanency review hearing, the court may, among other things, return the child to the parents' custody but place the child in CYFD's protective supervision for up to six months. §32A-4-25.1(D)(4). Protective supervision allows CYFD to visit the child in the home, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations, and obtain information and records concerning the child. §32A-1-4(U).

During the period of protective supervision, CYFD may file a motion to remove a child from the home or may seek emergency removal by a police officer under §32A-4-6 if necessary to protect the child's best interests. When a child is removed in this situation, a permanency hearing must be scheduled within 30 days of the child coming back into the department's legal custody. §32A-4-25.1(D)(4).

10.3 Ongoing Responsibilities

CYFD's custody ends when the case is dismissed, the child is adopted, the court enters an order appointing a permanent guardian, or the child reaches the age of majority. *See* §32A-4-24(F). Even though CYFD's custody ends, court jurisdiction can be extended after a child reaches the age of majority if CYFD has not met certain conditions concerning documents and benefits for youth transitioning to adulthood, §§32A-4-25.3 and 32A-4-24, or if a child has a pending application for special immigrant juvenile status, §32A-4-23.1

CYFD may continue to provide transitional services to children who emancipate from its custody at age 18. §32A-4-24(F); 8.10.9 NMAC. Before the child turns 18, transition plans are developed to address the emancipating child's strengths and needs and to plan with the youth in order to maximize the child's ability to successfully transition into adulthood. The child may continue to receive independent living services until age 21 and may receive some educational services up to the age of 23. 8.10.9.20 NMAC. (These ages may be going up to 23 and 26 under the federal Family First Prevention Services Act passed in 2018.)

In the case of an adoption, a special needs child may receive an adoption subsidy, which is negotiated between CYFD and the adoptive parents. §§32A-5-43 - 32A-5-45; ***see also*** Handbook §37.5. CYFD also now has a guardianship assistance program to provide assistance for children who are in the care of relatives and who meet certain criteria. ***See*** Handbook §25.14

CHAPTER 11

COURT APPOINTED SPECIAL ADVOCATE (CASA)

This chapter covers the following with regard to Court Appointed Special Advocates:

- Role and purpose.
- Duties and responsibilities.
- Qualifications and training.
- Availability of CASA programs in New Mexico.

11.1 Purpose

A Court Appointed Special Advocate is "a person appointed as a CASA, pursuant to the provisions of the Children's Court Rules who assists the court in determining the best interests of the child by investigating the case and submitting a report to the court." §32A-1-4(E). Children's Court Rule 10-164 governs the appointment, qualifications, powers, duties, reports and procedures for CASAs.

CASAs are trained community members appointed by a judge to represent the best interest of the child in abuse and neglect cases. The CASA has an official role in the judicial proceeding, working alongside professionals within the scope of Rule 10-164. The mission of the CASA is to provide effective advocacy for the best interests of abused and neglected children involved in the court system, with the goal of ensuring that every child has a safe, supportive, and permanent home.

11.2 Duties and Responsibilities

Under Rule 10-164(C), the CASA may assist the court:

- in determining the best interests of the child by investigating the facts of the situation when directed by the court and submitting reports to the parties; and
- by monitoring compliance with the treatment plan and submitting reports to the court and the parties subsequent to adjudication.

Rule 10-164(D) provides that a CASA shall be assigned duties consistent with the best interest of the child, which include:

- reviewing records to the extent permitted by §32A-4-33 or otherwise limited by the court;
- interviewing appropriate parties;
- monitoring case progress;
- preparing reports based on the investigation conducted by the CASA, including recommendations to the court; and
- conducting business while maintaining confidentiality of information obtained.

The CASA **must** receive notice prior to certain events in the case, including a change in the child's placement, judicial review hearings, and permanency hearings. §32A-4-14; §32A-4-25; §32A-4-25.1. A CASA is expressly prohibited from engaging in *ex parte* communications with the judge assigned to any case on which the CASA volunteer is working. Rule 10-164(E).

Reports prepared by the CASA volunteer are not permitted to be filed with or considered by the judge prior to the conclusion of the adjudicatory hearing. Reports are to be submitted at least five (5) days prior to the hearing at which it will be considered. Rule 10-164(F).

As a practical matter, a CASA undertakes the following tasks to fulfill his or her responsibilities in a case. The CASA:

- investigates the facts of the situation by acting as an independent gatherer of information:
    - reviewing records,
    - interviewing appropriate parties, including the child, respondents, foster parents, relatives, teachers, medical personnel, therapists, and others who have information concerning the circumstances of the case and/or the child's needs, and
    - maintaining confidentiality during the investigation as information obtained from one source may not be shared with other sources;
- meets with the child in person on a regular basis;
- seeks cooperative solutions to the child's situation;
- monitors the implementation of the treatment plan to determine if services are being provided in a timely manner and are accomplishing their stated objectives.
- monitors the progress in the case;
- provides written reports of findings and recommendations to the court five days prior to each hearing, after the adjudicatory hearing. Reports are not submitted for a termination of parental rights hearing;
- attends all hearings, mandatory meetings, and other meetings where the child's welfare is addressed;
- maintains communication with the child's GAL or youth attorney; and
- remains actively involved with the case until formally dismissed by the presiding judge.

11.3 Qualifications and Training

CASAs are recruited by local CASA programs from the community. To be eligible to serve as a CASA, an individual must meet the qualifications outlined in Rule 10-164(B), the guidelines of the statewide NM CASA Network, and the standards set by the National CASA Association (NCASA).

A CASA must:

- be at least 21 years of age;
- pass screening requirements, including a written application, personal interview, reference checks and national, state, and local criminal background checks; and
- successfully complete an initial minimum 30-hour pre-service training and be under the supervision of the local CASA program.

The initial (or pre-service) CASA training includes information on:

- roles and responsibilities of a CASA volunteer;
- Children's Court process;
- dynamics of abuse and neglect, attachment, and separation;
- impact of mental health, substance abuse, domestic violence, other adverse childhood experiences (ACES), and poverty on family;
- relevant state and federal laws, regulations and policies regarding child abuse (including ASFA, ICWA, etc.), reasonable efforts, out-of-home placement and permanency planning;
- confidentiality and record keeping;
- child development;
- community agencies and resources available to meet the needs of children and families;
- communication, information gathering, and report writing;
- court observation; and
- effective advocacy practices that aim to address the special needs of the children served.

Cultural competency is of particular importance and is given specific attention. Per §32A-18-1, CASA volunteers are required to receive training on cultural recognition including:

  - the impact of ethnicity on a child's needs;
  - cross-cultural dynamics and sensitivity;
  - child development;
  - family composition and dynamics;
  - parenting skills and practices;
  - culturally appropriate treatment plans; and
  - alternative health practices.

After screening and completion of training, each CASA volunteer signs confidentiality and commitment statements, as well as a statement agreeing to adhere to program policies and procedures. Volunteers are sworn in as officers of the court by the local district judge. To

remain active, a CASA volunteer must complete a minimum of 12 hours of in-service training each year, in accordance with NCASA standards.

11.4 Availability of CASA Programs

CASA programs have operated in New Mexico since 1985. In 2018 the network of CASA programs serves 11 of the 13 judicial districts. Fourteen programs operate 20 offices around the state. Each program operates independently and has its own governing body and staff.

In 1990 a state-level organization, the NM CASA Network, was created by local CASA programs to support program development, provide ongoing training, technical assistance and quality assurance, and to provide networking opportunities.

To locate a local CASA program in your area or the state-level organization, visit nmcasa.org for up-to-date contact information.

CHAPTER 12

FOSTER PARENTS

This chapter covers the following with regard to foster parents:

- Role of foster parents.
- Qualifications, licensure, and training.
- Responsibilities.
- Participation in the case, including:
  - collaboration with the case management team; and
  - involvement with the legal proceedings.

12.1 Introduction

Simply stated, foster parents provide care for children who are removed from their homes and placed in the custody of the state because of suspected abuse or neglect. While accurate, such a factual statement does not convey the breadth of what foster parents provide to children in the state's custody. By taking children who have experienced neglect or abuse into their homes, foster parents provide far more than food, clothing, and shelter; they also offer stability, compassion, patience, safety, love, and many other forms of support. They help with homework and advocate for their foster children at school, make sure that their foster children receive proper dental and medical care, understand that their foster children love their parents despite the problems that brought them into foster care, and encourage their foster children to maintain family, community, and cultural connections and engage in normal childhood activities. Foster parents also provide a critical link between CYFD and the child, keeping the agency informed about the child's needs and well-being, and participating in case planning. In sum, foster parents are central to the success of the child welfare system.

12.2 Qualifications and Licensure

Foster parents are licensed and regulated by CYFD or a child placement agency. §32A-1-4(I). CYFD issues three types of foster care licenses: the family foster home license, the provisional license for relative foster care, and the specialized foster home license for care of special needs foster children.

A treatment foster care license is issued to a family foster home by a child placement agency that has met both CYFD's child placement agency licensing regulations and the treatment

foster care standards contained in the Department of Health's regulations, 7.20.11.29 NMAC. CYFD does not license treatment foster care homes. 8.26.4.17 NMAC.

12.2.1 Family Foster Home License

Any adult who is a legal resident of the country and who resides in New Mexico can apply to be a foster parent. People wanting to become foster parents are subject to screening which includes criminal record checks with the FBI and state and local police and a CYFD abuse and neglect check. Foster parents also must undergo a rigorous home study and complete a detailed autobiographical application that provides the licensing body with information about the potential ability of an adult to be a substitute caregiver. In addition, CYFD interviews in person all adult members of the foster parent applicant's household. 8.26.4.12 NMAC.

Foster parent applicants attend required pre-service training. 8.26.4.14 NMAC. At a minimum, this training generally includes:

- communication techniques;
- parenting techniques for children in crisis;
- working with biological parents;
- understanding child development;
- techniques for de-escalating crisis situations;
- adult, child, and infant CPR and first aid;
- understanding grief and loss; and
- child trauma and attachment issues.

Once licensed, the foster parent must complete at least 12 hours of training each year. For foster parents licensed by CYFD, six of the 12 hours are mandated by CYFD; the remaining 6 hours are chosen by the foster family and approved by CYFD. 8.26.4.14 NMAC. The content of the mandatory training varies from year to year and has addressed placement stability, concurrent planning, attachment, and trauma, among other things.

12.2.2 Provisional Licenses for Relative Foster Care

Relatives who provide foster care for children in the state's custody must be licensed. Unlike other foster parent applicants, however, relatives may begin fostering their relative child with a provisional license before completing the "full" family foster home license. A provisional license may be issued for 60 days once CYFD completes the initial relative assessment and a supervisor approves the provisional license. The initial relative assessment involves collecting and assessing the following information:

- the child's attitude toward the prospective caregiver;
- the prospective caregiver's attitude toward the child and parents, motivation to foster the child, and ability to safely parent the child;
- local and state criminal records;
- CYFD abuse and neglect referral history; and

- the physical standards checklist.

The provisional license is valid for 60 days, with the possibility of one 30-day extension. During that period, the relative must complete all of the requirements for family foster home licensing. If the relative does not complete these licensing requirements, the foster child must be removed from the relative's home. 8.26.4.16 NMAC.

12.2.3 Specialized Foster Home Licenses

A specialized foster home license is a license issued to a licensed foster parent who has the additional training, education, or experience needed to care for a special needs certified child. 8.26.4.7 NMAC. Specialized foster homes may care for no more than 3 special needs certified foster children at a time. 8.26.4.17 NMAC.

12.2.4 Treatment Foster Care

Treatment foster care is designed to "provide intensive therapeutic support, intervention and treatment" for foster children "who would otherwise require a more restrictive placement." 8.26.4.7 NMAC. More specifically, treatment foster care services are provided in a foster family setting for "children or adolescents who are psychologically or emotionally disturbed, or behaviorally disordered[.]" 7.20.11.7 NMAC. Foster children and adolescents are eligible for treatment foster care if they:

- are at risk for failure or have failed in regular foster homes;
- are unable to live with their own families; or
- are transitioning from residential care as part of the process of returning to their family and community. 7.20.11.29 NMAC.

As noted earlier, CYFD does not license treatment foster care homes. Rather, treatment foster homes are licensed by child placement agencies that have met the treatment foster care standards in 7.20.11.29 NMAC. 8.26.4.17 NMAC. Treatment foster parents must complete 30 hours of training before a child is placed in the foster home, and an additional 10 hours within two months of the first placement. 7.20.11.29 NMAC. This training must include:

- first aid and CPR;
- child and adolescent development;
- behavioral management;
- prevention and de-escalation of aggressive behavior and the use of therapeutic holds;
- crisis management/intervention;
- grief and loss issues for foster children;
- cultural competence and culturally responsive services;
- specific agency policies and procedures, including documentation;
- recognizing the signs of abuse and neglect and understanding reporting requirements;
- side-effects of psychotropic medications; and
- the role of the treatment foster parent in treatment planning.

Twenty-four hours of in-service training are required each year after a child is placed in the home. *Id.*

12.3 Responsibilities of Foster Parents

12.3.1 Family Foster Parents

Although it is difficult to capture the essence and importance of the foster parent in a list of responsibilities, CYFD regulations describe the roles and responsibilities of the foster parent as follows:

- The foster parent is responsible for the daily care and supervision of a child placed in the foster parent's home.
- The foster parent helps preserve the child's connections with family and community, including the child's connection with the foster parent once the child leaves foster care.
- The foster parent agrees to abide by all federal, state, and local laws and CYFD's policies and procedures.
- The foster parent is a member of the child's case management team and as a team member participates in the development and implementation of team plans and may participate in conferences, substitute care review board meetings, judicial reviews, Individual Education Plan meetings, etc. The foster parent may serve as the child's educational decision maker to protect the child's educational rights, if appointed by the court, and acts as an advocate for the child in the educational process.
- The foster parent may serve as the child's decision maker for early intervention, evaluation, assessment, and treatment, when appointed by the Department of Health's Director of the Family, Infant Toddler program.The foster parent keeps copies of the child's medical and educational documents in a file that remains with the child if the child is moved.
- Foster parents, in cooperation with CYFD, create or maintain a life book for each child, which will remain with the child if the child is moved.
- Foster parents maintain and return all of a child's belongings when he or she moves to another placement, including return home.
- Foster parents may refuse placements they believe are not appropriate to their home.
- Foster parents do not release the child to anyone without CYFD's approval, except pursuant to the reasonable and prudent parent standard (***see*** §12.5 below). The child may be surrendered to the custody of a law enforcement officer.
- Foster parents document their observations of the child's attitudes and behaviors and provide the information to CYFD.
- Foster parents honor the confidentiality provisions of the Children's Code.
- Foster parents agree to never inflict corporal punishment on a child in foster care, including shaking, spanking, whipping, hitting, hair or ear pulling, or to use isolation, forced exercise, threats of exclusion from the foster home, or denial of food, sleep, or approved visits with the child's parent as discipline. Foster parents are prohibited

from using any actions intended to produce fear, shame, or other emotional and/or physical trauma.
- Foster parents do not belittle or disparage the foster child's parents, family, or cultural heritage, and encourage recognition and acceptance of the family's strengths and achievements.
- Foster parents cooperate with and carry out CYFD's plans for the child, including returning the child to his or her parents, placing with relatives, transferring to other substitute care settings, or adoption planning and placement. 8.26.2.12 NMAC, as amended in 2015.

Foster parents provide transportation to medical, educational, and recreational activities, as well as food, clothing, and activities that are age appropriate and promote healthy development. They are expected to provide a structured and nurturing home which provides appropriate discipline and expectations of the child as a member of the family.

-- *As described by a foster parent*.

12.3.2 Treatment Foster Parents

Treatment foster parents have many of the same core roles and responsibilities as other foster parents, but have additional responsibilities because of the unique behavioral and psychological needs of their foster children. They work with the treatment team and with agency supervision to develop and implement the treatment plan. They also provide front-line treatment interventions. The family living experience is the basic service to which individualized treatment interventions are added. 7.20.11.29(B)(11) NMAC.

In addition, treatment foster parents are responsible for:

- maximizing the likelihood that services are provided in a culturally competent and culturally proficient manner;
- helping the foster child maintain contact with his or her family (unless contraindicated by the treatment plan);
- working to meet the foster child's permanency goals;
- keeping records of the foster child's behaviors, activities, and significant events related to the treatment plan;
- keeping the agency informed of significant events and reporting serious incidents;
- maintaining confidentiality;
- being available at all times; and
- working with and securing all resources and services available in the community. *Id.*

12.4 Foster Parents as Members of the Case Management Team

The foster parent is an integral member of the child's case management team, dedicated to the critical responsibility of providing safety, permanency and well-being for the child, 8.26.2.12 NMAC. Foster parents are active participants in case planning for the child and play an essential role in contributing vital information about the child to the team. As the

foster parent is the primary caregiver and observes behaviors that indicate the progress or needs of the child, it is important that he or she be involved in team meetings or staffings.

Foster parents collaborate with the other team members to ensure the child's best interest. They work closely with PSD staff to implement the case plan for the children, including visitation.

12.5 Reasonable and Prudent Parent Standard

In its efforts to normalize the lives of foster children, CYFD empowers foster parents to approve the child's participation in activities without prior approval from the agency

The foster parent's decision making is guided by the "reasonable and prudent parent standard", defined as the standard of care characterized by careful, nurturing and thoughtful decision making intended to maintain a child's health, safety, culture or cultural identity and best interests while encouraging the child's emotional, social and developmental growth. 8.26.2.7 NMAC, as amended in 2015. The standard is described in more detail in a new section of CYFD's rules, 8.26.2.13 NMAC.

At the permanency hearing, CYFD must report to the court on its efforts to ensure that the child has regular, ongoing opportunities to engage in age and developmentally appropriate activities. 8.10.8.15 NMAC, adopted in 2015. As the member of the child's team caring for the child on a daily basis, the foster parent plays an important role in providing these opportunities and uses the reasonable and prudent parent standard in making decisions involving them. Activities that may be considered include, for example:

- cultural, social, or enrichment activities that foster positive identity development;
- a sleepover of one or more nights;
- participation in sports or social activities, including related travel;
- obtaining a driver's license and conditions for driving of a vehicle;
- allowing the child to travel in other person's vehicle;
- possession and use of a cell phone;
- obtaining a job or working for pay (e.g. babysitting, yard work, etc.); or
- recreational activities, like boating, swimming, camping, hunting, cycling, hiking, or horseback riding. 8.26.2.13 NMAC, adopted in 2015.

Of course, there are times when foster parents are uncertain or uncomfortable, in which case they may consult with CYFD. There may also be times when the child disagrees with a decision; if the child is 14 or over, the child may request review. 8.26.2.13 NMAC.

Under to the reasonable and prudent parent standard, a foster parent may consent to the use of the foster parent's own vehicle by a foster child. When the foster parent gives consent to the use of the foster parent's vehicle, the foster parent assumes all civil and financial liabilities applicable to the child's driving. A foster parent provides written documentation

to PSD that all requirements have been met, including insurance coverage for any vehicle driven by the child. 8.26.2.12 NMAC, as amended in 2015.

12.6 Involvement in the Abuse and Neglect Proceeding

Unless they have intervened in the case, foster parents are not parties to the abuse or neglect proceeding. They are, however, given notice of judicial reviews and permanency hearings and have a right to be heard at those reviews and hearings. Rule 10-104.1 ensures that foster parents are informed of this right:

> In abuse and neglect proceedings, the department shall give notice of permanency hearings and periodic judicial review hearings to the child's foster parents, pre-adoptive parents and relative care givers. The notice given shall expressly inform foster parents, pre-adoptive parents and relative care givers of their right to be heard at the permanency hearing or judicial review. Notice shall be served in the manner provided by Rule 10-104 NMRA, and a certificate of service shall be filed with the court.

Several sections of the Children's Code also refer to the foster parent's right to notice of the proceedings. For example, §32A-4-27(F) provides:

> The foster parent, preadoptive parent or relative providing care for the child shall be given notice of, and an opportunity to be heard in, any review or hearing with respect to the child, except that this subsection shall not be construed to require that any foster parent, preadoptive parent or relative providing care for the child be made a party to such a review or hearing solely on the basis of the notice and opportunity to be heard.

Other provisions of the law include:

- §32A-4-20(C): Foster parents shall be given notice and an opportunity to be heard at the dispositional phase.
- §32A-4-25(D): The children's court attorney shall give notice of the time, place and purpose of any judicial review hearing to all parties, including the child by and through the child's guardian ad litem or attorney, the child's foster parent or substitute care provider, the child's CASA, and any designated substitute care review board (SCRB).
- §32A-4-25.1(G): The children's court attorney shall give notice of the time, place and purpose of any permanency or permanency review hearing to all parties, the child's foster parent or substitute care provider, the child's CASA, and any designated SCRB.

A foster parent can ask to intervene to become a party to the abuse and neglect proceeding in certain situations:

- §32A-4-27(A), (B): The court may permit intervention when the child has lived with the foster parent for at least six months and the foster parent files a motion for affirmative relief. The court will consider the foster parent's rationale for intervening and whether intervention is in the child's best interests.

- §32A-4-27(E): The court must permit intervention if:
  - the foster parent desires to adopt the child;
  - the child has resided with the foster parent for at least six months within the year prior to the termination of parental rights;
  - the motion for termination of parental rights has been filed by a person other than the foster parent; and
  - bonding between the child and the foster parent is alleged in the motion as a reason for terminating parental rights.

A Foster Parent's View:

Foster parents advocate for the best interest of the child in all settings, from SCRB meetings to medical evaluations. While a foster parent does not independently determine the most appropriate treatment for a child, the information the foster parent can contribute about the child provides valuable insight into the child's needs.

As foster parents, individuals must serve as advocates for a swift and timely move towards permanence for the child. In many cases, this involves working closely with biological families. Foster parents serve as a model for biological parents with respect to parenting skills, disciplining techniques, establishing a nurturing environment, and approaches to problem-solving. Foster parents need to collaborate in a non-judgmental manner with a child's biological family to improve the family's skills and facilitate a safe return of the child. The child's team members and CYFD staff are urged to support this collaborative relationship.

CHAPTER 13

SUBSTITUTE CARE ADVISORY COUNCIL AND REVIEW BOARDS

This chapter covers the following with regard to the Substitute Care Advisory Council (Council) and the Substitute Care Review Boards:

- Authority and Purpose.
- Substitute Care Advisory Council.
- Advisory Committee.
- Substitute Care Review Boards (SCRBs).
- Case Reviews.

13.1 Authority and Purpose

The Citizen Substitute Care Review Act (Act), §§32A-8-1 *et seq*., establishes:

> a permanent system for independent and objective monitoring of children placed in the custody of the department [Children, Youth and Families/CYFD] by examining the policies, procedures and practices of the department and, where appropriate, specific cases to evaluate the extent to which the department is effectively discharging its child protection responsibilities. §32A-8-2

The system changed considerably when the Act was amended effective July 1, 2016. The amendments to the Act included:

- A nine-member Substitute Care Advisory Council that oversees the functions and procedures of the substitute care review boards and is administratively attached to the Regulation and Licensing Department.
- A six-member advisory committee appointed by the Council.
- Council rules on specific selection criteria for cases to be designated for review by substitute care review boards.
- Submission of an annual report by November 1 to designated parties.

The Act meets the requirement of the federal Child Abuse Protection & Treatment Act (CAPTA), 42 U.S.C. §5101 et seq., to:

- Establish volunteer citizen panels to examine "policies, procedures, and practices of State and local agencies and where appropriate, specific cases" to evaluate the extent that state and local child protection systems are effectively discharging their child protection responsibilities in accordance with:
    - the CAPTA state plan;
    - child protection standards; and
    - "any other criteria the panel considers important to ensure the protection of children including a review of the extent to which the State and local child protective services system is coordinated with the foster care and adoption programs established under Part E of title IV of the Social Security Act (42 U.S.C. 671 et seq.)."
- Provide the volunteer citizen panels access to information on cases to be reviewed. 42 U.S.C. §5106a(c)(4)(A).

In addition, CAPTA requires panels to provide for "public outreach and comment in order to assess the impact of current procedures and practices upon children and families in the community." 42 U.S.C. §5016a(c)(4)(C).

Both CAPTA and the Act require that the members on the review panels/boards be representative of the community they serve, and include "members who have expertise in the prevention and treatment of child abuse and neglect, and may include adult former victims of child abuse or neglect." CAPTA and the Act require submission of an annual report, which includes recommendations to the state agency, with CAPTA requiring a written response from the agency within 6 months of receipt. In addition to submitting the annual report to the state agency, the Act requires submission of the report to the courts and appropriate legislative interim committees. *See* 42 U.S.C. §5106a(c)(2) and (6); §32A-8-4 and -5.

13.2 Overview of the Council

The nine-member Substitute Care Advisory Council consists of the following:

- Secretary of Public Education (PED) or the secretary's designee;
- Secretary of Human Services (HSD) or the secretary's designee;
- Secretary of Finance and Administration (DFA) or the secretary's designee;
- Secretary of Health (DOH) or the secretary's designee;
- Children's Court Judge, appointed by the governor;
- Two public members, appointed by the governor, who are at least 18 and no more than 30 years of age at the time of appointment and who were previously placed in substitute care.
- Two public members, appointed by the governor, who have expertise in the area of child welfare. §32A-8-4.

Except as provided above, no person or a relative of a person employed by CYFD or a district court may serve as a Council member. §32A-8-4.

The responsibilities of the Council are to:

- Meet at least twice annually;
- Appoint a 6 member advisory committee;
- Oversee the substitute care review boards;
- Adopt reasonable rules relating to the functions and procedures of the substitute care review boards and the Council in accordance with the duties of the boards as provided in the Act. Rules shall include:
    - Criteria for membership;
    - Training requirements for board members;
    - Criteria for designation of cases for review;
    - Procedures for case reviews;
    - Specify the information needed for cases;
    - Specify case information to be tracked and reported.
- Evaluate the effectiveness of CYFD in discharging its child protection responsibilities, including:
    - Compliance with the State CAPTA plan;
    - Coordination of the child protection services system with the foster care and adoption programs;
    - In accordance with child protection standards.
- Identify systemic issues;
- Provide for public outreach;
- Present a report with recommendations to CYFD, the courts and appropriate legislative interim committees, on or before November 1 of each year, regarding statutes, rules, policies and procedures relating to substitute care and any recommendations for changes in substitute care review boards. §32A-8-4.

Rules governing the boards were promulgated by the Council and made effective February 14, 2017. *See* 8.26.7 NMAC.

13.3 Advisory Committee

On or before October 1 of each year, the Council must appoint a six-member advisory committee from the active substitute care review boards' membership. Appointment terms are for one year and members may be reappointed. The advisory committee advises the Council on matters relating to substitute care review. §32A-8-4(J)

13.4 Membership on the Substitute Care Review Boards

The Council is required to establish no fewer than three or more than 24 substitute care review boards (SCRBs, formerly known as CRBs) around the state. The Act does not require that there be a board in each judicial district but sets a maximum number that any one district may have. §32A-8-5.

Pursuant to §32A-8-5(C), a person or relative of a person employed by DFA, CYFD, HSD, PED, DOH or a district court is NOT eligible to serve as a member.

Any person who has been convicted of, or who faces pending charges for a felony or misdemeanor involving a sex offense, child abuse or neglect, or related charges that may pose risks to children or call into question the credibility of a board, is not eligible for membership on an SCRB.

Individuals interested in a position on an SCRB must submit an application and undergo a review process that includes interviews, background and reference checks, and training. Selected members must sign confidentiality forms and a Code of Conduct.

Members are appointed for two years and may be reappointed subject to successful completion of the criteria established for reappointment. Members meet annual training requirements and adhere to the Code of Conduct to maintain their membership.

13.5 Case Reviews

SCRBs conduct case reviews, which are coordinated and facilitated by Council staff. Each SCRB meets at least once a quarter to review cases. §32A-8-5(E)

Not all individual cases are reviewed by an SCRB. Prior to an initial judicial review, CYFD is required to submit a copy of the adjudicatory order, the dispositional order, notice of the initial judicial review, and other necessary information to Council staff. The Council, or staff under Council guidelines, reviews the information and determine whether the case will be designated for review. 8.26.7.9 NMAC. They will consider, for example,

- Sibling placement;
- The frequency and severity of neglect or abuse;
- The behavioral health status of household members;
- The placement of children in households where there are no relatives of the children;
- Data related to demographics; and
- Relevant trend data. §32A-8-4(G).

Pursuant to §32A-8-6, SCRBs notify interested parties in advance of an upcoming case review. Interested parties include biological parents, foster parents, relatives, CYFD staff, guardians ad litem, youth attorneys, respondent attorneys, court appointed special advocates and service providers. Interested parties may participate and provide input in writing, by telephone or in-person.

Council staff provides specific case information to the SCRB members who will participate in the case review meeting. For each case an SCRB reviews, Council staff prepares a summary report of the board's findings that includes strengths, barriers and recommendations for the case. The report is then submitted to the presiding judge and the interested parties for consideration. *Id*.

Council staff track data related to demographics and note trends from the case reviews. The assessment of this data identifies factors the New Mexico child protection system faces, evaluates the extent to which CYFD is effectively discharging its child protection responsibilities and proposes changes to statutes, policies and procedures related to substitute care. §32A-8-4(H).

CHAPTER 14

COMMENCEMENT OF CASE

The filing of a petition in children's court commences the abuse or neglect case. This chapter covers:

- Filing the abuse or neglect petition.
- Filing a motion for an *ex parte* custody order and accompanying affidavit.
- The *ex parte* custody order.
- Requirements for Indian children
- Confidentiality of records in the proceeding.

14.1 Filing of Petition

The filing of the petition with the district court clerk initiates an abuse or neglect proceeding under the Abuse and Neglect Act, which is part of the Children's Code. The children's court attorney is the sole person empowered by statute to file, and then only after determining and endorsing upon the petition that filing it is in the best interest of the child. §32A-4-15. If the child was taken into emergency custody, the petition must be filed within two working days of the child being taken into custody. §32A-4-7(D); Rule 10-312. If the children's court attorney is going to file a preemptory election to excuse the judge, it must be done within two days of filing the petition. Rule 10-162.

14.2 Jurisdiction and Venue

14.2.1 Jurisdiction

The Children's Code establishes a division in the district court for each county known as the "children's court," which has exclusive original jurisdiction over abuse or neglect proceedings. §§32A-1-5, 32A-1-8(A). During abuse and neglect proceedings in which New Mexico is the home state under the Uniform Child Custody Jurisdiction and Enforcement Act, §§40-10A-101 to 40-10A-403, the court has jurisdiction over both parents to determine the best interest of the child and to decide matters incident to the court proceedings. §32A-1-8(C).

As soon as the child is taken into custody, CYFD must make reasonable efforts to determine whether the child is an Indian child and send notice to the child's tribe. §32A-4-6(D), (E).

Under the Indian Child Welfare Act (ICWA), the Indian child's tribe has exclusive jurisdiction of the matter if the child resides or is domiciled on the reservation, and the children's court has only emergency jurisdiction to protect the child until the tribe can assume jurisdiction and the child is transferred to that jurisdiction. 25 U.S.C. §1911(a) and 25 U.S.C. §1922. In cases involving Indian children where the state court has concurrent jurisdiction over the child, the children's court must transfer the proceeding to the jurisdiction of the Indian child's tribe at the request of the child's parent, guardian, or tribe, unless there is good cause not to transfer. The transfer is barred if there is an objection to the transfer by a parent of the child or the child's tribe, and the tribe may decline jurisdiction. §32A-1-9(D), 25 U.S.C. §1911(b); ***see*** Handbook Chapter 32 on ICWA.

14.2.2 Venue

Abuse or neglect proceedings may be brought in the county where the child resides or in the county where the child is present at the time the petition is filed. §32A-1-9(A).

If the case is begun in a court for a county other than the one in which the child resides, the court, on its own motion or on motion of a party made at any time prior to disposition of the case, may transfer it to the court for the county of residence. A transfer may also be made if the child's residence changes during or after the proceeding. Certified copies of all legal and social records pertaining to the proceeding must accompany the case on transfer. §32A-1-9(C).

If there is a change of venue, the original guardian ad litem is to remain on the case until a new guardian ad litem is appointed by the new court, and the new guardian ad litem has communicated with the original one. §32A-1-7(G). Respondents' attorneys and youth attorneys under contract are also encouraged to stay on the case if feasible. If staying on the case is not feasible, the attorney should ask for appointment of a new attorney and communicate information about the case to the new attorney prior to withdrawing. ***See*** the respondent attorney performance standards at Handbook §6.4.

14.3 Form and Content of Petition

The petition sets forth the factual basis necessary to confer jurisdiction on the children's court, as well as other pertinent facts concerning the child. It should include the name, birth date and address of the child, the name and address of the parent, guardian or custodian, and whether the child is an Indian child. §32A-1-11.

The petition is to be in a form approved by the Supreme Court. Rule 10-312; Form 10-501. Facts which could give rise to a finding of aggravated circumstances should be pleaded separately from the allegations of abuse and neglect. §32A-4-20(G).

Definitions: "Abused child," "neglected child," and "aggravated circumstances" are defined in the Abuse and Neglect Act. ***See*** Handbook §17.5 for these definitions.

If the child has been placed in emergency custody, the petition must be filed within two working days of the date the child is taken into custody. §32A-4-7(D). Otherwise, a petition may be filed at any time. New allegations or the joinder of additional parties require the filing of an amended petition. CYFD may amend the petition "once as a matter of course at any time within twenty (20) days after it is served" or with the court's permission. Rule 10-312(F).

Calculating Deadlines: If any period of time prescribed or allowed by the Children's Code, the Children's Court Rules or an order of the court is less than eleven days, intermediate Saturdays, Sundays and legal holidays are excluded from the calculation. Rule 10-107(A). Hence, if a child is taken into custody on a Friday or Saturday, the next Tuesday would be the last day for filing the petition. This Handbook will sometimes describe days fewer than eleven as "working days."

14.4 Persons Named as Parties in the Petition

The parties to an abuse or neglect action are:

- the state (that is, CYFD);
- the parent, guardian or custodian who has allegedly neglected or abused the child;
- the child alleged to be neglected or abuse; and
- any other person made a party by the court. Rule 10-121(B).

The state may join as parties the non-custodial parent or parents, the guardian or custodian of the child, or any other person permitted by law to intervene. Rule 10-121(C). Persons who may intervene or seek to intervene are discussed in Handbook Chapter 27.

Practice Note: Especially in light of the shortened timelines for abuse or neglect cases, it is usually desirable to join all parents in the case at the earliest opportunity.

CYFD considers naming as a respondent any parent who has a constitutionally protected liberty interest in the care and custody of the child if there is any viable allegation of abuse or neglect at all. A presumed father who is not the biological father should also be considered since a presumed father may withhold consent to an adoption, if adoption were to become an option in the future. *See* §32A-5-17 and 8.10.7.11 NMAC.

If a parent is not named as a respondent, the court may be making a decision in a vacuum, and a parent not named is generally considered available to take custody of the child. ***See*** cases discussed below.

A parent who is not alleged to have abused or neglected the child may be brought into the case under Rule 10-121(C). It is important to involve all parents as early as possible.

In *In re Mary L.*, 1989-NMCA-054, ¶¶8-13, 108 N.M. 702, the Court held that, when the noncustodial parent indicated a desire to have custody of the children, the department was required to either turn custody over to that parent or file a legal action to establish its right to

custody as against her. At the time the mother requested custody, she had not been joined in the abuse or neglect case. ¶4. *See also State ex rel. CYFD v. Lisa A.*, 2008-NMCA-087, 144 N.M. 324. On the other hand, in *State ex rel. CYFD v. C.H. in re A.H.*, 1997-NMCA-118, 124 N.M. 244, CYFD requested, and was denied, a finding that it was required to release the children to a father who had been dismissed from the case. The Court of Appeals agreed that the department should retain custody of the children. *Id.* ¶12. "Given the condition of these children and the extent of their need for services, the Department has a responsibility to investigate even a natural parent when allegations of such abuse have been made." *Id.* ¶8. The court distinguished *Mary L.* on the basis that there was no factual predicate giving rise to any suspicion of neglect or abuse in that case. *Id.* ¶6.

14.5 Motion for *Ex Parte* Custody Order

Usually, but not always, a motion for an *ex parte* custody order accompanies the petition. If a motion is filed, it must be supported by a sworn statement of facts, or affidavit, showing that probable cause exists to believe that:

- the child is a neglected or abused child (***see*** definitions of neglected child and abused child in Handbook §17.5.3); and
- it is necessary for CYFD to take, or keep, custody because the child is at risk under one or more of the criteria set forth in §32A-4-18(C) (***see*** the list in Handbook §15.7.4). §32A-4-16(A).

The affidavit may be signed by any person who has knowledge of the facts alleged or is informed of them and believes that they are true. §32A-1-10(B). The case worker or supervisor responsible for investigating the allegations customarily signs the affidavit.

The affidavit should provide sufficient factual details about the abuse or neglect found during investigation, and should also document the efforts, if any, made to prevent or avoid removal of the child, or to make it possible for the child to return home. If no efforts were made, the facts should indicate that, under the circumstances, not making efforts was reasonable. In light of the regulations under the Adoption and Safe Families Act, it is very important that the affidavit contain the facts to support detailed findings that continuation in the home is contrary to the welfare of the child. ***See*** §14.6 below, as well as Handbook §36.4 on ASFA.

The motion and affidavit must be substantially in the form approved by the Supreme Court. Rule 10-311(A).Forms 10-503 and 10-504.

ICWA Note. The Indian Child Welfare Act requires that emergency placement be permitted only if it is necessary to prevent imminent physical damage or harm to the child. Since the ex parte custody hearing is considered an emergency proceeding (*see State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶34, 149 N.M. 315), it appears that this standard should be applied and supporting facts included in the affidavit if there is reason to know that the child is an Indian child. 25 U.S.C. §1922; 25 C.F.R. §25.113.

14.6 *Ex Parte* Custody Order

The Rules of Evidence do not apply to the issuance of an *ex parte* custody order. Rule 11-1101(D)(3); §32A-4-16(C).

If the court is convinced that probable cause exists, it may grant the motion and issue an order directing that the child be placed, or remain, in the legal custody of the department. If not, the child must remain in, or be returned to, the custody of the parent.

ASFA Note: If an order is issued, it is very important that the order contain a finding to the effect that **continuation in the home is contrary to the welfare of the child**. The consequences of omitting such a finding are serious and cannot be remedied. Under the ASFA regulations, the child will be ineligible for federal Title IV-E foster care funds if such a finding is not made in the first order in the case that sanctions, even temporarily, the removal of the child from the home.

The exact phrase "contrary to the welfare of the child" is not required. Comparable language is acceptable. However, the findings must be detailed and must be found in the court order or hearing transcript; the order may not simply incorporate by reference the facts asserted in the affidavit. ***See*** Handbook §36.4 on ASFA.

The ASFA regulations also require that the court determine whether **reasonable efforts were made by CYFD to prevent removal from the home**. This determination could be made in the *ex parte* order, with the underlying facts stated, based upon sworn affidavits. If the subject of reasonable efforts is not addressed within 60 days of the date the child is removed from the home, the child becomes ineligible for federal foster care payments for the duration of his or her stay in foster care. ***See*** Handbook §36.4.

These ASFA requirements are now reflected in Children's Court Forms 10-503 – 10-505B pertaining to ex parte custody orders.

If an *ex parte* custody order is issued, the court must hold the initial custody hearing within ten working days of the date the petition was filed. §32A-4-18(A), Rule 10-315(A); ***see*** the box in §14.3 above on calculating deadlines. The initial custody hearing will determine whether the child will remain in or be placed in CYFD's custody pending adjudication. ***See*** Handbook Chapter 15.

Signing or declining to sign an order for *ex parte* custody is not considered a discretionary act that would prevent a party from disqualifying a judge under Rule 10-162(A).

14.7 Appointments

At the inception of the proceeding, the court must appoint:

- a guardian ad litem (GAL) or, for a child 14 years of age or older, an attorney ("youth attorney") for the child; and

- counsel for the parent, guardian, or custodian of the child. §32A-4-10, Rule 10-312.

"Youth Attorney": A child under the age of 14 receives a GAL while a child 14 years of age or older receives an attorney. §32A-4-10, Rule 10-312. The GAL is also a licensed attorney but the GAL represents the best interests of the child while the older child receives client-directed representation, just as an adult does. To distinguish between the two attorneys (the GAL for the younger child and the traditional attorney for the youth), it has become common parlance to refer to the latter as a "youth attorney."

These appointments are generally made as soon as the petition is filed. In the case of the parent, guardian, or custodian, appointed counsel serves until the initial custody hearing, at which time the court makes an indigency determination. ***See*** Handbook §15.5.

14.8 Service

14.8.1 Petition

The petitioner (CYFD) is responsible for effecting service of the summons, petition and related orders and notices by personal service upon the respondent and upon the child's GAL or youth attorney. §§32A-1-12, 32A-1-13; Rule 10-103. The summons must clearly state that the proceeding could result in termination of parental rights. §32A-4-17.

If a parent has not been named as a party in the petition, a copy of the petition must be served on that parent with a notice that the parent may intervene and request custody of the child. Rule 10-312(C).

CYFD must also deliver a copy of the petition to the district attorney. §32A-1-6(C).

14.8.2 *Ex Parte* Custody Order

For a child not already in CYFD's custody, the e*x parte c*ustody order is to be served on the respondent by a person authorized to serve arrest warrants. §32A-4-16(B).

14.9 Notice to Relatives

Within thirty days after a child is taken into custody by law enforcement, or when CYFD files a petition seeking legal custody, whichever occurs first, CYFD must exercise due diligence and make reasonable efforts to identify and provide notice to all grandparents, all parents of a sibling of the child (when the parent has legal custody of the sibling, and other adult relatives of the child, including relatives suggested by the parents, unless notice would be contrary to the best interests of the child due to family or domestic violence. §32A-4-17.1, added in 2016; 8.10.7.17 NMAC.

The notice to relatives must:

- specify that the child has been or is being removed from the custody of the parent;
- explain the options the relative has to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice;
- describe the requirements to become a foster family home and the services and support available to children in such a home; and
- set out the dates of any scheduled court hearings that involve the child. §32A-4-17.1.

To meet the spirit and intent of the law, the CYFD case worker asks the parents and child to identify relatives during the investigation, but no later than 30 days after the removal of the child. When a child comes into custody, the case worker further encourages the parents to identify relatives and invite them to the family centered meeting (FCM) to discuss issues of safety, custody, and relative placement. CYFD may also use parent locator services to locate relatives.

FCM: A family centered meeting is a facilitated meeting where CYFD Protective Services workers and supervisors meet with parents or caregivers and others for the purpose of case planning and decision making.

14.10 Indian Children

The state's Abuse and Neglect Act requires that CYFD make reasonable efforts to determine whether a child taken into custody is an Indian child. §32A-4-6(D). An "Indian child" is defined in the Indian Child Welfare Act as an unmarried person who is under age 18 and is either:

- a member of an Indian tribe, or
- eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.

25 U.S.C. §1903(4). (This definition is somewhat different than the definition in §32A-1-4(L), which seems to require that a child who is a member of an Indian tribe also be a child of a member. While this would tend to be the case for a child who is a tribal member, it is not required by federal law, and the federal definition governs.)

If the child is an Indian child, CYFD must notify the child's tribe when the abuse or neglect petition is filed, using a form of notice that complies with the Indian Child Welfare Act. §§32A-1-14(B); Rule 10-312(E); Form 10-521. ***See also*** Handbook §32.2.5.

The tribes have the exclusive authority to determine if the tribe is the "Indian child's Tribe" as defined under ICWA. 25 U.S.C. §1903(5) and 25 C.F.R. §23.108. If the child is a member of or eligible for membership in more than one tribe, the court must give deference to any agreement among the tribes and must give the tribes the opportunity to make that determination. 25 C.F.R. §23.109(b) and (c). If the tribes are not able to reach an agreement as to which tribe is the child's tribe, the court may make the determination based on the

factors in 25 C.F.R. §23.109(c)(2).

14.11 Confidentiality of Records

All records concerning a party to an abuse or neglect proceeding incident to or obtained as a result of an abuse or neglect proceeding or that were produced or obtained during an investigation in anticipation of or incident to such a proceeding are confidential and closed to the public. Social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse, and medical records are examples of records that are confidential. §32A-4-33(A).

These confidential records may be disclosed only to the parties and the following categories of people:

- court personnel;
- court appointed special advocates (CASAs);
- the child's GAL;
- the attorney representing the child in an abuse or neglect action, a delinquency action, or any other action under the Children's Code;
- CYFD personnel;
- the local substitute citizen review board (SCRB), or the contractor implementing SCRBs;
- law enforcement officials, except when use immunity is granted under §32A-4-11 (***see*** Handbook §29.5);
- district attorneys, except when use immunity is granted as above;
- any state government social services agency in any state or when, in CYFD's opinion, it is in the best interest of the child, a governmental social service agency of another country;
- persons or entities of an Indian tribe authorized to inspect records under ICWA;
- the current or prospective foster parent for the child, if the records concern the child's social, medical, psychological, or educational needs;
- school personnel, if the records concern the child's social or educational needs;
- a grandparent, parent of a sibling, relative or fictive kin, if the records or information pertain to a child being considered for placement with that person and the records or information concern the child's social, medical, psychological or educational needs;
- health care or mental health care professionals involved in the evaluation or treatment of the child, the child's parents, guardian, custodian, or other family members;
- protection and advocacy representatives pursuant to certain federal laws;
- children's safehouse organizations conducting investigatory interviews of children on behalf of law enforcement or CYFD;
- representatives of the federal government or their contractors authorized by federal law to review, inspect, audit or otherwise access records and information pertaining to abuse or neglect proceedings;
- any person or entity attending a meeting arranged by CYFD to discuss the child's safety, well-being and permanency, when the parent or child, or parent or legal

custodian on behalf of a child under 14, has consented to the disclosure; and
- any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court. §32A-4-33(B), as amended in 2016.

Anyone who intentionally and unlawfully releases information or records closed to the public or releases or makes other unlawful use of records in violation of the Abuse and Neglect Act is guilty of a petty misdemeanor and subject to imprisonment in the county jail for up to six months, to the payment of a fine of up to $500, or both. §32A-4-33(D); §31-19-1.

Section 32A-4-33 requires CYFD to promulgate rules that would implement the statute's disclosure provisions

Rule 10-166. The Supreme Court has made it clear that all court records in abuse or neglect cases are confidential and sealed automatically without motion or order of the court. "Court record" means "all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case." Rule 10-166(B), (C).

CHAPTER 15

CUSTODY HEARING

The custody hearing is held within 10 days of the date the petition is filed. This chapter covers:

- Purpose of the hearing.
- Nature of abuse and neglect hearings as closed hearings.
- Advising respondents of rights.
- Findings of probable cause and reasonable efforts.
- Order providing for temporary custody.
- Requirements for Indian children.
- Identifying relatives
- Appointing an educational decision maker

15.1 Purpose of Hearing

As the first court hearing in an abuse or neglect proceeding and the first appearance of the parties before the court, the custody hearing sets the standard and the tone for a process involving the child, the family, CYFD and the court system. Giving utmost attention to the immediate health and safety of the child, the court must decide who will have legal custody of the child pending the adjudicatory hearing.

The custody hearing follows closely upon the filing of the petition. Consequently, a sense of crisis predominates: emotions run high and information is often incomplete. Thus, the first priority is to establish that the respondents understand the nature of the proceedings and their rights. Second, it is important to inquire into the factual circumstances surrounding the family, in particular to ascertain any relationship of the child to an absent parent, other relatives, or an Indian tribe.

The primary purpose of the custody hearing is "to determine if the child should remain in or be placed in the department's custody pending adjudication." §32A-4-18(A). The court must return legal custody to the parent, guardian or custodian unless there is "probable cause" as provided in §32A-4-18(C). In the case of an Indian child, the court must also find that keeping

the child in CYFD's custody is necessary to prevent imminent physical damage and harm to the child. ***See*** §§15.7.3 and 15.7.4 below.

The hearing is not to determine whether there is probable cause to proceed with an adjudication. Rather, the hearing is to determine whether there is probable cause for the child to remain in custody pending the adjudication. This distinction has been a source of confusion. In 2009, §32A-4-18 was amended to address the cases in which probable cause is not found.

15.2 Timeline

The custody hearing must be held within ten working days of the date the petition is filed. Upon written request of the respondent, the hearing may be held earlier, but in no event less than two days after the date the petition is filed. §32A-4-18(A), Rule 10-315(A), Rule 10-107(A) (Saturdays, Sundays, and holidays not included). CYFD, as the petitioner, is responsible for requesting a setting when filing the petition and the motion for an *ex parte* custody order.

Sometimes scheduling restrictions permit little latitude in this area. The earlier the hearing, the sooner the child's needs can be addressed, but the less likely that the parties will be prepared, or in some cases even served or notified of the hearing.

CYFD is responsible for giving reasonable notice of the time and place of the custody hearing to the parents, guardian or custodian. Rule 10-315(B). If CYFD has reason to know that the child is an Indian child, the department should take all practical steps to notify the child's tribe. ***See*** Handbook Chapter 32 on ICWA.

ICWA Note. The New Mexico Supreme Court has held that the custody hearing is an emergency proceeding under the Indian Child Welfare Act, which means that the court and parties do not need to wait 10 to 30 days after notice to hold the hearing, as was formerly thought. ***See*** *State ex rel. Marlene C.*, 2011-NMSC-005, ¶34, and Handbook Chapter 32.

15.3 Participants

CYFD is responsible for notifying the parties of the hearing. The department is specifically required to give reasonable notice of the time and place of the custody hearing to the child's parents, guardian, or custodian. §32A-4-18(B) and Rule 10-315(B). When the case involves an Indian child, the department must also give notice to the Indian child's tribe. 25 U.S.C. §1912(a); Rule 10-315(F); Form 10-521; ***see*** Handbook §32.2.5.

Practice Note: At a minimum, the hearing should include the children's court attorney, a CYFD case worker, the child's GAL or youth attorney, and any other appointed attorneys. As a general rule, the child may attend the hearing; ***see*** the discussion following the box. The respondent or respondents should appear, but the hearing may proceed in their absence.

In some instances, the respondent is officially served just prior to or at the hearing itself. At other times, the respondent, despite CYFD's efforts, is not served until after the custody

hearing. In that case, the respondent may want to request that the hearing be reopened.

There are also cases in which a parent appears who is not a party to the petition and is not alleged to have neglected or abused the child. When that happens, the court may consider awarding custody of the child to that parent. ***See*** Handbook §14.4 for case law on this subject.

A child under the age of 14 may be excluded from the hearing only if the court finds it is in the child's best interest. A child who is 14 or older may be excluded only if the court finds there is a compelling reason to do so and states a factual basis for that finding. §32A-4-20(E). The decision as to whether the child should attend may be a complex one. Having the child present in the courtroom could be meaningful but difficult for the child. On the other hand, the hearing is an opportunity for the judge to meet the child for whom very serious decisions are being made.

It is not up to the adults alone to decide whether the child should attend. Counsel for the older child is expected to advise the child that he or she has the right to attend the hearing and must notify the court orally whether the child has been so advised. Rule 10-325, adopted in 2016. If the child is under the age of 14, the child's GAL is expected to advise the child, to the maximum extent possible given the child's developmental capacity, of the child's right to attend the hearing. The GAL is also required to notify the court orally whether the child was informed of the custody hearing and whether the child wishes to attend. The GAL should state his or her position about whether attendance is or is not in the child's best interest. Rule 10-325.1, adopted in 2017.

With regard to the respondent, efforts should be made to obtain a transportation order if the respondent is incarcerated. If an order cannot be enforced, as where the respondent is in a prison out-of-state, other means of participating in the hearing should be used, such as participation by telephone. If the parent is in federal prison, habeas corpus may be a means of bringing the parent to state court for the hearing, although it is unlikely that there will be enough time before this particular hearing. *See State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶49, 136 N.M. 53; *see also In re Ruth Anne E.*, 1999-NMCA-035, 126 N.M. 670, on alternatives to in-person participation and Handbook §24.5.8 regarding the due process rights of incarcerated parents in the context of termination of parental rights proceedings.

15.4 Hearings Closed to Public; Records and Information Confidential

All abuse and neglect hearings are closed to the general public. Only the parties, their counsel, witnesses and other persons approved by the court may be present. Persons the court finds to have a proper interest in the case or in the work of the court may be present on the condition that they refrain from divulging any information that would identify the child or the family. §32A-4-20(B).

Rule 10-324 was adopted to clarify who may attend a hearing. Among other things, the rule defines a person with a proper interest in the case or in the work of the court.

- A "person with a proper interest in the case" is a member of the general public:
  - whose presence is necessary to aid in resolving the issues presented at the hearing;
  - who has a professional relationship with a party; or
  - who has a close personal relationship with a party.
- A "person with a proper interest in the work of the court is a member of the general public who wishes to attend a closed hearing as a neutral observer for educational, administrative, or other similar purposes. Rule 10-324(A)/

As this Handbook goes to press, the Supreme Court is considering an amendment to Rule 10-324 that would make it clear that, in the case of an Indian child, a representative of the Indian child's tribe is not a member of the general public and hence may attend the hearing.

Unless the court excludes all members of the general public from the hearing, the court must inquire of any members of the general public who are present to determine if the person may attend the hearing. The court may permit a person to attend all or part of the hearing if the person has a proper interest in the case or in the work of the court or if the person's interest is consistent with the interests of the parties and the court, taking six factors into account. An objection by s party is only one factor and does not mean that the person is automatically excluded. *See* Rule 10-324(E) for the list of factors.

The media may be admitted to the hearing so long as they refrain from divulging identifying information and comply with any regulations the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Children's Code. §32A-4-20(C)-(D), Rule 10-324(C). Where confidentiality cannot be maintained, the media enjoys no statutory right of access. In the absence of a statutory right of access, the children's court has the discretion under §32A-4-20(D) to decide whether to allow the media to attend the proceedings. *Albuquerque Journal v. Jewell*, 2001-NMSC-5, ¶5, 130 N.M. 64. Furthermore, if the child who is the subject of the proceeding is present at the hearing, the child may object to the presence of the media. If the child does object, the court may exclude the media if it finds that the presence of the media is contrary to the best interests of the child. §32A-4-20(D), Rule 10-324(C).

All records and information concerning a party to an abuse or neglect case are confidential and closed to the public, including information disclosed during a closed hearing. §32A-4-33(A); Rule 10-166. Anyone admitted to a closed hearing who intentionally divulges confidential information from the hearing, or who intentionally and unlawfully releases information that is confidential under the Abuse and Neglect Act, is guilty of a petty misdemeanor. §§32A-4-20(F), 32A-4-33(D).

Practice Note: As a practical matter, family members, professionals involved in the case, persons who are supports for a party and other advocates may attend the hearing under Rule 10-324. Any responsible adult or appropriate relative whom the child knows and trusts can be a potential resource and should be encouraged to come forward. The court may need to balance its interest in an orderly proceeding and the need for confidentiality with the desirability of keeping the extended family and others as part of the solution at this stage of the proceedings.

15.5 Appointment of Counsel

The automatic appointment of counsel to represent the parent, guardian, or custodian at the inception of the proceeding is valid only until an indigency determination is made at the time of the custody hearing. A form for the indigency determination can be found in the Children's Court Rules and Forms, at Form 10-510. If the respondent is indigent, the appointment continues. Counsel may also be appointed if the court, in its discretion, considers appointment "required in the interests of justice." §32A-4-10(B).

Rule 10-314(B) on appointment of counsel prohibits an attorney from being appointed to represent more than one parent in "any proceeding or case that may result in the termination of parental rights." An attorney retained by multiple respondents should also be alert to the possibility of a conflict. *See State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, 126 N.M. 664 (decided before this rule was adopted), on conflicts of interest. ***See*** Handbook §6.2.2.

Practice Note: Courts that contract with particular attorneys to serve as respondent's counsel should have contracts with at least two different attorneys.

15.6 Advising Respondents of Rights

Respondents must be advised of their rights at their first appearance. §32A-4-10(G). Their first appearance is usually the custody hearing, but the court and parties must be aware that a party's first appearance may be at a later hearing.

The court must inform the respondent of:

- the allegations of the petition;
- the right to an adjudicatory hearing on the allegations of the petition;
- the right to an attorney and, if the respondent cannot afford one, the right to have one appointed to represent him or her free of charge; and
- the possible consequences, including termination of parental rights, if the allegations of the petition are found to be true. Rule 10-314.

Practice Note. Not only is this the first time the respondent has appeared in the case, it may well be the first occasion for this individual to come before the court in any capacity. The judge or special master can anticipate some level of confusion or hostility, or both, on the part of respondent. This can be addressed by clarifying the nature of the hearing, and by focusing on information gathering and problem solving to address the immediate needs of the child.

In describing the possible consequences, it is crucial for the court to emphasize the child's need for permanence and resolution, and the time frames within which change must occur.

The respondent in a civil abuse or neglect proceeding can be compelled to testify, subject to the privilege against self-incrimination, and the testimony given can be used against the respondent

in a later criminal prosecution. If testifying or producing documents is going to be a concern, the respondent may want to consider invoking his or her Fifth Amendment privilege against self-incrimination and offering to testify only if granted use immunity. While §32A-4-11 provides that the children's court attorney can apply for use immunity, amendments to Rule 10-341 authorize any party or the court to request immunity. Since use immunity orders cannot be issued *nunc pro tunc*, §32A-4-11(F), it is very important that such immunity, if desired, be sought before testimony is to be given or documents produced. ***See*** Handbook §29.4 for an explanation of use immunity.

15.7 Conduct of the Hearing

15.7.1 General; Court Interpreters

By the time the custody hearing takes place, the child is usually in the temporary custody of CYFD pursuant to an *ex parte* custody order. Before that, the child may have been taken into emergency custody by a police officer. §32A-4-6(A). Because of the traumatic or exigent circumstances surrounding a child being taken into custody, an early concern is the need for calm and clarity. The court should also consider the need for courtroom security.

Under Rule 10-315(C), the court must make an audio recording of the hearing. The court must be able to give a copy of the recording immediately to any party who wishes to file an appeal under Rule 10-315(I) from the order entered after the hearing.
A party or party's attorney must notify the court at the party's first appearance if a party needs a court interpreter. Rule 10-167(B), Form 10-612. If a party fails to timely notify the court of a need for an interpreter, the court may assess costs against that party for any delay caused by the need to obtain an interpreter. Rule 10-167(B)(4). Before appointing a court interpreter, the court must qualify the interpreter in accordance with Rule 11-604 of the Rules of Evidence, and may use the questions in Form 10-611 to assess the qualifications of the proposed court interpreter.

15.7.2 Is the Child an Indian Child?

At the commencement of the custody hearing, the court will ask each party and participant, including the GAL and the CYFD representative, to state on the record under oath whether the person knows or has reason to know that the child is an Indian child under the Indian Child Welfare Act. Rule 10-315(D). ***See*** §15.9 below for the procedures to be followed and other requirements.

15.7.3 Custody of Indian Children

If the court determines that the child is an Indian child or there is reason to know the child is an Indian child, the child will be treated as an Indian child. This affects the standard that the court must apply when considering custody. Based on *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶¶32-35, the custody hearing is considered an emergency proceeding under the Indian Child Welfare Act. This means, under ICWA, that the court may permit the emergency placement to continue only if the court finds that it is necessary to prevent imminent physical

damage or harm to the child. 25 CFR §23.113, now incorporated into Rule 10-315. ***See also*** Handbook Chapter 32 on ICWA.

If the court is treating the child as an Indian child subject to ICWA, the "imminent physical damage or harm to the child" standard needs to be applied in determining whether emergency placement is appropriate, in addition to the probable cause standard below.

15.7.4 Custody under the Children's Code

After the respondents are advised of their rights, the court will consider whether probable cause exists for CYFD to retain custody pending adjudication. The determination of probable cause is directed to custody, not the underlying petition.

The standard set forth in the statute is whether probable cause exists to believe that:

- the child is suffering from an illness or injury, and the parent, guardian, or custodian is not providing adequate care; or
- the child is in immediate danger from his or her surroundings and removal is necessary for the child's safety or well-being; or
- the child will be subject to injury by others if not placed in the custody of the department; or
- there has been an abandonment of the child by the parent, guardian, or custodian; or
- the parent, guardian or custodian is not able or willing to provide adequate supervision and care. §32A-4-18(C).

If the court finds probable cause, it then needs to determine the custody of the child pending the adjudicatory hearing on the petition. Section 32A-4-18(D) provides two options.

- One possibility is to return legal custody of the child to his or her parent, guardian, or custodian upon such conditions as will reasonably assure the safety and well-being of the child, including protective supervision by CYFD. Protective supervision, as defined in §32A-1-4, allows CYFD to visit the home where the child resides, to inspect the home, to transport the child to court-ordered diagnostic examinations and evaluations, and to obtain information and records about the child.
- The second approach is to award legal custody of the child to CYFD, while making reasonable efforts to preserve family unity, with the paramount concern being the child's health and safety. ***See*** §15.7.5 below.

Practice Note on Placement: When custody is awarded to CYFD, the agency has the discretion to place the child with the most appropriate caretaker. In some situations, this will result in the child remaining in or returning to physical placement in the home, with CYFD able to remove the child without additional legal action if the child becomes endangered. In most cases, however, CYFD places children in substitute care.

Practice Note on Visitation: When CYFD is awarded legal custody and the child is not going to reside with the respondent, CYFD is required to arrange for visitation between the

child, any siblings and the family and fictive kin, as is appropriate under the circumstances. 8.10.8.19 NMAC. The preferred practice is for the parties to arrive at a reasonable arrangement for visitation. Visitation can be monitored both to ensure the safety of the child and to provide additional information as to the nature and quality of parent-child interactions.

If the court finds that probable cause does not exist, then it must return legal custody of the child to the parent, guardian, or custodian pending adjudication. The court will:

- retain jurisdiction;
- unless the court permits otherwise, order that the respondent and child remain in the court's jurisdiction pending the adjudication;
- return legal custody of the child to the child's parent, guardian, or custodian with conditions to provide for the safety and well-being of the child; and
- order that the child's parent, guardian, or custodian allow the child necessary contact with the child's guardian ad litem or attorney. §32A-4-18(F).

The issue of abuse or neglect remains to be adjudicated.

15.7.5 Reasonable Efforts

Reasonable efforts must be made to preserve and reunify the family, with the paramount concern being the child's health and safety. §32A-4-18(E). This means that, prior to filing the petition, reasonable efforts must have been made to prevent or eliminate the need to remove the child from the child's home. §32A-4-7(D). It is incumbent upon the parties to introduce evidence at the custody hearing sufficient to allow detailed findings regarding whether reasonable efforts were made by CYFD to prevent removal from the home.

There may be circumstances in which it was reasonable not to make any efforts to preserve the family. *In re Kenny F.*, 1990-NMCA-004, ¶16, 109 N.M. 472, and *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶¶14-17, 133 N.M. 136. However, these circumstances must themselves be documented at the hearing.

ASFA Note. The federal Adoption and Safe Families Act requires that the court make findings that continuation in the home would be contrary to the child's welfare and that the child welfare agency made reasonable efforts to prevent the need for placement in foster care. These findings must be made within 60 days of the date the child is removed from the home for the child to remain eligible for Title IV-E payments. The finding is included in the form of order for the ex parte custody order (Form 10-505A) but, if not made in that order, should be made no later than the custody hearing, and the finding and a factual recitation included in the custody order.

15.7.6 Examinations and Evaluations

The custody hearing provides the most timely occasion for the court to order the respondent or the child, or both, to undergo appropriate diagnostic examinations or evaluations. Copies of the

reports must be provided to the parties at least five days before the adjudicatory hearing, which does not allow much time for any necessary exams or evaluations to take place. §32A-4-18(G); Rule 10-335.

Practice Note: The ordering of exams and evaluations should not be tacked onto the custody order without a discussion in open court. The court should address the proposed assessment plan and the parties should have an opportunity to comment on it.

Even if the court determines that probable cause does not exist, the court may order the respondent or the child or both to undergo appropriate diagnostic examinations or evaluations as necessary to protect the child's best interests, based upon the allegations in the petition and the evidence presented at the custody hearing. §32A-4-18(G).

Questions of immunity for the respondent undergoing an examination or evaluation should be considered and addressed, if appropriate, before the examination or evaluation begins. ***See*** Handbook §29.5.2.

15.8 Grandparents and Other Relatives

While CYFD will start trying to identify relatives right away (***see*** Handbook §14.9), the custody hearing provides an important opportunity for CYFD and the court to put the respondents on the stand, if necessary, to ask about grandparents and other relatives. 8.10.7.17(B) NMAC.

CYFD is required to start trying to identify relatives right away under §32A-4-17.1, added in 2016. "[T]he department shall exercise due diligence and make reasonable efforts to identify and provide notice to all grandparents; all parents of a sibling of the child, when the parent has legal custody of the sibling; and other adult relatives of the child, including adult relatives suggested by the parents, unless such notice would be contrary to the child's best interests due to family or domestic violence." The statute requires that the notice:

- specify that the child has been or is being removed from the custody of the child's parent or parents;
- explain the options the relative has under federal, state or other law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice;
- describe the requirements for becoming a foster family home and the additional services and support that are available for children placed in such a home; and
- set out the dates of any currently scheduled court hearings that involve the child.

When CYFD determines that the home of an adult relative meets all relevant child protection and licensing standards and placement in the home would be in the child's best interest, the department must give a preference to placement in that home. CYFD will make reasonable efforts to conduct home studies on appropriate relatives who express an interest in providing placement for the child. §32A-4-18(E), added in 2016. Prior to complete licensing, CYFD is able to provisionally license a relative or fictive kin by completing an initial assessment process,

which includes a state and local criminal record check and a check of CYFD's abuse/neglect referral information. 8.26.4.16 and 8.26.4.17 NMAC.

If the respondents are not cooperating with the department in its efforts to locate relatives, the custody hearing provides an important opportunity for the court and CYFD to put the respondents on the stand, if necessary, to ask for the names and contact information of grandparents and other relatives.

The form of custody order approved by the Supreme Court requires the respondents to provide CYFD with information about relatives, for possible relative placement, within five days of the hearing. *See* Form 10-520.

15.9 Indian Children

15.9.1 Is the Child an Indian Child?

As noted above, Rule 10-315 now requires the court to ask each party and participant, including the GAL and CYFD representative, to state on the record under oath whether the party or participant knows or has reason to know that the child is an Indian child under ICWA. A child is an Indian child if he or she is unmarried, under 18 years of age, and a member of an Indian tribe, or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4); §32A-1-4(L).

On the basis of the information and evidence provided, the court will determine if the child is or is not an Indian child. If the evidence is insufficient to make a determination, the court must then decide if there is reason to know the child is an Indian child. This may be based any of the following types of information:

- a participant in the proceeding, an officer of the court, or an Indian tribe, organization or agency informs the court that the child is an Indian child;
- any of the above people or entities informs the court that it has discovered information indicating the child is an Indian child;
- the child gives the court reasons to know he or she is an Indian child;
- the court is informed that the domicile or residence of the child , the child's parent, or the child's Indian custodian is on a pueblo, reservation or Alaska Native village;
- the court is informed that the child is or has been a ward of a Tribal court; or
- the court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe. Rule 10-315(E).

If the court determines that the child is an Indian child or that there is reason to know the child is an Indian child, the court will:

- confirm, by way of a report, declaration or testimony included in the record, that CYFD or other party used due diligence to verify that the child is in fact a member (or a biological parent is a member and the child is eligible for membership);
- ensure that that CYFD promptly sends the notice required by ICWA and its regulations;

- treat the child as an Indian child unless and until it is determined otherwise. Rule 10-315(F).

If the court determines that the child is not an Indian child or that there is no reason to know that the child is an Indian child, the court will proceed as though the child is not subject to ICWA but will order the parties and participants to inform the court if they receive information that provides reason to know the child is an Indian child. If the court finds at a later hearing that the child is an Indian child, the court will proceed as required by Rule 10-315(E). Rule 10-315(G).

15.9.2 Jurisdictional Question

If the child is an Indian child or the court has reason to know the child is an Indian child, the parties should offer evidence on the domicile or residence of the child. The child's tribe has exclusive jurisdiction if the child resides or is domiciled on the reservation. 25 U.S.C. §1911(a); *State ex rel. CYFD in re Andrea Lynn M.*, 2000-NMCA-079, ¶6, 129 N.M. 512; ***see*** Handbook Chapter 32.

15.9.3 Enrollment

If a child is not currently a member of an Indian tribe but is eligible for membership, CYFD has a statutory obligation to pursue enrollment for the child if the child remains in the department's custody at disposition. §32A-4-22(I). Since enrollment can be a lengthy process, the children's court and CYFD should pay close attention early on to situations in which the child is or may be eligible for membership in an Indian tribe.

There may be situations in which the parent is eligible for membership in a tribe but is not yet enrolled and where, if the parent were enrolled, the child would be eligible to enroll and ICWA would apply. In *State ex rel. CYFD v. Marsalee P.*, 2013-NMCA-062, ¶¶25-26, the Court of Appeals reversed a termination of parental rights because CYFD had not complied with §32A-4-22(I) to pursue enrollment for the children in a situation where the children were eligible to enroll once the mother was enrolled, and the mother's enrollment was taking time. The Court suggested that CYFD should have helped the mother pursue enrollment, if necessary to facilitate the children's enrollment. *Id.* ¶24. The Court went on to say that "*the district court has an affirmative obligation* to ensure that the Department complies with Section 32A-2-22(I) before terminating a parent's parental rights." *Id.* ¶27 (emphasis added).

Case Note: CYFD's duty to pursue enrollment is not unlimited. In another appeal of a termination of parental rights, *State ex rel. CYFD v. Nathan H.*, 2016-NMCA-043, the Court of Appeals looked at the sufficiency of the state's efforts. Father argued that ICWA applied to the case because the children were eligible for enrollment; however, enrollment depended on the Mother's lineage and she was not cooperating with CYFD's efforts to track this down. Also, Navajo Children and Family Services determined the children were not eligible based on its research. Finally, Father argued the children were eligible for enrollment in the Ute tribe but no evidence of this could be found. The Court concluded that CYFD's efforts complied with §32A-4-22. "[T]he statute does not require CYDF to implement all possible methods in its investigation." *Id.* ¶29.

Under ICWA and its regulations, the tribes have the exclusive authority to determine if the tribe is the "Indian Child's Tribe" as defined under ICWA. 25 U.S.C. §1903(5) and 25 CFR §23.108.

15.9.4 Placement Preferences

The Children's Code has long had a provision setting forth the ICWA placement preferences found in 25 U.S.C. §1915. §32A-4-9. Rule 10-318, adopted in 2016, requires that the court ensure that CYFD follows these placement preferences when:

- the court finds at the custody hearing or any subsequent hearing that the child is an Indian child or there is reason to know that the child is an Indian child: and
- legal custody is or has been transferred or awarded to the department.

If any party asserts that good cause exists not to follow these placement preferences, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the placement preferences bears the burden of proving by clear and convincing evidence that there is good cause for the departure. Permissible and impermissible considerations are outlined in Rule 10-318. For a discussion of "good cause," see *State ex rel. CYFD v. Casey J.*, 2015-NMCA-088, although it predates the adoption of Rule 10-318 and the 2016 ICWA regulations and guidelines.

See Handbook Chapter 32 on ICWA.

15.10 Stipulations

Frequently respondents will waive the right to contest the probable cause hearing and stipulate to a finding of probable cause and interim custody, but enter a denial as to the petition. Similarly, the respondent might stipulate to certain findings, but not others. In any event, it is important to keep in mind the need to make a record as described in §§15.11 and 15.13 below.

15.11 Evidence

The Rules of Evidence do not apply to custody hearings. §32A-4-18(H); Rule 11-1101(D)(3).

The fact that the Rules of Evidence do not apply does not mean testimony is not given, and often sworn testimony is given. In fact, there may be occasions requiring sworn testimony.

- Sworn testimony may be desirable when CYFD has not submitted a written report and must establish probable cause through witnesses, such as the case worker, police officer, or medical or school personnel.

- Sworn testimony may also be necessary to elicit information about the identity and location of absent parents. Biological fathers who participate in the child's life, for example, may have a constitutionally protected liberty interest and should be identified so

that they can be brought into the case and given the notice and reasonable efforts protection provided by the Children's Code. 8.10.7.16 NMAC. On the other hand, a mother's declaration under penalty of perjury that an alleged father has not assumed sufficient responsibility for the child to be treated as an acknowledged father should be sufficient for a *prima facie* showing as to the status of that father, assuming the individual has failed to file with the putative father registry. *See* §32A-5-19 and §32A-5-3(F) and (G) regarding alleged and acknowledged fathers; ***see also*** Handbook Appendix B for definitions of the two terms.

- As explained earlier the Children's Code requires that CYFD try to identify and provide notice to grandparents and other adult relatives of a child early in the proceeding. The case worker will ask the parents about other relatives during the investigation but, if the parents are not forthcoming, the custody hearing gives the children's court attorney an opportunity to ask them under oath.

- Also as explained earlier, the court will ask each party and participant to state under oath whether they know or have reason to know that the child is an Indian child under ICWA.

- Another area in which sworn testimony may be advisable is on the subject of reasonable efforts since ASFA regulations require the court's findings on this subject to be "explicitly documented." ***See*** §15.13 below, as well as Handbook §36.4 on ASFA. At the very least, any stipulations should include facts specific enough to meet the ASFA standards on documentation.

15.12 Appointing an Educational Decision Maker

Before the hearing closes, the judge will need to appoint an educational decision maker for the child. This is the individual who will attend school meetings and make decisions about the child's education that a parent could make under the law, including decisions about the child's educational setting, and the development and implementation of an individual education plan for the child. The respondent is to be appointed unless the court determines that this would be contrary to the child's best interest. If another qualified individual needs to be appointed, the court will take into account whether the individual:

- knows the child and is willing to accept responsibility for making educational decisions;
- has any personal or professional interests that conflict with the child's interests; and
- will be permitted to make all necessary educational decisions, including whether the child is a child with a disability under the federal Individuals with Disabilities Education Act.

The court may change the appointment upon motion of a party at any time. It will also review the appointment at every subsequent stage of the proceeding. §32A-4-35; Rule 10-316; Form 564. ***See also*** Handbook Chapter 35 on education.

15.13 Findings and Order

The court must make and record findings about whether there is probable cause to believe that one or more of the statutory bases exists for giving legal custody to CYFD or returning legal custody to the parent, guardian, or custodian with conditions. ***See*** §15.7.4 above.

The court must also make a finding as to the efforts made to prevent removal of the child, or to make it possible for the child to return to the home, and whether those efforts were reasonable. ***See*** §15.7.5 above. According to the ASFA regulations, the judicial determination must be explicitly documented, made on a case-by-case basis, and stated in the court order. ***See*** Handbook §36.4 on ASFA. (Note: This determination could conceivably be made earlier, in the *ex parte* custody order.)

The court must make findings about whether the child is an Indian child and the case subject to ICWA and, if it has reason to believe the child is an Indian child, make the findings described in §13.7.3. If it does not find that the emergency placement is necessary to prevent imminent physical danger or harm, the child must be restored to the parents, the child transferred to the jurisdiction of the tribe, or a "child custody proceeding" initiated. 25 C.F.R. §23.113. See Chapter 32 for more on this provision in the ICWA regulations.

Finally, a finding that granting custody to CYFD is in the best interest of the child should support any order placing or continuing the child in CYFD's custody.

The order should reflect the child's custodial status, including any conditions or limitations concerning visitation or protective supervision. ***See*** §15.7.4 above. A separate order (*see* Form 10-564) must be issued appointing an educational decision maker. ***See*** §15.12 above.

Because subsequent hearings are subject to a tight timeline, it is the best practice for the court to set the date and time for the pre-adjudicatory meeting, any pretrial conference, and the adjudicatory hearing in open court at the custody hearing. This ensures that the matters are scheduled within the correct timeframe and that the parties are aware of the dates early on.

Appeals Under §32A-4-18. The court's decision must be made by a written order filed with the clerk of the court at the earliest practicable time. Rule 10-315(H). Section 32A-4-18 provides that a party aggrieved by an order entered pursuant to the section may file an immediate appeal as a matter of right. If the order grants legal custody to or withholds it from one or more of the parties, the appeal must be expedited and heard at the earliest possible time. Procedures for these appeals are set forth in the Rules of Appellate Procedure, Rule 12-206.1. ***See*** Handbook Chapter 26 on appeals.

Under §32A-4-18, the children's court has jurisdiction to take further action in the case pending the appeal, although a stay is possible under §32A-1-17(B). The Supreme Court has made it clear in Rule 10-343(E)(3) that the deadline for the adjudicatory hearing is not affected by an appeal under §32A-4-18.

15.14 Checklist

CUSTODY HEARING
CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Manner and date of service
  - Notice of hearing
  - Appointment of counsel; opportunity to consult
  - Language or cognitive challenges
- ☐ Inquiry regarding
  - Absent parents
  - Presence of child
  - Relatives
- ☐ Indian child
  - Determine whether Indian child
  - Domicile/residence of child
  - Notice to tribe
- ☐ Advisement of rights
  - Allegations of petition
  - Right to hearing on merits of petition
  - Right to an attorney
  - Possible consequences if allegations are found to be true, including termination of parental rights
- ☐ Continuing respondent counsel's appointment
  - Indigency or interest of justice
- ☐ Use immunity, if requested
- ☐ Stipulations of parties, if any
- ☐ Rules of Evidence do not apply
- ☐ If Indian child, apply emergency placement standards
- ☐ Probable cause determination
- ☐ Reasonable efforts to prevent removal
- ☐ Custody pending adjudicatory hearing
  - Any conditions, if child is with respondent
  - ICWA placement preferences
- ☐ Assessments and evaluations
- ☐ Order to identify relatives
- ☐ Separate order naming educational decision maker
- ☐ Scheduling of further proceedings
  - Pre-adjudicatory meeting/mediation
  - Adjudicatory hearing

CHAPTER 16

PRE-ADJUDICATORY HEARING MEETING

The pre-adjudicatory hearing meeting is held to try to settle issues and develop a case plan (also known as the treatment plan). This chapter covers:

- Purpose and timing of the meeting.
- Conduct of the meeting.
- The case plan.

16.1 Purpose of the Meeting

The pre-adjudicatory hearing meeting is intended to expedite settlement, develop a case plan, and identify placement alternatives. The meeting requirement in §32A-4-19 consists of one subsection:

> B. Prior to the adjudicatory hearing, all parties to the hearing shall attend a mandatory meeting and attempt to settle issues attendant to the adjudicatory hearing and develop a proposed treatment plan that serves the child's best interest.

The term "treatment plan" is a term that is being increasingly replaced with the term "case plan". *See*, for example, §§32A-4-21 and 32A-4-22, as amended in 2016, as well as CYFD's permanency planning rules, 8.10.8 NMAC. The term "case plan" will be used in this Handbook, often with "treatment" in parentheses as a reminder.

There are two aspects to these meetings, which are sometimes referred to as treatment or case planning conferences:

- resolving the abuse or neglect allegations; and
- addressing the case plan.

Even if the parties are not able to agree on one of these, they may be able to agree on the other. Similarly, it may be possible to narrow the issues to be tried.

16.2 Timing and Initiation

The meeting is held some days before the adjudicatory hearing. It is best to set the dates for both the meeting and the adjudicatory hearing at the initial custody hearing, while the parties are present, especially in view of the accelerated timeframes.

As a practical matter, CYFD takes responsibility for notifying the parties and conducting the meeting. While the children's court attorney arranges the meeting, the judge orders everyone to appear.

Practice Note: Some jurisdictions have experimented with scheduling the meeting at the courthouse with a judge available, so that, if a plea or other agreement is reached, it can be put on the record, the adjudicatory hearing vacated and a dispositional hearing scheduled. Alternately, the adjudicatory hearing can be used to present admissions or a proposed consent decree discussed at the meeting.

16.3 Participants

Section 32A-4-19(B) requires that all parties to the adjudicatory hearing attend the meeting. Hence, at a minimum, the meeting should include the children's court attorney and the permanency planning worker for CYFD, the respondent and respondent's counsel, and the child (if age and developmentally appropriate) and the child's GAL or youth attorney. Any other persons the state has joined as parties or who have been permitted to intervene should also participate.

16.4 Conduct of the Meeting

While the court does not participate in the pre-adjudicatory hearing meeting, it can play a role by encouraging and admonishing the parties to take advantage of this confidential and non-coercive opportunity to air their concerns. Mediation is used for this meeting in a number of jurisdictions. Over half of the children's court mediations statewide occur at the pre-adjudication stage. Mediation is not mandatory and many courts have elected an "opt in" approach. However, some judicial districts, often those with more experience with the Children's Court Mediation Program, have adopted an "opt out" approach and routinely order pre-adjudication cases for mediation. ***See*** Handbook §31.4.

Whether or not mediation is used, the meeting offers an excellent and important opportunity to try to settle the case. The prospects for settlement are greatest before positions become entrenched and personalities traumatized by litigation. Early settlement is particularly important when the lives of children are in the balance. Parents who are motivated to regain custody of their children may be more disposed to participate in a plan developed in a confidential, non-adversarial setting.

A parent may be reluctant to disclose information that could be construed as an admission, especially when there is the possibility of criminal prosecution. CYFD has prepared a form that meeting participants sign concerning the non-disclosure of statements made at the meeting, but the agreement is not binding on the district attorney. As a result, some respondents' attorneys may advise their clients to remain silent as to the allegations of abuse or neglect. Parents and their attorneys may feel somewhat more comfortable participating in mediation at this stage, with the additional confidentiality protections afforded by the

Mediation Procedures Act. However, there is an exception in §44-7B-5 for disclosures of abuse or neglect that would have to be reported under §32A-4-3.

Despite the limits to confidentiality, in either the meeting or a mediation:

- productive talks can take place regarding aspects of the case plan;
- in many cases, questions of custody and visitation can be negotiated, even when there is disagreement as to some of the allegations of the petition; and
- the attorneys can use the discussion to narrow the issues that need to be tried.

If no agreement is forthcoming, the parties are at least in a better position because of the pre-adjudicatory meeting or mediation to advise the court regarding the anticipated length and extent of the trial and to address any pre-trial issues.

Practice Note. Attorneys concerned about confidentiality and disclosure may want to consult Rule 11-408 of the Rules of Evidence on compromise offers and negotiations, Rule 10-342(G) of the Children's Court Rules on admissions, Children's Court Form 10-563, (Report of Mediation), the Mediation Procedures Act, §§44-7B-1 through 44-7B-6. Additionally, in June 2017 New Mexico adopted, by Supreme Court Order No. 17-8500-013, the "Statewide Court-Connected Mediation Guidelines" dated September 2016, which address confidentiality issues among many other things, https://adr.nmcourts.gov/adr-commission-information.aspx.

16.5 Proposed Case Plan

If the child is adjudicated an abused or neglected child during the adjudicatory hearing or if the parties settle the abuse or neglect issues in such a way that the case proceeds directly to the dispositional hearing, then the court will consider the case plan proposed by the parties at the dispositional hearing. The pre-adjudicatory hearing meeting is an opportunity for the parties to try to come to agreement on what the proposed plan should look like.

Ideally, the permanency planning worker and the parties will have discussed items for the proposed case plan prior to the meeting and the worker will come to the meeting with a proposed plan, with all necessary assessments and evaluations having been completed. If time allows, the pre-disposition study required by §32A-4-21 will be circulated to the parties in advance of the meeting.

Section 32A-4-21(B) calls for a case plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and the parents to facilitate permanent placement of the child in the parent's home. The plan should address:

- the safety threats and the parental behavior, including lack of protective capacity, that led to removal of the child from the home and that have to be changed as conditions of return; and
- the child's needs.

Meeting participants should examine the plan:

- Are the desired outcomes/goals of the plan clear?
- Is there a logical connection between identified safety threats, the plan requirements, and the changes needed in behavior or circumstances?
- Who is responsible for carrying out which portions of the plan?
- What obstacles to implementation of the plan can be identified and how can they be overcome?
- Who can help?
- How can the parent demonstrate that protective capacity has been developed or that the problematic behaviors/circumstances are changing or have changed?
- Most importantly, does the parent understand the requirements and consequences that have been proposed?
- Are the child's needs being addressed, e.g., special education needs, psychological problems, physical problems, etc.?

Examining the case plan with these issues in mind and working to ensure that the parents understand the goals and requirements of the plan are particularly important. Mere compliance with the terms of a plan, without changes in behavior or circumstances that would eliminate or mitigate safety threats and reduce the risk of harm to the children, does not guarantee return of the children to the parents. *See State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, ¶9, 140 N.M. 390.

With regard to placement and visitation:

- What provisions have been made for visitation or otherwise maintaining the relationship between the child and the respondent?
- What provisions have been made for siblings to be placed together or, if such placement is contrary to the safety and well-being of one of the siblings, what provisions have been made for visitation or otherwise maintaining the relationship between the siblings?
- If the child must be in substitute care, can the respondent help identify relatives or other adults who are known to the child and who could serve as the substitute care provider, keeping in mind state licensing requirements for substitute care providers? This concern can be especially significant when the respondent is or will be incarcerated or enrolled in residential treatment, as for substance abuse.

Ordinarily, the plan will concentrate on those steps necessary for the child to return to the home. However, if aggravated circumstances are alleged (***see*** Handbook §17.5.4) or if the child's permanency plan has already changed, then CYFD will emphasize permanency as the child's primary requirement and identify an alternative placement as the primary objective of the plan. In such cases, candor and creativity can combine to focus the meeting on finding a suitable permanent placement for the child, and may include a conversation about some form of post adoption contact agreement. ***See*** Handbook §§24.3.3, 31.4, 37.4.2.

Important Considerations: There can be a tendency to attempt to "fix" other conditions within the home or family structure, or affecting the parent's lifestyle, without a demonstrable connection to those immediate safety threats and welfare factors that prevent the parent from properly caring for the child. The parties should remember to focus on the behavior of the parent that led to the removal of the child from the home and the changes in behavior that would allow the child to return home.

Once the case plan is in place, the parties should not lose sight of the fact that the various services and programs being offered to or required of the parent are only a means to an end, the end being the change in behavior needed to allow the parent to properly care for the child. If a parent complies with program requirements but does not change his or her behavior, the child will not be able to return home. Likewise, failure to complete all aspects of a treatment plan should not prevent reunification if the respondent has otherwise demonstrated the ability to properly care for the child.

CHAPTER 17

ADJUDICATORY HEARING

The adjudicatory hearing is the trial in the case. This chapter covers:

- The 60-day deadline for holding the hearing.
- Definitions of the terms "abused child" and "neglected child."
- Definition of the term "aggravated circumstances."
- The need for the court to make findings on these matters.
- For Indian children, ICWA-required findings.
- Admissions and no contest pleas.
- Motion for a new hearing.

17.1 Purpose

The adjudicatory hearing is the trial in the abuse or neglect case. It entails a full evidentiary hearing complete with all of the protections of due process. The findings made at this hearing determine whether the state continues to intervene in the life of the family.

17.2 Timeline

17.2.1 60-Day Deadline

Rule 10-343(A) provides that the adjudicatory hearing must be commenced within 60 days after the latest of the following: 1) the date that the petition is served on the respondent; 2) the date of the termination of any diversion agreement; 3) if a mistrial is declared or a new trial is ordered by the trial court, the date that such order is filed; or 4) in the event of an appeal from a judgment or disposition on a petition alleging abuse or neglect, the date that the mandate or order is filed in the children's court disposing of the appeal. Section 32A-4-19 of the Children's Code provides for the adjudicatory hearing to be commenced within 60 days after the date of service on the respondent. Timelines of this nature are procedural and the rule would govern in case of conflict. *See State ex rel. CYFD v. Arthur C.* 2011-NMCA-022, ¶21, 149 N.M. 472. As a practical matter, the date the petition is served on the respondent will be the applicable date in most cases.

Appeals from orders entered at the custody hearing do not affect these time limits. Rule 10-343(E).

17.2.2 Extensions of Time

Extensions may be granted by the children's court judge for good cause shown, provided the aggregate of all extensions granted by the judge does not exceed 60 days, except upon a showing of exceptional circumstances. The order must be in writing and shall state the reasons supporting the extension. Rule 10-343(C), as amended in 2015. The motion for an extension must concisely state the facts that support the extension and be filed within the 60 day period described in §17.2.1 above, except that a motion may be filed within 10 days of the expiration of that period if based on exceptional circumstances beyond the control of the parties or the trial court. Rule 10-343(D), as amended.

17.2.3 Failure to Timely Commence

The case must be dismissed with prejudice if the adjudicatory hearing does not commence within the time limits provided in Rule 10-343, including any court-ordered extensions. Rule 10-343(E)(2**)**; *see also* §32A-4-19(D)**.** An appeal from a custody order under §32A-4-18 and Rule 10-315 does not affect this time limit. Rule 10-343(E)(3).

One question is what it means for a hearing to commence but not be completed within the 60 days. The Rules of Criminal Procedure formerly required that a defendant's trial commence within a prescribed period of time but was silent on completion, much like current Rule 10-343. Observing that there was no requirement in the rule that all subsequent stages of the trial be contiguous, the Court of Appeals held that the rule did not require that the trial be completed within the prescribed period. *State v. Rackley*, 2000-NMCA-027, ¶4, , 128 N.M. 761, citing *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617. However, the Court also stated that it would scrutinize closely any prolonged, unjustified delay or conduct suggestive of an attempt to circumvent the rule. *Id.* ¶7.

Because of the need of children for permanency and the short time frame for these cases, adjudications should be commenced and concluded as expeditiously as possible. It is urgent that the adjudicatory hearing be concluded early enough to give parents even a minimal amount of time to try to follow the case plan (also known as the treatment plan).

Practice Note: It is suggested that courts set aside at least one half day within the 60-day window for the adjudicatory hearing.

17.3 Initiation and Notice; Court Interpreters

As a matter of practice, the children's court attorney is responsible for notifying the parties of the hearing and assuring that it is timely held. Similarly, any party who has requested an extension of time is responsible for ensuring that any new date for the hearing falls within the time allowed and that all parties are notified of the change.

Practice Note: It is preferable that, whenever possible, the adjudicatory hearing be set at or before the custody hearing and announced in open court while the parties are present at the custody hearing. This ensures that the parties are aware of the date early on and should minimize the need for extensions of time. Due to the short time frame, the court, the attorneys, and their support staffs also need to communicate and cooperate on scheduling matters, especially if hearings need to be vacated and/or re-set.

If a party needs a court interpreter, the party or party's attorney is responsible for notifying the court at the party's first appearance before the court. If a party's witness needs a court interpreter, the party must notify the court in writing upon service of the notice of hearing. Rule 10-167(B). The party should use the notification form found in Form 10-612 and indicate whether the party anticipates that the proceeding will last more than two hours. Under the rule, a need for a court interpreter exists "whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding." Rule 10-167(B)(1). If a party fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay that causes. Rule 10-167(B)(4).

Before appointing a court interpreter, the court must qualify the interpreter in accordance with Rule 11-604 of the Rules of Evidence and may use the questions in Form 10-611 to assess the qualifications of the proposed court interpreter. At the beginning of the hearing, the judge will also instruct the parties and others present in the courtroom regarding the role of the court interpreter. Rule 10-167(E)(2).

If the need for a court interpreter is identified under Rule 10-167(B), then a case participant may only waive court interpretation services if the waiver is in writing and the requirements of Rule 10-167(D) are met. Neither the judge nor a party's attorney may act as an interpreter for the proceeding, except that a party and his or her attorney may engage in confidential attorney-client communications in a language other than English. Rule 10-167(C)(3).

17.4 Participants

The participants in the adjudicatory hearing include the parties, their attorneys and the witnesses. Even though the child is a party, the court may exclude a child under 14 from the hearing if it finds that this is in the child's best interest. The court may only exclude a child who is 14 or older after making a finding that there is a compelling reason to exclude the child and stating the factual basis on the record. §32A-4-20(E).

2016 and 2017 Rules: The Supreme Court requires counsel for an older youth to notify the court in writing that the youth has been advised of his or her right to attend. Rule 10-325; Form 10-570. For children under 14, the rules requires the GAL to advise the child, to the maximum extent possible given the child's developmental capacity, of the right to attend, state whether the child wants to attend, if ascertainable given developmental capacity, and state whether the GAL believes that attendance is in the child's best interest. Rule 10-325.1; Form 10-570.1. Both rules require that the child to file a motion for alternative testimony under Rule 10-340 if the child wishes to offer information about the substantive allegations in the petition without appearing in court.

If not previously resolved, the court should determine whether the child is an Indian child. Hopefully, this was determined earlier because, if the case is governed by the Indian Child Welfare Act (ICWA), there are very important findings that will need to be made at the adjudication, with notice to the tribe. These are described later in this chapter. ***See*** Handbook §15.9.1 for the rules on determining whether a child is an Indian child.

A transport order may be needed if the respondent is incarcerated; ensuring that parents who are incarcerated participate meaningfully in the hearing is important. ***See*** Handbook §24.5.8. If the person is in federal prison, habeas corpus may be a means of bringing the parent into state court for the hearing. If for any reason, a parent is unable to attend court, alternative methods of participation in the proceedings should be considered. *See State ex rel. CYFD in re Ruth Anne E.*, 1999-NMCA-035, 126 N.M. 670.

A common predicament occurs when the respondent does not show up for the hearing. This is **not** a situation for a default judgment, which is not appropriate in an abuse or neglect case. *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, ¶23, 127 N.M. 699. Note also that the Children's Court Rules do not provide for default judgments.

If the respondent does not appear, an inquiry on the record should go to such questions as: was there actual notice, whether attempts to provide notice were reasonable under the circumstances of the case, communication with counsel, and the like. *Maria C.*, 2004-NMCA-083, ¶52. One approach may then be to postpone the hearing in hopes that the respondent will attend, but this is only an option if time permits. Another approach, suggested in *Stella P.*, would be to proceed with the trial but to require that the state prove abuse or neglect by clear and convincing evidence, as if the respondent were present and contesting the allegations. 1999-NMCA-100, ¶¶30, 36.

If a respondent who has not yet testified appears, the court should receive the testimony of that respondent concerning the identity and whereabouts of any other person who may have a custodial or protected interest in the child and the nature of that relationship. ***See*** Handbook §15.11. Similarly, the respondent could be asked about relatives who might be interested in caring for child. See §15.8.

Although there is no right for CASAs or foster parents who are not parties to be heard at the adjudicatory hearing, foster parents and CASA volunteers may be present as observers, subject to court approval and the provisions of §32A-4-20(C) and Rule 10-324. Foster parents can be called as witnesses by any of the parties.

Abuse and neglect hearings are closed to the general public. Only the parties, their counsel, witnesses and other persons approved by the court may be present. Accredited representatives of the media are also allowed to attend under certain conditions. §32A-4-20(B) – (D); Rule 10-324. ***See*** Handbook §15.4 on the procedures and standards for the court to use in determining who may attend.

Persons granted admission to a hearing who intentionally divulge protected information are guilty of a petty misdemeanor. §32A-4-20(F).

17.5 Conduct of the Hearing

17.5.1 No Right to Jury Trial

The parties do **not** have a right to a jury trial in an abuse or neglect case. *State ex rel. CYFD in re T.J.,* 1997-NMCA-021, 123 N.M. 99; *see* Committee Commentary to Rule 10-314.

17.5.2 Making a Record

The court's decision at the adjudicatory hearing is an appealable one. *State ex rel. CYFD v. Frank G.,* 2005-NMCA-026, 137 N.M. 137, affirmed on other grounds in *In re Pamela A.G.* 2006-NMSC-019, 139 N.M. 459..Also, basic due process considerations apply to the hearing. *Pamela A.G.*,¶11; *State ex rel. CYFD v. Kathleen D.C.,* 2007-NMSC-018, ¶¶12, 14, 141 N.M. 535.

It is very important that the practitioners before the court make a good record, offer the evidence that should be offered, and state objections clearly on the record. Because of the press of business and the general preference for informality in other aspects of an abuse or neglect case, both the court and the attorneys may be inclined to be less formal than in other types of trials. However, since the record made will be critical to any appeal taken, counsel and the court should fully develop the record, as fundamental liberty interests are implicated. *See State ex rel. CYFD v. Amanda M.,* 2006-NMCA-133, ¶¶20-22, 140 N.M. 578.

With regard to court interpretation, the court may make and maintain a record of the interpretation at the request of a party. Unless the parties agree otherwise, the requesting party pays the costs for making this record. Rule 10-167(E)(5).

In a number of Court of Appeals decisions, the court has declined to address an issue because it was not preserved below. In *State ex rel. CYFD v. Patricia N.,* 2000-NMCA-035, 128 N.M. 813, appellants criticized the children's court for not ordering a predisposition report to obtain certain information about the child. The Court of Appeals declined to address the issue, finding no indication that the issue was preserved below, there being no record showing whether a disposition report was ordered or not. *Id.* ¶11. *See also Pamela A.G.,* 2006-NMSC-019, ¶15 .

17.5.3 Definitions of Abuse and Neglect

The court must determine whether the allegations of the petition are true, by admission or proof. If the allegations are denied, the court must proceed to hear the evidence and make and record its findings on whether the child is an abused child, a neglected child, or both. 32A-4-20(G).

The definitions of "abused child" and "neglected child" are critical in determining what must be proven and found. Given their importance, the current definitions are set forth in full:

"**Abused child**" means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;
(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;
(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;
(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or
(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child. §32A-4-2(B).

The children's court in the *Carl C.* case was able to determine that the abuser was either the mother or the father but could not determine which one. The Court of Appeals held that evidence that the abuse was perpetrated by either the mother or the father was sufficient for a court to conclude that "the action or inaction of a parent, guardian, or custodian" caused the abuse. *State ex rel. CYFD v. Carl C.*, 2012-NMCA-065, ¶12. "Had the Legislature intended to require a court to specifically find which parent caused the abuse, it would have so specified." *Id*.

The term "physical abuse," as used in the definition of "abused child," includes any case in which the child suffers strangulation or suffocation and any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and:

- there is not a justifiable explanation for the condition or death;
- the explanation given for the condition is at variance with the degree or nature of the condition;
- the explanation given for the death is at variance with the nature of the death; or
- circumstances indicate that the condition or death may not be the product of an accidental occurrence. §32A-4-2(H) (strangulation and suffocation added in 2018).

Other terms that are used in the definition of "abused child" and that have their own definitions are sexual abuse and sexual exploitation.

- "Sexual abuse" includes criminal sexual contact, incest or criminal sexual penetration as those acts are defined by state law. §32A-4-2(J). *See also* §§30-9-11, 30-9-13 and 30-10-3.
- "Sexual exploitation" includes:
  - allowing, permitting, or encouraging a child to engage in prostitution;
  - allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or

- filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law. §32A-4-2(K).

"Neglected child" means a child:

(1) who has been abandoned by the child's parent, guardian or custodian;
(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;
(3) who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;
(4) whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or
(5) who has been placed for care or adoption in violation of the law; provided that nothing in the Children's Code may be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Children's Code; and further provided that no child shall be denied the protection afforded to all children under the Children's Code. §32A-4-2(G).

"Abandonment," a term used in the above definition of "neglected child," includes instances when the parent, without justifiable cause:

- left the child without provision for the child's identification for a period of fourteen days; or
- left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:
  - three months if the child was under six years of age at the commencement of the three-month period; or
  - six months if the child was over six years of age at the commencement of the six-month period. §32A-4-2(A).

In *State ex rel. CYFD v. Michael H.*, 2018-NMCA-032, the Court of Appeals addressed what may or may not constitute justifiable cause under §32A-4-2(A). The father had no contact with and did not provide financial support for the infant child for over three months. The trial court determined that Father had neglected the child by abandonment under §32A-4-2(A) and 32A-4-2(G)(1). The Court of Appeals affirmed and found that Father's lack of knowledge that Mother was neglecting the child was irrelevant to his duty to provide support to, and communicate with, the child. ¶¶28-30. It also found that the lack of "certain knowledge" through DNA testing that he was the Child's father was not justifiable cause for leaving the child in Mother's care without support or communication. ¶¶34-35, 37, 39-40.

Neglect also occurs when a parent fails to provide medical care necessary for the child's well-being when the parent is able to provide such care. §32A-4-2(G)(2). In *State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶30, the Court of Appeals upheld an adjudication of abuse and neglect when the evidence demonstrated that mother did not recognize and seek treatment for the child's severe head trauma even though the injury was visible to others who saw the child later and which the testimony established would have been visible to mother.

In *State ex rel. CYFD v. Amanda H.* (not to be confused with *Amanda M.)*, 2007-NMCA-029, ¶¶ 21-31, 141 N.M. 299, the Court of Appeals reversed an adjudication of neglect because of insufficient evidence. The evidence showed that the baby's positive toxicology result was likely a false positive, that mother's admitted use of illegal drugs during the first trimester of her pregnancy did not cause the baby to be born with a drug addiction or any other health problem, and that mother's history of violence, past drug addiction, and criminality had not rendered her unable to properly care for her child. The court held that the evidence was not clear and convincing that mother either intentionally or negligently disregarded her child's well-being and needs, as required by §32A-4-2(E)(2) (now (G)(2)), or that she was unable to provide proper parental care under §32A-4-2(E)(4) (now (G)(4)). On its own, risk of future neglect is not evidence of neglect as defined in these statutes. *Id*. ¶29.

In *State ex rel CYFD v. Christina L.*, 2015-NMCA-115, the Court of Appeals elaborated on the standard of proof required under §32A-4-2 (G)(4). The Court stated "…the distinguishing feature under Section 32A-4-2(E)(4) [now G(4)] is the requirement that CYFD establish by clear and convincing evidence that one of the listed conditions -- such as a mental disorder or incapacity -- is the cause of the parent's inability to discharge his or her responsibilities to the child." *Id*. ¶17. In order to do so, the Court observed, "it is unlikely that a finding of neglect under the 'mental disorder or incapacity' element of Section 32A-4-2(E)(4)) [now G(4)] could be sustained by anything other than a diagnosis supported by the evidentiary reliability of the underlying scientific knowledge." *Id.* ¶22. The Court found the evidence and the trial court's rationale for its adjudication lacking and reversed the adjudication of neglect.

In *State ex rel. CYFD v. Shawna C.*, 2005-NMCA-066, 137 N.M. 687, the appellant contended that "the district court effectively based its finding of abuse or neglect upon Mother's character and mental deficiency 'standing alone,' without any showing of actual errors or omissions in Mother's parenting." *Id.* ¶23. The Court of Appeals agreed "that low IQ, mental disability, or mental illness alone are not sufficient grounds for a finding of abuse or neglect." *Id.* ¶27. The question is whether the parent is "unable to discharge [her] responsibilities to and for the child" because of these conditions. The statute requires a clear and convincing showing of an inability to parent in the specified circumstances, which is what the lower court found in that case. *Id.* ¶30.

Leaving an infant at a hospital, fire station, or law enforcement agency with staff on-site at the time, in accordance with the Safe Haven for Infants Act, protects a parent, guardian, or custodian from criminal prosecution for child abandonment, but does not protect against abuse and neglect proceedings under the Children's Code. §24-22-3.

17.5.4 Aggravated Circumstances

A specific inquiry occurs when CYFD alleges that the respondent has subjected the child to aggravated circumstances as defined in §32A-4-2, which is set forth below. When aggravated circumstances are alleged, the court must make and record its findings on whether they have been proven. The concept of aggravated circumstances is important, not with respect to whether the child is an abused or neglected child, but with respect to whether CYFD must undertake reasonable efforts to preserve or reunify the family. Specifically, when the court finds that aggravated circumstances exist, it may decide that CYFD is not required to make reasonable efforts toward preservation or reunification. §32A-4-22(C). ***See*** Handbook §18.14.2. *See also State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, 133 N.M. 136.

"**Aggravated circumstances**" include those circumstances in which the parent, guardian or custodian has:

(1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;
(2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
(3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or
(4) had his parental rights over a sibling of the child terminated involuntarily. §32A-4-2(C).

Included within the definition of aggravated circumstances is the phrase "great bodily harm," which is also defined. "Great bodily harm" means an injury to a person that creates a high probability of death, that causes serious disfigurement, or that results in permanent or protracted loss or impairment of the function of any member or organ of the body. §32A-4-2(F).

In *State ex rel. CYFD v. Raquel M*., 2013-NMCA-061, ¶1, the Court of Appeals upheld a district court determination that termination of parental rights over a sibling constituted aggravated circumstances, even though the termination was on appeal when the determination was made. This issue arose when CYFD sought to terminate the mother's parental rights over a second child. When the court granted termination, Mother appealed. She argued that relieving CYFD of its obligation to make reasonable efforts based on the earlier termination of parental rights over a sibling, while an appeal was pending on the earlier termination, violated her right to due process. ¶21. The Court of Appeals disagreed, saying that she was free, on her own, to engage in efforts toward reunification, and yet she failed to do so. *Id*. ¶23. (It is worth noting that the earlier termination was affirmed by the Court of Appeals during the pendency of the appeal regarding the Child. *Id*. ¶17.)

The appellate court in *Raquel M*. observed that, in some cases, the facts or circumstances may call for delaying an aggravated circumstances determination pending the outcome of an

appeal. Whether the court should make such a determination and the timing of the determination is properly left to the sound discretion of the district court. 2013-NMCA-061, ¶26.

Unlike reasonable efforts under state law, aggravated circumstances do **not** affect the requirement that active efforts be proven under ICWA. In an adjudication involving an Indian child, CYFD must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. ***See*** §17.11.2 below. *There is no exception in ICWA for aggravated circumstances.* Even if the state might be relieved from proving reasonable efforts, active efforts must still be proved. *See In the Interest of J.S.B.*, Jr., 691 N.W.2d 611, 620 (S.D. Sup. Ct. 2005).

17.6 Admissions, Including No Contest Pleas

Most often, if there is going to be an admission or no contest plea, the admission or plea will have resulted from the pre-adjudicatory meeting and be scheduled before the court accordingly. However, a respondent could decide at any time, even in mid-trial, not to contest any further. At that point, counsel for the respondent should inform the court that the respondent is prepared to enter an admission, either by:

- admitting sufficient facts to permit a finding that some or all of the allegations of the petition are true; or
- entering a plea of no contest by declaring his intention not to contest some or all of the allegations in the petition. Rule 10-342(A).

Rule 10-342 makes it clear that a no contest plea is an admission for purposes of the case. However, the rule also provides that the plea may not be used as an admission for any other civil or criminal purpose. *See* Rule 10-342(A).

The court may not accept an admission, including the entry of a no contest plea, without first addressing the respondent personally, in open court, to ensure that the admission is given freely, knowingly, and voluntarily. The court must determine that the respondent:

- understands the allegations of the petition;
- understands the dispositions that the court may make if the allegations of the petition are found to be true;
- understands that making an admission means that the court will enter a finding that the child is an abused or neglected child as to that respondent and that such a finding can be used against the respondent to establish the fact of abuse and/or neglect in the event the case proceeds to a hearing on a motion to terminate parental rights;
- understands that he or she has a right to deny the allegations in the petition and to have a trial on them; and
- understands that, by making an admission, he or she is waiving his right to trial; and
- that the admission is voluntary and not the result of force or threats or promises other than those in any consent decree agreement. Rule 10-342(C).

Practice Note: It is very important to ensure that a parent understands that, if he or she enters a plea to an aggravated circumstances allegation, the resulting finding may allow the court to relieve CYFD of any obligation to make efforts to assist the parent to reunify with the child. *See State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶12.

Before accepting an admission the court must satisfy itself that there is a factual basis for accepting it. However, if the admission is a no contest plea, the court may not question the respondent. Support for a finding that one or more of the statutory grounds alleged in the petition are true must be obtained by some other means. Rule 10-342(D).

If the child is in CYFD's custody, the court must accept or reject the admission, including a no contest plea, within five days after the admission is made. Rule 10-342(H). Once the court accepts an admission, including a no contest plea, with the exception of an admission accepted for purposes of a consent decree, the court may proceed to make any disposition permitted by law that it deems appropriate under the circumstances. Rule 10-342(E).

Practice Note: If the respondent makes an admission as to some but not all of the allegations in the petition, CYFD may proceed to prove the allegations that were not admitted. Whether the department will want to do so depends on the nature of the allegations in the case and the importance, if any, of obtaining findings on them.

To the extent that the disposition is tied to the findings in the adjudication, it may be very important to have a particular finding. The availability of treatment for the respondent or possibly the child may depend, for example, on the findings in the adjudication.

17.7 Consent Decrees

A consent decree in an abuse or neglect proceeding is an order of the court, after an admission has been made, that suspends the proceedings and in which, under terms and conditions negotiated and agreed to by the respondent and CYFD:

- legal custody of the child is transferred to CYFD for a period not to exceed six months from the date of the decree; and
- the child is allowed to remain with the respondent or other person, and the respondent will be under CYFD supervision for a period not to exceed six months. Rule 10-342(B).

If the court accepts the consent decree, the court may approve the disposition provided for in the decree or another disposition more favorable to the respondent than the one provided. If the court rejects the consent decree, the decree is null and void. Rule 10-342(F).

The procedural rules that apply to admissions, described in §17.6 above, also apply to consent decrees. *See* Rule 10-342.

Admissions and Consent Decrees – Some Pros and Cons

Admissions may be necessary to lay the groundwork for the treatment plan that is needed. Combined with a dispositional order, they also provide more flexibility than a consent decree. The circumstances of children and families can change and the court is able to adjust a dispositional order more readily than a consent decree, which would have to be renegotiated by the parties, a time-consuming and cumbersome process.

Also, the focus of a consent decree and whether it may be revoked is upon the fulfillment of, or compliance with, the terms of the consent decree by the respondents, rather than the change in behavior needed to allow the child to be safe in the home. Rule 10-342(J). As a result, there is a subtle shift in the focus of the proceedings away from the well-being of the child.

Consent decrees may be desirable from the respondents' point of view in that they forestall a finding of neglect or abuse. Even if a consent decree were revoked due to the failure of a parent to fulfill its terms, there would still be no adjudication of abuse or neglect. At a trial on a motion to terminate parental rights, CYFD would have to demonstrate that the child has been abused or neglected by the parents, rather than being able to rely on an adjudication in the case.

On the other hand, due to their conditional or provisional nature, consent decrees may simply defer litigation and cause confusion if questions arise as to whether the conditions have been fulfilled. It is important to state the obvious, which is that a consent decree requires agreement, and CYFD may feel constrained by its statutory duties from agreeing to consent decrees in many cases.

17.8 Use Immunity

If any of the parties would like the respondent to testify in the civil abuse or neglect case and the respondent risks criminal prosecution or conviction, they should consider applying for use immunity for the respondent. Under §32A-4-11, the children's court attorney may apply for use immunity for the respondent's in-court testimony, for any records, documents or objects produced by the immunized respondent and for any statement that the respondent makes in the course of a court-ordered psychological evaluation or treatment program. The Supreme Court rule on immunity, Rule 10-341 allows *any party or the court*, not just the children's court attorney, to seek use immunity for the respondent. The rule covers testimony and records and does not address statements the respondent makes during evaluation or treatment.

Rule 10-341also allows witness immunity *for any person* who has been or may be called to testify or to produce records, documents or other objects in the children's court proceeding. Again, any party may make the application to the court, or the court may consider granting immunity on its own motion. Rule 10-341(A).

Evidence compelled under an order granted pursuant to the rule or information directly or indirectly derived from the evidence may not be used against the person in any criminal case except as provided by Rule 11-413, which makes an exception for prosecutions for perjury or contempt. Rule 10-341(C).

See also Handbook §29.5.2 for a more detailed discussion of use immunity. It is critical that the parties and their attorneys determine early on whether use immunity will be needed so that counsel can make a timely application.

17.9 Evidence

The Rules of Evidence apply at the adjudicatory hearing. Rule 10-141; Evidence Rule 11-1101. *See State ex rel. CYFD in re Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, for a discussion of evidentiary issues arising in an adjudicatory hearing; ***see also*** Handbook Chapter 29 on evidence.

In some cases due process may require the appointment of an expert witness for an indigent parent at state expense. *State ex rel. CYFD v Kathleen D.C.*, 2007-NMSC-018. If an expert is needed, court-appointed counsel should consult the *Kathleen D.C.* case and refer to the guidelines available from the Administrative Office of the Courts.

If an Indian child is involved, CYFD is required to present evidence, *including the testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e). The term "qualified expert witness" is explained in Chapter 32 on ICWA.

17.10 Burden of Proof

CYFD bears the burden of proof. It must prove that the child is an abused or neglected child, as the case may be, by clear and convincing evidence that is competent, material, and relevant in nature. §32A-4-20(H).

The statute does not specify the standard required to prove the existence of aggravated circumstances but the same clear and convincing standard is generally considered to apply. The courts have come close to addressing this issue but have not specifically ruled on it. *See State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶12. *But see Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (constitutional requirement of clear and convincing evidence is needed only for permanent termination of parental rights).

17.11 Findings and Order

17.11.1 Abuse or Neglect; Aggravated Circumstances

If the court finds that the child is neglected or abused, the court must enter an order to this effect. §32A-4-20(H). The order ought to reflect first whether the finding was made

pursuant to an admission or after an evidentiary hearing. If the former, the order should state that a sufficient factual basis for the admission was provided, as required by Rule 10-342; if the latter, it should state that proof was by clear and convincing evidence and should be accompanied with appropriate findings of fact. *See also* Rule 10-351; Forms 522A - D.

Case Note. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, the Court of Appeals reversed a finding of child abuse against the father, who had not had an opportunity to contest the charge. CYFD had alleged neglect in the petition but, based on the evidence at the adjudication, asserted at closing argument that the evidence supported a finding of abuse. The court proceeded to find abuse as well as neglect, without further hearing. The Court of Appeals held that §32A-1-18(A) and due process both required that the father be given notice and an opportunity to be heard on the allegations of abuse.

Any finding as to proof of aggravated circumstances must also be included in the order, including a recitation of the factual basis for the finding. §32A-4-20(G)

A party aggrieved by an order entered pursuant to §32A-4-20(H) may file an immediate appeal to the Court of Appeals. §32A-4-20(I).

17.11.2 Findings Required by ICWA

If the child is an Indian child, the proceeding is subject to the Indian Child Welfare Act and the court must make certain findings at the adjudicatory hearing. The New Mexico Supreme Court, in *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315, addressed when and how a district court in an abuse and neglect proceeding must make the two factual findings required by 25 U.S.C. §1912(d) and (e):

- Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. §1912(d).

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

After an extensive analysis of the application of the ICWA requirements to proceedings under the Children's Code, the Supreme Court decided that the adjudicatory hearing is the most appropriate point in the proceeding to make the required findings. The adjudication incorporates the procedural due process protections and stringent standard of proof that parallel those required by ICWA. *Marlene C.*, 2011-NMSC-005, ¶36.

It is important to note that the standards and evidentiary requirements are different from and in addition to those required in non-ICWA cases. CYFD needs to satisfy the court that *active efforts* have been made to prevent removal, and that the evidence supporting removal includes the *testimony of qualified expert witnesses*. These requirements are explained further in Chapter 32 on ICWA.

ICWA Note. Regulations implementing ICWA were issued in 2016 and can be found at 25 C.F.R. Part 23. The Bureau of Indian Affairs also updated the ICWA Guidelines in 2016. The December 2016 Guidelines can be found at: https://tribalstate.nmcourts.gov/indian-child-welfare-act-icwa-title-iv-e.aspx.

17.11.3 Custody Pending Disposition

If the court makes a finding of abuse or neglect and does not proceed immediately to disposition, the court's order should provide for custody of the child pending disposition. §32A-4-20(K). The order should include a finding that such custodial arrangement is in the best interest of the child. Any concerns over visitation should also be addressed.

In addition, the court will need to revisit the appointment of an educational decision maker, and decide whether to change or continue the existing appointment. §32A-4-35; Rule 10-316. Any change should be made by separate order. Form 10-564.

17.12 Order of Dismissal

Under §32A-4-20(H), if the court does not find that the child is abused or neglected, the court must dismiss the petition and may refer the family to CYFD for appropriate services. Any order of dismissal should state the grounds (such as a stipulation, lack of timeliness, or failure of proof) and clearly indicate that custody of the child is restored to the respondent.

Another possibility is that a parent, guardian, or custodian who was not made a party to the petition appears at the hearing. The court may award custody of the child to that person and dismiss the case, depending on the circumstances. ***See*** Handbook §14.4.

17.13 Motion for New Hearing

A motion for a new adjudicatory hearing may be filed by a party or on the court's own initiative within ten days of entry of judgment. Rule 10-146(A).

A motion based on newly discovered evidence may be made within 30 days of judgment but, if an appeal is pending, the court may grant the motion only on remand. The motion may be granted if the evidence will probably change the result, was discovered after the original hearing and could not have been discovered before with due diligence, is material to the issue, is not merely cumulative, and is not merely impeaching or contradictory. Rule 10-146(A). A motion for a new adjudicatory hearing is automatically denied if not granted

within 30 days from the date it is filed or, if the case is on appeal, within 30 days from the date of remand to the children's court. Rule 10-146(A).

The court may relieve a party from a final judgment after 30 days for a number of reasons, including mistake or excusable neglect, newly discovered evidence which could not have been discovered in time to move for a new trial earlier, or misrepresentation. This motion must be made within a reasonable time and, in some cases, no more than one year after the judgment. Rule 10-146(C).

17.14 Checklist

AJUDICATORY HEARING

CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
  - Manner and date of service
  - Appointment of counsel
  - Language or cognitive challenges
- ☐ Inquiry regarding
  - Absent parents
  - Presence of child
  - Indian child
- ☐ Advisement of rights, if first court hearing
- ☐ Results of pre-adjudicatory meeting
- ☐ Stipulations, admissions, consent decrees
  - Advisement
  - Knowing, voluntary waiver of right to trial, if case settled
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: clear and convincing
- ☐ Findings of fact
  - Abused or neglected child
  - Aggravated circumstances, if alleged
- ☐ ICWA findings, if Indian child
  - Active efforts
  - Serious emotional or physical damage
  - Placement preferences
- ☐ Custody pending dispositional hearing
- ☐ Visitation pending dispositional hearing
- ☐ Educational decision maker
- ☐ Status of predisposition study
- ☐ Scheduling of dispositional hearing

CHAPTER 18

DISPOSITIONAL HEARING

The dispositional hearing takes place within 30 days of the adjudicatory hearing. This chapter covers:

- Purpose of dispositional hearing.
- Description of predisposition study.
- Findings required by Children's Code.
- Approval of case (treatment) plan.
- Reasonable efforts determination.
- Decisions on custody and visitation.
- Placement preferences for Indian children.
- Immigrant children and SIJS.

18.1 Purpose

The purpose of the dispositional hearing is to adopt a case plan, establish legal custody of the child, set visitation arrangements if appropriate, and determine appropriate findings of fact as required by statute. (The law was amended in 2016 to change the term "treatment plan" to "case plan" to reflect the broad scope of the plan.)

18.2 Timeline

The dispositional hearing can proceed on two different tracks:

- The disposition may follow immediately after the adjudication.

  This is the most efficient approach and should be anticipated where the parties have reached agreement at the pre-adjudicatory meeting or at mediation, or later announced their intention to enter into a plea of no contest. The advantages are that the parties are already in attendance before the court and no further scheduling is necessary. It would be premature, however, if the initial assessments or evaluations

have not been completed or if the case plan has not yet been formulated with sufficient specificity.

- If the dispositional hearing is not held in conjunction with the adjudicatory hearing, it must commence within thirty days after conclusion of that hearing. §32A-4-22(A) and Rule10-344(C).

18.3 Initiation and Notice

If disposition does not immediately follow adjudication, CYFD is responsible for requesting a setting and notifying the parties of the dispositional hearing. Again, it is preferred practice to announce the setting in open court when the respondent is present, at the close of the adjudicatory hearing.

18.4 Participants

In addition to all the parties and attorneys who participated in the adjudicatory hearing, this phase expands to include contributions from the court appointed special advocate (CASA). This is the point at which the CASA volunteer may begin submitting reports to the court. When the CASA submits a report, he or she is supposed to serve the report on the parties, but not the court, at least five days prior to the hearing at which it will be considered. Rule 10-164(F).

This is also one of the points at which the foster parent may want to get involved. The Abuse and Neglect Act specifically requires that the foster parent, pre-adoptive parent, or relative providing care for the child be given "notice and an opportunity to be heard at the dispositional phase." §32A-4-20(C).

Abuse and neglect hearings are closed to the general public. For the persons who may attend the hearing, ***see*** Rule 10-324 and Handbook §15.4.

18.5 Issues to be Considered

18.5.1 Legal Custody

At this point, the child has been adjudicated an abused or neglected child and it is up to the court to determine who will have legal custody of the child. The court will consider whether it is safe for the child to remain in or return to the custody of the parent or a previously non-custodial parent, or whether the child's safety demands that custody be in CYFD.

In the most extreme cases, the court may conclude that the family is not likely to be rehabilitated and that efforts should be devoted to some other permanent plan for the child. Based on the facts of the case, the court could find that efforts to assist the family would be futile. §32A-4-22(C)(1). To ensure that the requirements of due process are met, it would appear to be best practice for the party seeking this finding to give advance notice by

pleading that the finding will be sought. Also, a determination that no efforts need be made to assist the parents would be expected where the court entered a finding of aggravated circumstances at the adjudicatory hearing. In either situation the court could order that CYFD implement a case plan despite the finding. §32A-4-22(C).

18.5.2 Case Plan

CYFD will propose a case plan, which is supposed to have been created jointly with the parties and which was discussed by the parties at the pre-adjudicatory meeting or at mediation, if there is mediation separate from the pre-adjudicatory meeting. The proposed plan may or may not be a matter of contention at the hearing. ***See*** §§18.6 and 18.7 below.

Practice Note. The case plan is often referred to as a treatment plan because, for many years, it was officially known as the treatment plan. However, "case plan" is more accurate because treatment is only part of the plan. When CYFD revised its permanency planning rules in 2015, it changed the term to "case plan." The legislature followed suit in 2016 when it was amending the statutes on disposition and permanency hearings. While the language has not been changed in other sections of the Children's Code yet, the best practice is to refer to the plan as the "case plan."

18.5.3 Reasonable Efforts

The court is required to consider whether reasonable efforts have been made to preserve and reunify the family, with the paramount concern being the child's health and safety. Under certain circumstances, the court may also decide that reasonable efforts are not necessary. ***See*** §18.11.2 below. The Adoption and Safe Families Act requires that the court make a "reasonable efforts" determination within 60 days of the removal of the child from the home, so the finding will likely have been made at a hearing prior to the dispositional hearing. However, it should be made at this hearing if it has not been made before. (Failure to make this determination within 60 days will result in the child being rendered ineligible for federal foster care payments for the duration of his or her stay in foster care.) ***See*** Handbook §36.4 on ASFA.

Even if the finding has been made, the requirement that reasonable efforts be made to preserve and reunify the family does not disappear. The requirement continues, and the court will need to consider whether reasonable efforts have been made when it conducts periodic judicial reviews or hears a motion for termination of parental rights. *See* §§32A-4-25(I)(5) and 32A-4-28(B)(2). The case plan should set out what the efforts should be, both as a guide and because information about what the parties have done to implement the case plan will determine whether reasonable efforts have been made.

18.5.4 Active Efforts in ICWA cases

In all cases involving Indian children, any party seeking to effect a foster care placement, and ultimately a possible termination of parental rights, must demonstrate to the court that active

efforts have been made to prevent the breakup of the Indian family. 25 U.S.C. §1912(d). In the context of case planning, there should be a plan that indicates how the intervention with the family will be active enough to meet the definition of active efforts. ***See*** Handbook §17.11.2. The case plan should be completed with the admonition of the Court of Appeals in the *State ex rel. CYFD v. Yodell B.*, 2016-NMCA-029, case in mind. The Court stated that "the term "active efforts connotes a more involved and less passive standard than that of reasonable efforts." *Id.* ¶20 (without citation and internal quotation marks). According to 25 C.F.R. §23.2, issued shortly after *Yodell* was decided, active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.

18.6 Predisposition Study and Report

A case plan is only as effective as the assessment underlying it and the availability of the services in it. Section 32A-4-21 provides that CYFD will do a predisposition study and submit the study and report in writing to the court. The Children's Code requires the department to study the situation of both child and family from a variety of viewpoints, to report extensively on the situation, and to propose a case plan.

Under §32A-4-21(B), the predisposition study must contain:

1. a statement of the specific reasons for intervention by CYFD or for placing the child in CYFD's custody and a statement of the parent's ability to care for the child in the parent's home without causing harm to the child;

2. a statement of how an intervention plan is designed to achieve placement of the child in the least restrictive setting available, consistent with the best interests and special needs of the child, including a statement of the likely harm the child may suffer as a result of separation from parents, and a statement of how the intervention plan is designed to place the child in close proximity to the parent's home without causing harm to the child due to separation from parents, siblings or any other person who may significantly affect the child's best interest;

3. the wishes of the child as to the custodian;

4. whether the child has a family member who, after study by CYFD, is determined to be qualified to care for the child;

5. a description of services offered to the child, his or her family and his or her foster care family and a summary of reasonable efforts made to prevent removal of the child from the family or reasonable efforts made to reunite the child with family;

6. a description of the home or facility in which the child is placed and the appropriateness of the child's placement;

7. the results of any diagnostic examination or evaluation ordered at the custody hearing;

8. a statement of the child's medical and educational background;

9. if the child is an Indian child, whether the placement preferences set forth in the Indian Child Welfare Act (ICWA) or the placement preferences of the child's Indian tribe were followed and whether the child's case plan provides for maintaining the child's cultural ties;

10. a case plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and his or her parents to facilitate permanent placement of the child in the parent's home;

11. for children 16 years of age and older, a plan (known as the "life skills plan") for developing the specific skills the child requires for successful transition into independent living as an adult, regardless of whether the child is returned to the parent's home; (CYFD rules, at 8.10.8.13 and 8.10.9.12 NMAC, require that Protective Services work with children **age 14** and older to develop this plan. This conforms with federal law, ***see*** Handbook §36.10.)

12. a case plan that sets forth steps to ensure that the child's educational needs are met and, for a child 14 years or older, a case plan that specifically sets forth the child's educational and postsecondary goals; and

13. a description of the child's foster care placement and whether it is appropriate in terms of the educational setting and proximity to the school the child was enrolled in at the time of the placement. The description must include plans for travel for the child to remain in that school, if reasonable and in the child's best interest.

In the context of addressing the needs of the child, CYFD has adopted regulations intended to help children in foster care have more "normal" childhood experiences. 8.26.2.13 NMAC. The regulations refer to the "reasonable and prudent parent standard." The regulations allow for foster parents to agree to routine childhood activities, without the consent of CYFD, for the children in their care. These can include sleepovers, participation in extracurricular activities, travel in a vehicle other than the foster parent's, and other activities that the foster parent believes foster positive identity development for the child, see the list in 8.26.2.13(D) NMAC. ***See also*** Handbook §36.10 for the federal law that requires these policies.

While not listed in §32A-4-21, the Children's Code requires that recommendations be made in case plan for children who are undocumented immigrants. Section 32A-4-23.1, requires that, if a child is an undocumented immigrant, CYFD must include in the case (treatment) plan a recommendation as to whether:

- the permanency plan for the child includes reuniting the child with the child's parents; and
- it is in the child's best interest to be returned to the child's country of origin.

If the permanency plan being considered does not include reunification, then CYFD needs to consider whether the child should be returned to the country of origin. If CYFD does not recommend return, then the department needs to determine whether the child may be eligible for special immigrant juvenile status (SIJS) under federal law. ***See*** Handbook §18.11below for more details on SIJS.

Services to Immigrant Children. Services to children alleged to have been abused, neglected, or abandoned must be provided without regard to a child's immigration status except where immigration status is explicitly set forth as a statutory or regulatory condition of coverage or eligibility. §32-4-23.1(A).

CYFD's predisposition report must be filed with the court and served on counsel for all of the parties, including the youth attorney and the GAL, at least five days prior to the dispositional hearing. (In practice, the dispositional hearing tends to be held concurrently with the adjudicatory hearing, so the report would be circulated before the adjudicatory hearing. It would not be filed with the court in advance.) When served, the report should be accompanied by copies of any social, diagnostic, or other predisposition reports ordered by or submitted to the court, as well as a proposed disposition order. §§32A-4-18(G) and 32A-4-21(C); Rule 10-344(B).

The department's study and report should form the starting point for the court, but should not just be "rubber stamped." They are served on the parties prior to the hearing so that all will have had the opportunity to supplement, clarify, or challenge the particulars. All concerned need to compare the study and report with the proposed case plan to ensure that they are consistent with and complement each other.

18.7 Effective Case Plan

Sometimes still referred to as the treatment plan, the case plan is the core of the dispositional hearing. Section 32A-4-21(B)(10) requires a case plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and his or her parents to facilitate permanent placement of the child in the parent's home. The court contemplates the proposed plan, considers the input and perspective of the parties and the CASA, reviews the respective roles and responsibilities of different participants for the success of the plan, and orders its implementation, either as submitted or as amended by the court on its own or at the request of a party.

The case plan should focus on the safety threats and lack of protective capacities that caused the child's removal from the home and the elimination of the safety threats or development of the protective capacity needed for the parent to properly care for the child. However, it is important to remember that the plan is not just concerned with correcting the conditions that

caused the child to come into care, although it should definitely address these issues. When out-of-home placement is proposed, the plan should also provide specific measures for the child that will facilitate permanent placement in the parent's home, including visitation arrangements and medical, educational, and therapeutic services for the child. §32A-4-21(B)(10) and (12).

Practice Note: When reviewing the case plan at the dispositional hearing, the court should keep in mind that it will be looking to the plan when it later assesses whether or not CYFD has been making reasonable efforts to reunify the family, as required by the Children's Code.

18.8 Relative Placement

By the time a case is at disposition, CYFD should have been exercising due diligence and making reasonable efforts to identify and provide notice to all grandparents, parents of a sibling (where the parent has legal custody of the sibling), and other adult relatives of the child. §32A-4-17.1, enacted in 2016. ***See*** Handbook §15.8. At disposition, the department will need to demonstrate that it has made reasonable efforts to identify, locate, and give notice to these relatives and to conduct home studies on any appropriate relative who expresses an interest in providing care for the child. §32A-4-22(A)(6).

If the court finds at disposition that CYD has not made reasonable efforts, the court may make supplemental orders as necessary and reconsider the matter at the initial judicial review and subsequent periodic review hearings. *Id*.

The requirements of §32A-4-22(A)(6) were, until 2016, in the section of the Abuse and Neglect Act on permanency hearings, §32A-4-25.1. The requirement that CYFD try to find and consider relatives of the child for placement has been moved up in the proceeding. In *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057, the Court of Appeals held that "Section 32A-4-25.1(D) [now §32A-4-22(A)(6)] imposes a duty upon the district court to make a serious inquiry into whether the Department has complied with its mandate to locate, identify, and consider relatives with whom to place children in its custody." ¶61. The Court stated that "a pro forma ratification of the Department's assertions that such efforts have been made" will not satisfy this inquiry. To comply with §32A-4-25.1(D) [now §32A-4-22(A)(6)], "the court must conclude that the Department, *through all of its available resources*, has met its affirmative duty to 'identify and locate .. . [and] conduct home studies on any appropriate relative expressing an interest in providing permanency for the child.'" *Id*. (emphasis added).

18.9 Sibling Placement

One of the findings that will be required at the close of the hearing is a finding on sibling placement. §32A-2-22(A). CYFD will need to provide information to the court to permit the court to determine whether the department has made reasonable efforts to place siblings in custody together and whether siblings not placed jointly have been provided reasonable

visitation or other interaction. ***See*** §18.14.1 below for the information that the court will need in order to make the findings required by §32A-2-22(A).

18.10 Placement Preferences for Indian Children

For any Indian child, the court must verify that the child's placement complies with the preferences of the Indian Child Welfare Act or of the child's tribe and that the child's plan provides for maintaining the child's cultural ties. §32A-4-22(A)(13).

Reflecting the ICWA requirements of 25 U.S.C. §1915, §32A-4-9(A) requires that an Indian child accepted for foster care placement be placed in the least restrictive setting that most closely approximates a family in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to his or her home, again taking into account any special needs the child has. Preference will be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- a foster care home licensed, approved, and specified by the child's tribe;
- an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the child's tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

If these preferences are not followed or if the child is placed in an institution, a plan must be developed to ensure that his or her cultural ties are protected and fostered. §32A-4-9(B).

In order to meet the requirements of the new ICWA regulation on placement preferences, 25 C.F.R. §23.132, a new Children's Court rule was adopted. Under Rule 10-318, if any party asserts that good cause exists not to follow the placement preferences established by ICWA and its regulations, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the placement preferences bears the burden of proving good cause by clear and convincing evidence. Rule 10-318(C).

Good cause to depart from the placement preferences must be based on one or more of the following:

- the request of one or both of the Indian child's parents, if they attest that they reviewed the placement options, if any, that comply with the order of preference;
- the child's request, if the child is of sufficient age and capacity to understand the decision that is being made;
- the presence of a sibling attachment that can be maintained only through a particular placement;
- the extraordinary physical, mental or emotional needs of the child, such as specialized treatment services that may not be available in the community where families meet the placement preferences; or

- the unavailability of a suitable placement after a determination by the court that a diligent search was conducted. The standards for determining that a suitable placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which they maintain social and cultural ties. Rule 10-318(E).

There are impermissible considerations. A placement may not depart from placement preferences:

- based on the socioeconomic status of one placement relative to another, or
- based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement made in violation of ICWA. Rule 10-318(F).

While it predates Rule 10-318 and the 2016 ICWA regulations and guidelines, a case that addresses good cause at length is *State ex rel. CYFD v. Casey J.*, 2015-NMCA-088, ¶¶9-11 and ¶¶16-31.

18.11 Immigrant Children

18.11.1 Case Plan; SIJS Eligibility

Services to children alleged to have been neglected, abused or abandoned must be provided regardless of immigration status. If the child is an undocumented immigrant, CYFD must include in the case plan a recommendation as to whether the permanency plan for the child includes reuniting the child with the child's parents and whether it is in the child's best interest to be returned to the child's country of origin. If the plan does not include reunification and CYFD has determined that it is not in the child's best interest to be returned to his or her country of origin, then the department must also determine whether the child may be eligible for special immigrant juvenile status (SIJS). *See* §32A-4-23.1 generally.

Federal Law. It is important to note that a child's eligibility for special immigrant juvenile status is based on federal immigration law and that the concept of reunification in the immigration laws is not necessarily the same as the concept in federal and state child welfare laws.

The Immigration and Nationality Act of 1990, as amended in 2008, defines a special immigrant in part as a child "whose reunification *with 1 or both* of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." 8 U.S.C. §1101(a)(27)(J) (emphasis added). CYFD recognizes this definition in its regulations. 8.10.7.29 NMAC. It may mean that a child who can be reunified with one parent but not the other should be considered for SIJS status.

The website for U.S. Citizenship and Immigration Services is http://www.uscis.gov. A website with extensive resources on SIJS specifically is that of the Immigrant Legal Resource Center, http://www.ilrc.org.

18.11.2 Children's Court Order

If the child is eligible for SIJS, CYFD must move the children's court for a special immigrant juvenile status order containing a judicial determination that the child is deemed unable to reunify with one or both parents due to abuse, neglect or abandonment, and that it is not in the child's best interest to return to the country of nationality or last habitual residence. The department's motion must include a statement of the express wishes of the child, as expressed by the child or the child's GAL or attorney. The court and parties should take care that the order contains all findings necessary to establish that the child meets the criteria for federal SIJS. §32A-4-23.1(C); 8.10.7.29 NMAC.

18.11.3 Applying for SIJS

The SIJS order issued by the children's court sets the stage for a possible SIJS petition with U.S. Citizenship and Immigration Services. CYFD is responsible for filing the petition and application on behalf of the child and must do so within 60 days after entry of the SIJS order by the children's court. §32A-4-23.1(D).

CYFD will advise the court in judicial review reports of the status of the petition and application process. §32A-4-23.1(J). If a petition and application have been filed but have not been granted by the time the child turns 18, the children's court may retain jurisdiction over the case for the sole purpose of ensuring that the child continues to satisfy the requirement for SIJS. The children's court attorney will request court jurisdiction and set review hearings for the purpose of ensuring that the child continues to satisfy the requirements for classification as a special immigrant juvenile and determining the status of the petition and application. §32A-4-23.1(E) and (F); 8.10.7.29 NMAC. The court's jurisdiction terminates upon the final decision of the federal authorities or the child's 21st birthday, whichever occurs first. §32A-4-23.1(G) and (I).

Practice Note. It is important that work commence to secure special immigrant juvenile status as soon as it appears that the child is eligible and that SIJS is appropriate. The entire process takes time. Anyone interested in seeing how the process is handled by CYFD staff may review the Protective Services Permanency Planning Procedures at one of CYFD's county offices. SIJS is at PR 8.10.8.22 in the Procedures.

18.12 Evidence

The Rules of Evidence do not apply to dispositional hearings. *See* Evidence Rule 11-1101(D)(3). All relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the adjudicatory part of the hearing. §32A-4-20(J).

18.13 Burden of Proof

CYFD has the burden of proof on the issues of custody and the case plan, with the standard being a simple preponderance of the evidence.

A finding that it would be futile to make further efforts toward family reunification may be made (***see*** §18.14.2 below) upon a showing by a preponderance of the evidence. Note, however, that futility will have to be proven again by clear and convincing evidence (or beyond a reasonable doubt in the case of an Indian child) if relied upon as a ground for the termination of parental rights (***see*** Handbook §24.4.3).

18.14 Findings and Order

18.14.1 Findings required by §32A-4-22

At the conclusion of the dispositional hearing, the court must make and include in its judgment findings of fact on the following:

1. the interaction and interrelationship of the child with his or her parent, siblings, and any other person who may significantly affect the child's best interest;

2. the child's adjustment to his or her home, school, and community;

3. the mental and physical health of all individuals involved;

4. the wishes of the child as to his or her placement;

5. the wishes of the child's parent, guardian, or custodian as to the child's custody;

6. whether reasonable efforts have been made to identify, locate and give notice to all grandparents and other relatives and to conduct home studies on any appropriate relative who expresses interest in caring for the child. If reasonable efforts have not been made, the court may make supplemental orders as necessary and reconsider the matter at a judicial review;

7. whether consideration has been given to the child’s familial identity and connections;

8. whether there exists a relative of the child or other individual who, after study by CYFD, is found to be qualified to receive and care for the child;

9. the availability of services recommended in the case plan prepared as a part of the predisposition study in accordance with §32A-4-21;

10. the ability of the parent to care for the child in the home so that no harm will result to the child;

11. whether reasonable efforts were made by CYFD to prevent removal of the child from the home prior to placement in substitute care and whether reasonable efforts were made to attempt reunification of the child with the natural parent;

12. whether reasonable efforts were made by CYFD to place siblings together, unless such joint placement would be contrary to the safety or well-being of any of the siblings in custody, and whether any siblings who are not jointly placed have been provided reasonable visitation or other ongoing interaction, unless visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings; and

13. if the child is an Indian child, whether the placement preferences set forth in ICWA or the placement preferences of the child's Indian tribe have been followed and whether the Indian child's treatment plan provides for maintaining the Indian child's cultural ties. When placement preferences have not been followed, good cause for noncompliance must be clearly stated and supported. §32A-4-22, as amended in 2016.

The dispositional hearing is the hearing at which the court orders the case plan (with or without changes to the CYFD proposed plan), orders CYFD to implement the plan, and orders the parents, guardians, or custodians to cooperate with the plan. §32A-4-22(C). If the parties agree, the court may adopt the case plan by attachment and incorporate it by reference into the order.

18.14.2 Reasonable Efforts

In connection with approval of the case plan, the Children's Code requires that reasonable efforts be made to preserve and reunify the family, with the paramount concern being the child's health and safety. However, the court may determine that reasonable efforts are not required to be made if the court finds:

- the efforts would be futile; or
- the parent, guardian, or custodian has subjected the child to aggravated circumstances. §32A-4-22(C).

If the court finds that no further efforts at reunification are required, it must conduct a permanency hearing within 30 days of the determination. CYFD must make reasonable efforts to implement and finalize the permanency plan in a timely manner. §32A-4-22(J).

Note on Futility: The parties and the court should be cautious about addressing the issue of futility at a hearing during which the Rules of Evidence do not apply. Counsel may want to be prepared to present formal testimony and cross-examine witnesses. *See State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701, summarized in Handbook §23.7.1.

Note on Aggravated Circumstances: If aggravated circumstances were alleged in the petition and disputed by the respondent, the issue would have been tried at the adjudicatory

hearing. The finding at that hearing would form the basis for the court's ruling on reasonable efforts at disposition. ***See*** the definition of aggravated circumstances in Handbook §17.5.4.

Keep in mind that, in the case of an Indian child, the requirement that CYFD engage in active efforts remains, whether or not the court has decided that reasonable efforts are not needed. ***See*** Handbook §17.5.4.

18.14.3 Custodial Determination

Under §32A-4-22(B), the court may enter its judgment making any of the following dispositions to protect the welfare of the child. The court may:

- permit the child to remain with the child's parent, guardian, or custodian, subject to those conditions and limitations the court may prescribe;
- place the child under CYFD's protective supervision; or
- transfer legal custody to one of the following:
    - the non-custodial parent, if it is found to be in the child's best interest; or
    - the department.

"Protective supervision" gives CYFD "the right to visit the child in the home where the child is residing, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations, and obtain information and records concerning the child." §32A-1-4(U). Protective supervision allows CYFD to remain actively involved in implementing the terms of the treatment plan and to have access to the child to assure the child's safety even though the child has been returned to the parent's custody.

Any award of custody of the child should be supported by a finding that such award is in the child's best interest.

Practice Note: Custody and placement are two different concepts. When legal custody is awarded to CYFD, CYFD has the responsibility to make a placement for the child. Similarly, if legal custody is returned to a parent, that parent can make a placement decision.

The case of incarcerated parents illustrates the difference between custody and placement. While, in some situations, incarceration contributes to a situation of neglect, there may be incarcerated parents who can make responsible placement decisions for their child even though, as is obvious, they cannot provide a home for the child themselves. *See State ex rel. CYFD in re Sara R.*, 1997-NMSC-038, ¶17, 123 N.M. 711, for a similar discussion.

18.14.4 Visitation

If the child is not allowed to remain with his or her parent, guardian or custodian, any parent, guardian or custodian must be given reasonable rights of visitation as determined by the court, unless the court finds that the child's best interests preclude visitation. If the court finds that visitation is not in the best interest of the child, this finding should appear expressly in the order. §32A-4-22(D). The preferred practice is for the parties to arrive at a reasonable

arrangement for visitation. Protective Services Permanency Planning Procedures, procedure 19, sets out how CYFD is supposed to engage the family in planning visitation. PR 8.10.8.19.6.

The court may also order reasonable visitation between the child and the child's siblings or any other person who may significantly affect the child's best interest, if the court finds the visitation to be in the child's best interest. §32A-4-22(E).

18.14.5 Educational Decision Maker

The case plan will have set forth steps that need to be taken to ensure that the child's educational needs are met. ***See*** §18.7 above. For the federal and state laws that are important to meeting these needs, ***see*** Handbook Chapter 35 on education, a new addition to the Handbook in 2018.

The court will need to review the appointment of an educational decision maker that was made at the custody hearing (***see*** Handbook §15.12) and make any needed changes to the appointment by separate order. §32A-4-35; Rule 10-316; Form 10-564.

18.15 Child Support

If the child does not return home, the court is supposed to order the parent to pay the reasonable costs of support and maintenance for the child, to the extent the parents are financially able to pay. The court may use the child support guidelines set forth in §40-4-11.1 to calculate a reasonable payment. §32A-4-26. As a matter of practice, courts often direct parents to pay child support but refer the order to the Child Support Enforcement Division of the Human Services Department to assist in determining the amount and collecting the payments.

18.16 Duration of Judgment

A judgment vesting legal custody of a child in an agency remains in force for an indeterminate period not exceeding two years from the date entered. §32A-4-24(A). Prior to the expiration of the judgment, the court may extend the judgment for additional periods of one year if it finds that the extension is necessary to safeguard the welfare of the child or the public interest. §32A-4-24(E).

A judgment vesting legal custody in an individual other than the child's parent or permanent guardian remains in force for two years from the date entered, unless terminated sooner by court order. § 32A-4-24(B).

A judgment vesting legal custody in the child's parent or a permanent guardian remains in force for an indeterminate period, until terminated by court order or until the child is emancipated or reaches the age of majority. §32A-4-24(C).

At any time before expiration, a judgment vesting legal custody or granting protective supervision may be modified, revoked or extended on motion by any party, including the child by and through the child's GAL. §32A-4-24(D). (The attorney for a child 14 or older would make the same motion, not as GAL, but as the attorney for a party, namely the child.)

When a child reaches 18 years of age, all neglect and abuse orders affecting the child automatically terminate, except as provided in §32A-4-23.1 and §32A-4-25.3(C), described below. Termination of the orders does not disqualify a child from eligibility for transitional services. §32A-4-24(F).

If a petition for special immigrant juvenile status and an application for adjustment of status have been filed but not granted by the time the child reaches age 18, the court may retain jurisdiction over the case for the sole purpose of ensuring that the child continues to satisfy the requirements for classification as a special immigrant juvenile. §32A-4-23.1(E).

Retention of jurisdiction in this instance does not affect the transition services available to the child. §32A-4-23.1(H). The court's jurisdiction terminates upon the final decision of the federal authorities but in no event may the court retain jurisdiction after the child's 21st birthday. §32A-4-23.1(G) and (I).

The court may retain jurisdiction for one year after the child's 18th birthday if the court finds that CYFD did not make reasonable efforts to implement the following prior to the child's transition from foster care. CYFD must make reasonable efforts to:

- provide to the child written information concerning child's family history, whereabouts of any sibling if appropriate, and education and health records;
- provide to the child the child's social security card, certified birth certificate, state-issued ID card, death certificate of a parent, and proof of citizenship or residence;
- provide assistance to the child in obtaining Medicaid unless the child is ineligible for Medicaid; and
- make referral for a guardianship or limited guardianship if the child is incapacitated.

§32A-4-25.3(B). If the court finds that CYFD has not made reasonable efforts and that the termination of jurisdiction would be harmful to the youth, the court may continue to exercise its jurisdiction for a period not to exceed one year from the youth's 18th birthday. The young adult must consent to the court's continued jurisdiction. §32A-4-25.3(C).

18.17 Checklist

DISPOSITIONAL HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
- ☐ Inquiry regarding
  - Absent parents
  - Presence of child
  - Indian child
  - Relatives
- ☐ Results of predisposition study, including plans for meeting a child's educational needs and the life skills plan for youth 14 or older
- ☐ CASA report
- ☐ Stipulations
- ☐ Testimony
  - Rules of Evidence do not apply
- ☐ Findings required by §32A-4-22(A) on disposition
- ☐ Findings required for SIJS eligibility for immigrant child
- ☐ Approval of case plan
- ☐ Reasonable efforts determination
- ☐ Custody determination
- ☐ Relative and sibling placement
- ☐ Placement preferences for Indian child
- ☐ Educational decision maker
- ☐ Visitation
- ☐ Child support
- ☐ Scheduling of future meetings/hearings when court determines that reasonable efforts are not required
  - Permanency hearing within 30 days
  - Pre-permanency meeting/mediation prior to hearing
- ☐ Scheduling of future meetings/hearings in other cases
  - Initial judicial review within 60 days
  - Permanency hearing within 12 months of the date the child "entered foster care," as defined
  - Pre-permanency meeting/mediation

CHAPTER 19

INITIAL JUDICIAL REVIEW

The initial judicial review must be held within 60 days of the dispositional hearing. This chapter covers:

- Purpose of the hearing.
- Compliance with case plan (also known as the treatment plan).
- Review of dispositional order.
- Evidentiary considerations.
- Transition planning for older youth.

19.1 Purpose

Because of the short time frame for resolving cases, the purpose of the initial judicial review hearing is to make sure that everyone is engaged in the case plan (also known as the treatment plan) and barriers to implementing the plan are identified and addressed. If good assessment and case planning was done in conjunction with the dispositional hearing, there should be no need to make major changes to the plan. If adjustments need to be made, however, this is the time to make them.

The initial judicial review provides the best, and often the only, opportunity to test how the case plan is performing in practice, to identify obstacles, and to modify or fine tune the plan as necessary. From a motivational standpoint, it represents the last chance for the court to encourage or admonish the respondent prior to the permanency hearing.

The term "treatment plan" is still used in the section of the Children's Code on judicial reviews but it has been changed to "case plan" in the sections on disposition and permanency hearings, as well as in CYFD's permanency planning rules. It appears that the change is made whenever a section of the Code or rules is being otherwise amended.

19.2 Timeline

The initial judicial review must be held within 60 days of the disposition, regardless of whether the dispositional hearing was held in conjunction with the adjudicatory hearing or at some time thereafter. §32A-4-25(A); Rule 10-346.

Practice Note: Some children's court judges have also used what they call "compliance" or "interim" hearings. These hearings have many of the same characteristics as a judicial review but are held with greater frequency, in some cases once a month, to allow the court and the parties to check in with each other and address any problems as they arise. Not in the Children's Code or rules, these hearings may be scheduled at any time, at the request of a party or as the court deems necessary. Because of the burden on the parties that these may impose, the court should be careful to minimize formal reporting requirements and avoid holding the hearings too frequently.

19.3 Initiation and Notice

As with the earlier hearings in an abuse or neglect case, CYFD has the responsibility for requesting a date for the judicial review and notifying the parties. Rule 10-346. The children's court attorney (CCA) must notify all parties, including the child by and through the child's guardian ad litem (GAL) or attorney, the child's court appointed special advocate (CASA), if one has been appointed, the substitute citizen review board (SCRB), if one has been designated by the substitute care advisory council, and the child's foster parent or substitute care provider, of the time, place, and purpose of the hearing. §32A-4-25(D). The notice to foster parents, pre-adoptive parents, and relative caregivers must expressly inform them of their right to be heard at the review. Rule 10-104.1.

Practice Note: There are different ways to ensure the timely setting of hearings subsequent to the initial disposition of the case. One way is for courts to issue scheduling orders that include any or all of the hearings contemplated by the Children's Code post adjudication. They could start with the Initial Judicial Review hearing and include any interim reviews the court prefers to hold, as well as the initial permanency hearing and the permanency review. Another approach is to announce the setting of the initial judicial review hearing in open court at the previous hearing, when the respondent is present. At this point, the previous hearing was probably the dispositional hearing.

The initial judicial review is the first opportunity for the court to check in with the child after the formality and complexity of the adjudication and disposition. The child's GAL or attorney needs to pay careful attention to the rules adopted by the Supreme Court in 2016 and 2017 to ensure that the child knows about the hearing and the child's right to attend:

- In the case of a child age 14 or over, counsel must notify the court in writing 15 days in advance of the hearing that he or she has advised the youth of his or her right to attend the hearing. Rule 10-325.

- If the child is under the age of 14, the child's GAL will notify the court that he or she has advised the child to the maximum extent possible given the child's developmental capacity. The GAL will also state whether the child wishes to attend and the GAL's position as to whether attendance is or is not in the child's best interest. Rule 10-325.1.

It is important to note that, under both rules, if the child wishes to offer information on the substance of the hearing to the court without appearing in court, the child must file a motion for alternate testimony pursuant to Rule 10-340 and the Uniform Child Witness Protective Measures Act, §§38-6A-1 to 9. Rules 10-325(E) and 10-325.1(E).

This hearing is also the first point in the proceedings in which a substitute citizen review board (SCRB) may get involved. CYFD has a specific obligation to send the state substitute care advisory council a copy of the adjudicatory order and the dispositional order at the same time it sends notice of the judicial review. The council will review the case and determine whether the case should be designated for review by a substitute care review board. If the case is designated for review, a representative of the SCRB may attend the hearing and comment to the court. §32A-4-25(A). ***See*** Handbook Chapter 13 on the council and SCRBs.

19.4 Participants

Participants in the review include the parties and their attorneys, including the child's GAL or attorney and foster and pre-adoptive parents. §32A-4-25. Pursuant to Rule 10-324, persons with a proper interest in the case may also attend and participate as needed. Those persons include persons whose attendance is necessary to aid in resolving the issues presented at the hearing, as well as persons with a close personal or professional relationship with a party. An example might be a party's treatment providers. Witnesses may attend when called by a party.

The child is a party and, as a general rule, has a right to attend the hearing. A child under 14 may be excluded only if it is determined to be in the child's best interest. The child who is 14 or older may be excluded only if the court finds that there is a compelling reason for exclusion and states the factual basis for this finding on the record. §32A-4-20(E).
The CASA often presents findings and recommendations by written and/or oral reports to the court, although this may vary from court to court. The SCRB representative, if the case has been designated for review, may attend and comment to the court. §32A-4-25(A).

19.5 Conduct of the Hearing

At the initial judicial review, the parties must demonstrate to the court efforts made to implement the case plan approved by the court in its dispositional order. The court then determines the extent to which the plan has been implemented and makes any supplemental orders necessary to assure compliance with the plan and the safety of the child. §32A-4-25(A).

At the hearing, the court will measure the extent and quality of the respondent's compliance with each specific requirement of the plan. It will also consider any impediments that have been identified and any progress that has been made. The court will make such revisions to the plan as are necessary. The court also reviews the child's adjustment to placement, any change in the ability of the parent to meet the needs of the child, the quality and consistency of visitation, and any other matters touching on the child's welfare. These include the child's placement with siblings and the child's educational continuity, both important considerations

under the Children's Code and court and agency rules, as well as the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. ***See*** Handbook §36.9. In the context of the child's adjustment, issues concerning the reasonable and prudent parent standard can also be considered. As discussed in Handbook §18.6, CYFD has adopted regulations intended to allow children in foster care to have more "normal" childhood experiences. 8.26.2.13 NMAC. What activities the child may be able to or want to participate in, without the usual constraints of a foster care placement, can be explored at this hearing.

19.6 Evidence

The court may admit testimony by any person given notice of the hearing who has information about the status of the child or the status of the case plan. The Rules of Evidence do not apply. §32A-4-25(F); Evidence Rule 11-1101(D)(3).

The fact that the Rules of Evidence do not apply does not preclude the taking of evidence with some semblance of courtroom formality. The proceeding is a "hearing," not a "meeting" or "conference," and the ramifications for parents of not working to change their behaviors or not complying with the case plan can be enormous.

There is some debate over the level of formality required. For example, in some jurisdictions, the children's court attorney makes an oral presentation based on the written reports, or the case worker gives an oral report of the status of the case without providing formal testimony. In other courts, the children's court attorney puts the case worker on the stand. Putting the case worker on the stand is suggested as the preferred practice. ***See*** Handbook §23.7.1 for a summary of *State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701.

19.7 Findings and Order

The Children's Code requires that the court make findings of fact and conclusions of law at the conclusion of the hearing. §32A-4-25(G). The Supreme Court approved a form of order for the judicial review, Form 10-530, in 2014.

The court's findings should address the reasonableness of CYFD's efforts to implement the case plan, the degree of compliance by the respondent, and whether continued custody in CYFD is in the best interest of the child. The court may make any supplemental orders necessary to assure compliance with the plan and to protect the child. §32A-4-25(A).

If the child is an Indian child, the court must determine during review of the dispositional order whether the placement preferences set forth in the Indian Child Welfare Act or the placement preferences of the child's tribe were followed and whether the plan provides for maintaining the child's cultural ties. When placement preferences have not been followed, good cause for noncompliance must be clearly stated and supported. §32A-4-25(H). ***See*** Handbook §18.10 on "good cause."

If the child has turned 17, the proposed transition plan for the child will be reviewed at this hearing. The court must order a transition plan at this hearing. ***See*** §19.9 below.

The court will consider at the judicial review whether to continue or change the appointment of the child's educational decision maker. §32A-4-35; Rule 10-316; Form 10-564. ***See*** Handbook §15.12 for more details.

19.8 Special Immigrant Juvenile Status

CYFD must report the child's immigration status to the court at this first review. §32A-4-23.1(A). By this point, CYFD may have determined whether the child may be eligible for special immigrant juvenile status (SIJS), obtained the necessary SIJS order from the court and proceeded on behalf of the child to petition for SIJS status and apply for adjustment of status. Chances are, however, that CYFD only now has the information needed to proceed. ***See*** Handbook §18.11 for a detailed description of CYFD's obligation to determine whether the child may be eligible for SIJS and to apply for SIJS for an eligible child.

CYFD will advise the court in judicial review reports of the status of the petition and application process. §32A-4-23.1(J). If a petition and application have been filed but have not been granted by the time the child turns 18, the children's court may retain jurisdiction over the case for the sole purpose of ensuring that the child continues to satisfy the requirement for SIJS. The children's court attorney will request court jurisdiction and set review hearings for the purpose of ensuring that the child continues to satisfy the requirements for classification as a special immigrant juvenile and determining the status of the petition and application. §32A-4-23.1(E) and (F); 8.10.7.29 NMAC. The court's jurisdiction terminates upon the final decision of the federal authorities or the child's 21st birthday, whichever occurs first. §32A-4-23.1(G) and (I).

19.9 Transition Planning for Older Youth

19.9.1 Transition Plan

If a child is approaching age 17, there is a very good chance that the child will age out of the system without having returned home or been adopted. Even if one of these events may still happen, the child has likely been in care for some time. It is critical that the department, the child and everyone close to the child take stock and consider carefully what needs to be done to help meet the child's needs as he or she turns 18.

The Children's Code requires that CYFD meet with the child before the child's 17th birthday to develop a transition plan for the child. The child's attorney and others of the child's choosing, including biological family members, are also included in the meeting. The Code mandates that the department assist the child in identifying and planning to meet the child's needs at age 18, including housing, education, employment or income, health and mental health, local opportunities for mentors, and continuing support services. §32A-4-25.2(A)).

This transition plan must be presented to the court at the first hearing after the child's 17th birthday. The court will order a transition plan for the child, which will then be reviewed at every subsequent review and permanency hearing. §32A-4-25.2(B) and (C).

Transition Plan Compared to Life Skills Plan. The life skills plan is the plan required by §32A-4-21 (B)(11) for youth age 16 or older. (CYFD's rules now provide for these plans to be developed at age 14, and they are to be developed *with* the youth. They must be developed regardless of the child's permanency plan.) The plan identifies the activities, tasks, and services needed for the youth to develop the life skills necessary to safely transition into independent living. The plan is included in the youth's case plan and reviewed by the court at disposition. 8.10.9.11 NMAC, as amended in 2015.

The transition plan required by §32A-4-25.2 focuses less on general life skills and more on the youth's needs, strengths, and goals in such adult areas as housing, education, employment or income, health and mental health, and local opportunities for mentors and continuing support services. 8.10.9.16 NMAC. There is a very distinct awareness that the child will be on his or her own momentarily and it is important that the court review and act on the transition plan at the first hearing after the child's 17th birthday. §32A-4-25.2.

The life skills plan is part of the disposition plan and as such is reviewed at **every** judicial review and permanency hearing. Once the child turns 17, the transition plan is also reviewed at every judicial review and permanency hearing.

19.9.2 Discharge Hearing

If the initial judicial review is the last judicial review or permanency hearing before the child turns 18, the court must not only review the child's transition plan (***see*** §19.9.1 above) but also determine whether CYFD has made reasonable efforts to implement the requirements of §32A-4-25.3(B). This part of the judicial review or permanency hearing is called a "discharge hearing."

Section 32A-4-25.3 requires the court to determine at the discharge hearing:

- whether the child has been provided written information concerning:
  - the child's family history,
  - the whereabouts of any sibling, if appropriate, and
  - the child's education and health records;
- whether the child has been provided:
  - the child's social security card,
  - certified birth certificate,
  - state-issued identification card,
  - death certificate of a parent, and
  - proof of citizenship or residence;
- whether the child has been provided assistance in obtaining Medicaid, unless the child is not eligible; and

- whether the child has been referred for a guardianship or limited guardianship if incapacitated.

Under the new federal Family First Prevention Services Act, signed in February of 2018, CYFD must also provide the child with official documentation that the child was in foster care. *See* Handbook §36.11 on this new law.

If the court finds at the discharge hearing that CYFD has not made reasonable efforts to meet all of these requirements and that termination of jurisdiction would be harmful to the young adult, the court may continue to exercise its jurisdiction for up to one year after the child's 18th birthday. However, the young adult must consent to this continued jurisdiction of the court. §32A-4-25.3(C).

19.10 Checklist

INITIAL JUDICIAL REVIEW HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
- ☐ Inquiry regarding
  - Absent parents
  - Presence of child
  - Indian child/placement preferences
  - Relatives
  - Presence of foster parents
  - SIJS eligibility, if immigrant
  - Educational decision maker
- ☐ Rules of Evidence do not apply
- ☐ CASA report, if applicable
- ☐ Implementation of case (or treatment) plan
  - Reasonable and, if Indian child, active efforts
  - Compliance
  - Modifications
  - Further assessments, evaluations
  - Sibling placement, if applicable
  - Educational continuity and progress
  - Life skills plan for children 14 and older
- ☐ Transition planning for older youth
  - If child is 17 or older, approval of transition plan
  - If child is almost 18, conduct discharge planning hearing
- ☐ Scheduling
  - Permanency hearing w/in 6 months of the judicial review, or within 12 months of the child "entering foster care," as defined, whichever is sooner. If last hearing before child turns 18, include discharge hearing
  - Pre-permanency hearing meeting/mediation
  - Termination or permanent guardianship hearing, if appropriate

CHAPTER 20

PRE-PERMANENCY HEARING MEETING

This chapter covers:

- Requirement for a pre-permanency hearing meeting.
- Purpose and timing of the meeting.
- Nature and content of a permanency plan.
- Special considerations in developing a plan.

20.1 Purpose

As the permanency hearing approaches, some hard decisions have to be made. Either the child should be able to return home in the near future or, if the child cannot be returned home, then some other alternative permanency must be sought. The idea is "enough is enough."

CYFD usually will have conducted an internal case staffing, involving the county office manager, the permanency planning worker, and the supervisor, for the purpose of selecting the most appropriate permanency plan, which is brought to the table at the pre-permanency hearing meeting. The children's court attorney and a placement worker usually also attend the staffing.

From CYFD's perspective, every child has a permanency plan from the outset. At this stage in the case, the focus is on selecting the best plan for the child based on the safety threats, protective capacities, history of the case, and the information that has developed.

20.2 Timing and Initiation

The Children's Code requires that the parties attend a meeting *prior* to the initial permanency hearing to attempt to settle issues attendant to the hearing and develop a proposed case plan that serves the child's best interests. §32A-4-25.1(A)(3). The purpose of the meeting is to try to settle the issues to be addressed at the permanency hearing and develop a further treatment plan that serves the child's best interests. §32A-4-25.1(A)(3). The Children's Court Rules require that the pre-hearing mandatory meeting take place not less than five days prior to the hearing. Rule 10-345(D).

Since court personnel or facilities are not necessarily involved, the meeting can be scheduled at the mutual convenience of the parties. Often CYFD will send notice of the date and time of the meeting soon after the initial dispositional hearing. If this has not been done, given the time constraints operating in these cases, the court should consider setting the meeting for the parties while everyone is present at the initial judicial review hearing.

CYFD, usually through the children's court attorney, is responsible for notifying all the parties of the time and place of the meeting. Rule 10-345(D).

20.3 Participants

The Children's Code mandates that "all parties to the [permanency] hearing" attend the meeting. §32A-4-25.1(A). While the judge might schedule the meeting for the parties, he or she does not participate in the discussion.

CASA volunteers should be invited. Foster parents and family members who might become permanent caretakers for the child may also be invited. Therapists or other providers for the child and other parties may contribute useful information.

20.4 Conduct of the Meeting

The procedures for this meeting have developed as a matter of practice since 1997, when the law on permanency hearings was passed. Different areas of the state hold this meeting in different ways and at different places. A supervisor or a family centered meeting (FCM) facilitator for CYFD might act as a meeting facilitator. Alternatively, mediation may be used for and may take the place of the pre-permanency hearing meeting in some jurisdictions. Some courts routinely order mediation for the pre-permanency hearing meeting. ***See*** Handbook §31.4 on mediation.

By the time the meeting takes place, ideally CYFD should have prepared and served on each party a pre-permanency hearing report. The report should include the department's proposed permanency plan, as well as any changes to the disposition plan. §32A-4-25.1(A); Rule 10-345(C).

At the meeting, the parties need to discuss the proposed permanency plan and attempt to achieve consensus. If the parties support a permanency plan of reunification, they should also discuss a transition home plan. §32A-4-25.1(C) (requiring the court to adopt a transition plan over a period of up to six months for cases in which the permanency plan is reunification). If the parties support a plan other than reunification and the child is not currently placed with a relative, they should revisit any previous efforts to identify and place with relatives. Reasonable efforts to locate and place with relatives should have begun early in the case (§32A-4-18(E)) and reviewed at the dispositional hearing under §32A-4-22(A)(6), as amended in 2016, but that doesn't mean the inquiry should stop.

Once the parties have identified a permanency plan they need to develop a method to accomplish the objective in a timely manner. In a broad sense, there are two possible objectives:

- **Reunification.** If the goal is to return the child home, then the plan should focus on those steps necessary to ensure that the child will be safe and to minimize the possibility of disruption. These steps should be formulated into a proposed transition plan for the court. Some tough questions may include:
    - Can an in-home safety plan be implemented to allow the child to return home?
    - At what point can legal custody be returned to the parents? Or should custody remain with CYFD with a trial home visit for some period of time?
    - Can legal custody be returned to the parent if the parent is incarcerated but it appears that he or she can make a responsible placement decision for the child?

- **Alternative Permanency Options.** If the child cannot safely be returned home, then the parties should identify the best alternative permanency plan available for the child. This may involve the placement of the child with a relative or other individual who is capable of providing care for the child over the long term. Ideally a parent who participates in this process will be in a better position to retain some relationship to the child, even if not as the primary custodian.

At the very least, even if the parties agree to disagree at this meeting, there should be a full and frank discussion as to all the alternatives and a narrowing of issues for the hearing.

20.5 Proposed Permanency Plan

20.5.1 Five Possible Goals

"Permanency plan" means a determination by the court that the child's interest will be best served by:

- reunification;
- placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;
- placement with a person who will be the child's permanent guardian;
- placement in the legal custody of CYFD, with the child placed in the home of a fit and willing relative; or
- placement in the legal custody of CYFD under a planned permanent living arrangement, but only if there is substantial evidence that none of the above plans are appropriate for the child and only if the child is age 16 or older. §32A-1-4(R); §32A-4-25.1; 8.10.8.12(E) NMAC.

Reunification. Reunification is likely to be the initial plan. It does not have to be limited strictly to a return to the parent or the home from which the child was removed. Depending on the circumstances, it could mean a return to the noncustodial parent.

Adoption. A plan of adoption is considered when efforts to reunite the child with his or her family either have been unsuccessful or are not in the child's best interest, and termination of parental rights is appropriate.

Permanent Guardianship. Permanent guardianship allows an adult to take on the roles and responsibilities of parents without termination of the parents' rights. This is often a role suited for relatives who are able and willing to care for the child on a permanent basis without the parents' rights being terminated. Note, however, that "permanent guardianship" is not necessarily permanent. ***See*** Handbook Chapter 25.

Placement with a Fit and Willing Relative. A relative may be able and willing to care for the child but may not be prepared to consider permanent guardianship or adoption, at least not initially. The child would remain in the custody of the department but be placed with the relative as a foster parent. The hope would be to find a legal arrangement that would make the placement more permanent, and out of the custody of CYFD as this does not establish true permanency for the child.

Planned Permanent Living Arrangement. Another planned permanent living arrangement is acceptable for a child age 16 or older if there is substantial evidence that none of the options listed above is appropriate for the child. Such an arrangement may be appropriate, for example, if an older child cannot return home but is attached to his or her parents, does not want to be adopted and is living with foster parents who want to continue caring for the child until emancipation, and no relative is available for placement purposes. The permanency plan goal needs to consider not only the child's living options but also relational permanency issues.

Note on Age 16: CYFD rules limit use of the PPLA to youth age 16 and older, 8.10.8.12(E) NMAC. This rule was adopted in 2015 in response to the federal Preventing Sex Trafficking and Strengthening Families Act. ***See*** Handbook §36.10 on this federal legislation.

20.5.2 Agreement, If Possible

The proposed permanency plan should represent the agreement of the parties to the greatest extent possible. It must have a clearly stated outcome to be accomplished by a date certain. It should spell out specific roles and responsibilities for each participant. It can include intermediate objectives as well as necessary conditions (e.g., that the parent will maintain a stable household).

Practice Note: A plan of reunification may seem self-explanatory but still requires specificity as to any remaining safety threats and risk factors and how they are to be

addressed. The parties should be cautious, however, about trying to "fix" conditions within the home or family structure, or affecting the caretaker's lifestyle that do not have a demonstrable connection to those immediate safety and welfare factors that prevent the child from returning home. It is important to keep in mind that the family does not have to be the model of perfection in order for a child to return home.

If the parties are not able to agree on a proposed plan to submit to the court, then typically CYFD will propose a plan to the court and the other parties will raise and address their concerns at the hearing. Other parties may also advocate for an alternative permanency plan.

20.5.3 Substance Abuse Cases

Not only is substance abuse the single most common factor causing children to come into the state's care, but it is also among the most difficult to address within the statutory time frames. If the respondent has made little or no progress in treating the condition by the time of the pre-permanency hearing meeting, then a plan of reunification may not be viable. However, there are many instances where the parent has begun to show significant improvement, but may still require residential treatment or other major intervention for several months. Such situations pose a challenge to the creativity of the meeting participants. If they think that reunification is still an option, they need to be prepared to present evidence as to the compelling reasons for not changing the permanency plan to something other than reunification. *See* §32A-4-29(G), requiring a motion for termination of parental rights if the child has been in foster care for 15 of the 22 months, except in certain circumstances.

Other Time Constraints. When the permanency plan is reunification, §32A-4-25.1(C) requires that the court, at the first permanency hearing, adopt a transition home plan for a period "not to exceed six months." If, at the permanency review hearing halfway into the six months, the situation is such that the child needs to remain in CYFD custody, §32A-4-25.1(D)(3) allows the court to "continue legal custody of the child in the department to complete a transition home to the child's parent, guardian or custodian and continue the case plan for not more than six months, after which the case shall be dismissed unless the plan is changed…." (D)(3) could be read to indicate that only the case plan can be extended for an additional six months or that the transition home plan can also be extended. In either case, time is tight for a parent trying to deal with substance abuse issues.

20.5.4 Incarceration Cases

A respondent may be able to make responsible decisions for his or her child but not be in a position to provide daily necessities. If the parent is able to work out an arrangement with a substitute caretaker then intervention by CYFD may not be necessary. Conceivably, the court could return legal custody to the parent even though the child is physically placed with a substitute caretaker. This distinction may be useful for parents who are incarcerated or otherwise institutionalized, but who retain a positive relationship with their children and the ability to make responsible decisions.

20.5.5 Older Children

With this population, participants must be especially diligent in establishing a plan that is realistic. Problems commonly arise because:

- A child age 14 or older refuses to consent to adoption. (§32A-5-17(A) requires the consent of the child at that age.) If a child is not willing to consent, then adoption may not be an option. However, a child's initial refusal should be addressed through a therapeutic intervention to help the child explore the option.
- The urgency of the time frames in abuse or neglect cases may trigger termination of parental rights without adequate foresight for the "legal orphans" created thereby.
- The parties may erroneously assume that an older child is not adoptable when, in fact, the child in question has a good chance of being adopted.
- The permanency plan fails to assist an older child in a planned permanent living arrangement to prepare for transition into adulthood, not only with life skills but by facilitating relationships that will provide a support network to carry the child into adulthood.

The fact that federal law and CYFD rules now limit PPLA to children age 16 and over does not mean that such arrangements are the best for a 16 or 17 year old. It is still important to use PPLA as a last resort; there must be substantial evidence that none of the other options are appropriate for the child.

If the permanency hearing will be serving as a discharge hearing for a young person approaching age 18, the parties may want to address at this meeting any issues associated with the transition plan for the youth or CYFD's efforts to provide the documents and assistance required by §32A-4-25.3. *See* §§32A-4-25.2 and 32A-4-25.3.

CHAPTER 21

PERMANENCY HEARING

This chapter covers:

- Purpose of the permanency hearing.
- Timeline for the hearing.
- The need to determine a permanency plan for the child.
- Reasonable efforts to finalize a permanency plan.
- Transition planning for older youth.

21.1 Purpose of Hearing

The purpose of permanency hearings in general is to compel a resolution of the case so the child does not remain indefinitely "in the system." The court conducts a permanency hearing to determine what permanency plan is in the child's best interest. §32A-4-25.1; Rule 10-345. The court must conduct an initial permanency hearing and then conduct permanency hearings at least annually. §32A-4-25.1.

21.2 Timeline

The initial permanency hearing must be conducted by the earliest of the following dates:

- 6 months after the initial judicial review hearing (§32A-4-25.1(A)); or
- 30 days after a judicial determination that reasonable efforts toward reunification are not required (§§32A-4-22(J) and 32A-4-25(K)); or
- 12 months after the child enters foster care (§32A-4-25.1(A)). A child enters foster care on the earlier of:
    - the date of the first judicial finding that the child has been abused or neglected, or
    - 60 days from the date the child was removed from the home. (§32A-4-25.1(E)).

If, for example, the court makes a finding of aggravated circumstances at the adjudicatory hearing and decides at the dispositional hearing that reasonable efforts are not required, then

the court must hold a permanency hearing within 30 days of that second hearing. If the proceedings follow the general time frames set out in the Code, the typical scenario is that the permanency hearing is held within six months of the initial judicial review. Permanency hearings will be held at least every 12 months while the child is in CYFD's legal custody. §32A-4-25.1(F).

21.3 Initiation and Notice

The children's court attorney is responsible for requesting the hearing and providing notice. Notice must be given to the parties, including the child by and through the child's GAL or attorney, the child's CASA, the local substitute care review board (SCRB), if the case is designated for review, and the foster parent, pre-adoptive parent or relative providing care for the child. §32A-4-25.1(G); Rules 10-104.1 and 10-345(B).

21.4 Participants

Participants in the hearing are typically the parties and the CASA. Any person who has information about the status of the child or the treatment plan may give testimony, including anyone called as a witness by a party or any person given notice of the hearing. §32A-4-25.1(H). This includes the foster parent, pre-adoptive parent, or relative caregiver who has a right to be heard regardless of whether he or she is a formal party to the proceeding. §32A-4-27(F); Rule 10-104.1. Other individuals who may be permitted to attend the hearing, even though it is generally closed to the public, are described in detail in Rule 10-324. ***See also*** Handbook §15.4.

It is important to keep in mind that the child is a party to the proceeding and, as a general rule, has a right to participate in the hearing. GALs and youth attorneys should pay particular attention to Rules 10-325 and 10-325.1 regarding the notice they must file with the court regarding the child's right to attend. ***See*** Handbook §17.4 for details.

The Child and Family Services Improvement Act of 2006 requires the state to have procedural safeguards in place to assure that the court consults with the child in an age-appropriate manner regarding the proposed permanency plan for the child. ***See*** Handbook §36.8. The preferred practice in New Mexico is to involve children as much as possible in proceedings affecting them, including providing for their attendance at the hearing. The attendance of children at hearings is presumed and §32A-4-20(E) sets out the only circumstances in which a child can be excluded from a hearing. Indeed, CYFD rules specifically require that the child be consulted, in an age-appropriate manner, about the permanency plan at the permanency hearing. 8.10.7.12 NMAC.

21.5 Reports

Prior to the permanency hearing, CYFD must submit a copy of the continuation of the dispositional order and notice of hearing to the substitute care advisory council and a progress report to the SCRB, if the council has designated the case for review. A designated

SCRB may review the child's case and the progress report, and report its findings and recommendations to the court. §32A-4-25.1(A).

Rule 10-345(C) requires that CYFD, not less than five days prior to a permanency hearing, prepare and serve on each party a pre-permanency hearing report. The report must include the department's proposed permanency plan, as well as any proposed changes to the disposition plan (generally the case, or treatment, plan).

21.6 Evidence

The Rules of Evidence do not apply to permanency hearings. §32A-4-25.1(H); Rule 11-1101(D)(3). The court may admit testimony by anyone given notice of the hearing who has information about the status of the child or the status of the treatment plan, and all testimony is subject to cross-examination. §32A-4-25.1(H).

All parties have the opportunity to present evidence and cross-examine witnesses. §32A-4-25.1(B).

In *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, 136 N.M. 53, the court ruled that due process protections attach at the permanency hearings. "Because due process is a flexible right, the amount of process due at each stage of the proceedings is reflective of the nature of the proceeding and the interests involved, as well as the nature of the subsequent proceedings." *Id*. ¶25. The court determined that due process requires basic protections at critical stages of an abuse/neglect proceeding and that permanency hearings constitute a critical stage. *Id*. ¶¶28-29.

21.7 The Permanency Plan

21.7.1 Permanency Plans

The court adopts a permanency plan for the child at the first permanency hearing. As described in Handbook Chapter 20, the plan for the child will be:

- reunification;
- adoption, with either the filing of a motion for termination of parental rights or a voluntary relinquishment of parental rights;
- permanent guardianship;
- placement with a fit and willing relative; or
- placement in a planned permanent living arrangement (PPLA). §32A-4-25.1(B)

Reunification is the preferred option unless the court finds that aggravated circumstances exist. 8.10.8.12(A) NMAC. The last option, a PPLA, is available only if there is substantial evidence that none of the other permanency plans are appropriate for the child. §32A-4-25.1(B)(5). CYFD rules require that the children's court attorney document to the court "the

compelling reasons" for retaining legal custody in CYFD under a plan of PPLA. 8.10.7.15(D) NMAC.

The federal Preventing Sex Trafficking and Strengthening Families Act, enacted in 2014 and summarized in Handbook §36.10, limits the PPLA to youth age 16 and older. This is now reflected in CYFD regulations, at 8.10.8.12(E) and 8.10.9.7(L) NMAC.

21.7.2 Reasonable Efforts to Finalize Permanency Plan

When the court holds a permanency hearing, it will determine, among other things, whether CYFD has made reasonable efforts to finalize the permanency plan in effect. Rule 10-345(G). Like the court's adoption of a permanency plan, the reasonable efforts determination must be made within 12 months after the child is considered to have entered foster care. *Id*.

This judicial determination must be explicitly documented, made on a case-by-case basis, and so stated in the court order. 8.10.7.12(H) NMAC. The children's court attorney is expected to provide documentation and evidence to permit the court to make specific factual findings in its determination. 8.10.7.15(B) NMAC. *See also* Form 10-531, Finding #6.

ASFA Note. Many of the standards and procedures described in this chapter are based on the federal Adoption and Safe Families Act (ASFA). The requirement of "reasonable efforts to finalize the permanency plan" is an example.

As explained in Handbook §36.4, the so-called ASFA requirements are not requirements imposed directly on the New Mexico children's courts. Rather, they are conditions that Congress and the federal agency implementing ASFA have placed on the state's receipt of federal dollars for foster care. Federal funds make up a considerable portion of the funds provided to maintain a child in foster care in New Mexico, and they make up a significant portion of the funds used by CYFD to administer the foster care program. In order to qualify for the funds, CYFD has a plan which is approved by the federal agency and under which CYFD is committed to fulfilling the requirements of Title IV-E of the Social Security Act, including reasonable efforts to finalize the permanency plan.

In the case of the "reasonable efforts to finalize a permanency plan" determination, a child becomes ineligible for Title IV-E foster care payments if the determination is not made within the required 12 months period. ***See*** Handbook §36.4 for further explanation.

21.7.3 Considerations for ICWA cases

When a case involves an Indian child, the requirements of ICWA for continued custody by the state agency must be met. With regard to efforts to finalize the permanency plan, in most cases the permanency plan prior to the permanency hearing will be reunification. Therefore, the efforts to finalize that plan will be efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 U.S.C. §1912(d). Those efforts should include efforts that rise to the level of active efforts, which have been defined

in case law as "where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own." *State ex rel. CYFD v. Yodell B.*, 2016-NMCA-029, ¶17 (citation omitted). ***See*** Handbook §17.11.2, §18.5.4 and Chapter 32 on ICWA.

21.7.4 Reunification; Adopting a Transition Home Plan

Whenever the court establishes reunification as the permanency plan, it must also adopt a plan for transitioning the child home within a reasonable period of time depending on the facts and circumstances, but not to exceed six months. The court will also schedule a permanency review hearing within three months. §32A-4-25.1(C). ***See*** Handbook Chapter 22 on the permanency review hearing.

21.7.5 Reasonable Efforts to Locate Relatives

Until 2016, §32A-4-25.1 required that, when the permanency plan was other than reunification, the court was to determine whether CYFD had made reasonable efforts to:

- identify and locate all grandparents and other relatives; and
- conduct home studies on any appropriate relative expressing an interest in providing permanency for the child.

This mandate has been moved up in the proceeding to the dispositional hearing. Now, at disposition, the court will determine whether the department has made reasonable efforts to find relatives and conduct homes studies. If the court determines at disposition that reasonable efforts were not made, it may issue supplemental orders and reconsider the matter at future review hearings.

The permanency hearing provides an opportunity to continue to ask about possible relatives. While the mandate to identify relatives was moved up in the proceeding, the need to pay close attention to relatives who may be able to care for the child remains throughout the proceeding. *See State ex rel. CYFD v. Laura J.*, 2013-NMCA-057, ¶61.

Another consideration is whether the department has investigated whether the child is eligible for enrollment as a member of an Indian tribe and, if the child is eligible, pursued enrollment on the child's behalf. This is required by §32A-4-22(I) and emphasized by the Court of Appeals in *State ex rel. CYFD v. Marsalee P.*, 2013-NMCA-065, ¶¶25-27. Among other things, enrollment may well assist CYFD in identifying and locating relatives.

21.7.6 Out-of-State Placement Considerations

If a child is not being returned to the parent, CYFD must consider out-of-state as well as in-state permanent placements for the child, and CYFD will report on this at the permanency hearing. If the child is in out-of-state placement at the time of the hearing, the court will need to determine whether the out-of-state placement continues to be appropriate and in the best interests of the child, and the children's court attorney will request a finding on this

matter. 8.10.7.18(F) and (G) NMAC. ***See also*** Handbook §36.7 on the Safe and Timely Interstate Placement of Foster Children Act of 2006.

CYFD places children in its custody in out-of-state placements and accepts children in the custody of another state for placement in New Mexico in accordance with the 2006 federal law and the Interstate Compact on the Placement of Children (ICPC), which is found at §32A-11-1 to 7. *See* 8.10.8.21 NMAC.

21.8 Education and Activities

The court will review the appointment of the educational decision maker and decide whether to continue or change the appointment. §32A-4-35; Rule 10-316; Forms 10-531 and 10-564.

At this hearing, CYFD will document the steps it has taken to ensure that the child has regular, ongoing opportunities to engage in age and developmentally appropriate activities. It will also document the steps it has taken to ensure that the child's foster care provider is following the reasonable and prudent parent standard. 8.10.8.15 NMAC. This documentation at the permanency hearing is required by the federal Preventing Sex Trafficking and Strengthening Families Act of 2014, summarized in Handbook §38.10.

21.9 Transition Planning for Older Youth

21.9.1 Transition Plan

If the initial permanency hearing is the first hearing after the child's 17th birthday, CYFD will present the child's proposed transition plan to the court at the hearing. The Children's Code requires that the court order a transition plan for the child at the hearing. §32A-4-25.2(B). ***See*** Handbook §19.9 for a description of this plan and the process for developing a plan for the court's consideration.

Once the judge has ordered a transition plan, the plan must be reviewed at every subsequent review and permanency hearing. §32A-4-25.2(C).

Practice Note. As explained in Handbook §19.9, the transition plan is distinct from the life skills plan that is prepared with a child when the child is 14. However, both should be reviewed by the court at every judicial review and permanency hearing.

21.9.2 Discharge Hearing

If the permanency hearing is the last review or permanency hearing before the child turns 18, the court must conduct a discharge hearing as part of the hearing. The discharge hearing is described in detail in §19.9 of this Handbook. The court may retain jurisdiction after the child turns 18 if the department has not made reasonable efforts to meet the requirements of §32A-4-25.3(B), termination of jurisdiction would be harmful to the young adult, and the young adult consents.

21.10 Special Immigrant Juvenile Status

Given how long the process can take, it is important for CYFD to apply for special immigrant juvenile status for an undocumented child as soon as it determines that the child may be eligible. However, the information that forms the basis of this determination may not be available until the permanency hearing. In this case, the matter could be addressed at the permanency hearing and CYFD should move the court for an SIJS order that includes the findings required to establish that the child meets the criteria for SIJS. CYFD's motion must include a statement of the express wishes of the child. 8.10.7.29 and 8.10.8.22 NMAC.

See Handbook §18.11 for a detailed discussion of SIJS and the responsibilities of the court and CYFD under §32A-4-23.1 of the Children's Code.

21.11 Future Permanency Determinations

21.11.1 Permanency Review Hearings

The Children's Code requires the court to hold a permanency review hearing within three months of the initial permanency hearing if the child was not returned home and the permanency plan is reunification. If the child is reunified before the review hearing, the hearing may be vacated. §32A-4-25.1(C).

See Handbook Chapter 22 on permanency review hearings.

21.11.2 Hearing on Permanency Plan Every 12 Months

The court must hold permanency hearings every 12 months when a child is in the legal custody of CYFD. §32A-4-25.1(F). At each hearing, the court will review the permanency plan in effect and determine whether the department has made reasonable efforts to finalize the permanency plan and whether changes to the plan are appropriate. Rule 10-345(G).

21.12 Checklist

PERMANENCY HEARING CHECKLIST

- ☐ Preliminary matters
- ☐ Inquiries regarding
  - Absent parents
  - Presence/consulting with child
  - Indian child/placement
  - Relatives
  - Presence of foster parents
- ☐ Rules of Evidence do not apply
- ☐ CASA report, if applicable
- ☐ SCRB report, if applicable
- ☐ Result of pre-permanency hearing meeting
- ☐ Proposed permanency plan
- ☐ Case plan
  - Progress and proposed modifications, if any
  - Sibling placement, if applicable
  - Educational continuity and progress
  - Life skills plan
  - Orders as appropriate
- ☐ Presentation of evidence and cross-examination
- ☐ Adoption of permanency plan
- ☐ Reasonable efforts to finalize permanency plan
- ☐ Review of availability of relatives
- ☐ Out-of-state placement considerations
- ☐ Opportunities for activities for the child
- ☐ Transition planning for older youth
  - If child is 17, decide on transition plan
  - If child is almost 18, conduct discharge plan
- ☐ Special immigrant juvenile status, if applicable
- ☐ Education decision maker reviewed
- ☐ Scheduling
  - Permanency review hearing w/in 3 months if plan is reunification
  - Permanency hearing every 12 months
  - Discharge hearing before child turns 18

CHAPTER 22

PERMANENCY REVIEW HEARING

This chapter covers:

- Transition home plans required when permanency plan is reunification
- Permanency review hearings to review status of transition home plan

22.1 Purpose

If the permanency plan adopted by the court at the initial permanency hearing calls for reunification, the court will also adopt a plan to transition the child home and schedule a review hearing within three months. The permanency review hearing is an opportunity for the court to check in with CYFD and the family and see how the transition home is going. If reunification is looking hopeful, the hearing gives the court and parties a chance to make adjustments as needed. If it is not going well, the court will need to decide whether a different permanency plan is in the child's best interest. §32A-4-25.1(D).

22.2 Timeline

If the court adopts a permanency plan of reunification at the first permanency hearing, the court must adopt a plan for transitioning the child home within a reasonable period of time, depending on the facts and circumstances of the case, but not to exceed six months. The court must also schedule a permanency review hearing to be heard *within three months*. If the child is reunified, this hearing may be vacated. §32A-4-25.1(C); Rule 10-345(F).

22.3 Initiation and Notice

The children's court attorney (CCA) is responsible for giving notice of the permanency review hearing to the parties, including the child by and through the child's GAL or attorney. The CCA will also give notice to the CASA, if one has been appointed, the SCRB, if the case has been designated for review, and the foster parent, pre-adoptive parent, relative caring for the child, or substitute caregiver. §32A-4-25.1(G); Rules 10-104.1 and 10-345(B).

22.4 Conduct of the Hearing

22.4.1 Need for Action

The fact that the permanency review hearing is held at all means that the child has been in custody for well over 12 months. If the plan is reunification, the child should be returning

home. If the child cannot be returned home, the Children's Code requires the court to decide upon a permanency plan other than reunification. §32A-4-25.1(D); Rule 10-345(F).

22.4.2 Action at Hearing

Based on the evidence presented at the review hearing, the court has one of four choices. It can:

- change the plan from reunification to one of the alternative permanency plans set forth in §32A-4-25.1(B) (***see*** Handbook §20.5.1 for a description of these plans);
- dismiss the case and return custody of the child to the parent, guardian, or custodian;
- continue legal custody in CYFD to complete a transition home plan and continue the case plan for no more than six months, after which the case must be dismissed unless the plan is changed as provided in the first bullet above; or
- return the child to the custody of the parent, guardian or custodian, subject to any conditions or limitations as the court may prescribe, including protective supervision by CYFD and continuation of the case plan for not more than six months, after which the case must be dismissed. §32A-4-25.1(D); Rule 10-345(F).

If CYFD is given protective supervision, it may seek removal of the child from the home by obtaining an order in the case or by seeking emergency removal under §32A-4-6 during the period of protective supervision, if the child's best interest were to require such action. If the child is removed in this situation, the court will schedule a permanency hearing within 30 days of the child coming back into CYFD's legal custody. §32A-4-25.1(D).

Hard Decisions. The courts have to make hard decisions at this juncture. The statutory options seem simple enough on the surface. However, judges and participants have struggled to find solutions in those situations where the child's best interests would still be served by returning home, but the process would take longer than allowed.

Such a predicament is particularly acute in cases involving older children who have an active relationship with the parent and who do not want to be adopted (under the Adoption Act, by age 14, children have a right to turn down an adoption), as well as in cases where the parent has been making some progress in treatment, but not swiftly enough. Where the presenting problem is substance abuse, this is a frequent scenario. These difficult dilemmas do not alter the fact, however, that the child should not remain indefinitely in substitute care, despite the human tendency to hold out for additional time in hope of a better resolution.

As a legal matter, the decisions prompted by the permanency review hearing should take into account the compelling reasons that may obviate the need for the filing of a motion for termination of parental rights. If the situation of the family and child meets the criteria of §32A-4-29(G), there may be ways to allow further intervention without changing the permanency plan to adoption.

The New Mexico Court of Appeals recognizes the limited amount of time that parents have to rehabilitate and reunite with their children. *State ex rel. CYFD v. Maria C.*, 2004-

NMCA-083, ¶21, 136 N.M. 53. However, the court also has "no doubt that a parent, like a criminal defendant, has a constitutional right to fair notice and an opportunity to participate in all critical stages of abuse and neglect proceedings" and that "permanency hearings can represent a critical stage" in the proceeding. ¶¶28-29. Ensuring due process to the parents while moving toward permanency for the child under statutory timelines is challenging but important.

22.4.3 Evidence

At the permanency review hearing, all parties have the opportunity to present evidence and cross-examine witnesses. §32A-4-25.1(D). Foster parents, pre-adoptive parents or relative care givers have the right to be heard whether or not they are parties. §32A-4-25.1(G); §32A-4-27(F); Rule 10-104.1. Indeed, the court may admit evidence by any person given notice of the hearing who has information about the status of the child or the status of the treatment plan (also known as the case plan). §32A-4-25.1(H). *See also* Rule 10-324 for persons who have an interest in the case and may attend hearings, which is described in Handbook §15.4.

While the Rules of Evidence do not apply at permanency hearings, the court should ensure that respondents have the opportunity to be heard in a meaningful manner. *Maria C.*, 2004-NMCA-083, ¶¶23, 26. All testimony is subject to cross-examination. §32A-4-25.1(H).

The court should obtain the child's views of his or her permanency plan during the hearing. **See** Handbook §21.4.

22.5 Reasonable Efforts to Finalize Plan

CYFD should be prepared to demonstrate to the court that it has made reasonable efforts to finalize the permanency plan in effect and to request a determination to this effect. CYFD must request this determination at least once every 12 months that the child remains in foster care and hence should be prepared to do so at this hearing. Rule 10-345. ***See also*** Handbook §36.4 on ASFA.

22.6 Transition Planning for Older Youth

If the permanency review hearing is the first hearing after the child turns 17 or the last hearing before the child turns 18, then part of the hearing must be devoted to reviewing the transition plan for the child required by §32A-4-25.2, conducting the discharge hearing described in §32A-4-25.3, or both. ***See*** Handbook §§19.9 and 21.9 for more details.

22.7 Considerations at Every Hearing

Every judicial review and permanency hearing is an opportunity to ensure that certain key areas are being addressed. The court may have to use some discretion here because the hopeful outcome of the permanency review hearing is a green light to reunification in the

near future. However, if the child is to remain in the legal custody of the department for any length of time, these should be considered. It could be another nine months before the next permanency hearing.

Indian Child. Has it been resolved that the child is or is not an Indian child? While this inquiry and any efforts to pursue enrollment for an eligible child should have taken place much earlier in the case, it certainly needs to be done before termination of parental rights is contemplated. ***See*** Handbook §15.9.

ICWA Placement Preferences. If the child is an Indian child, are placement preferences being honored? ***See*** Handbook §18.10.

Relatives. Has CYFD made reasonable efforts to locate and do home studies on relatives who may be interested in caring for the child? What is the status of these efforts? ***See*** Handbook §18.8.

Siblings. Is CYFD placing the siblings together and, if not, why not? Are they visiting each other or having other interaction? ***See*** Handbook §18.9

Educational Decision Maker. Is the current education decision maker doing well or is there a need to change the appointment? ***See*** Handbook §15.12.

All of these areas are outlined in the form of order for the permanency review hearing. *See* Form 10-532.

22.8 Checklist

PERMANENCY REVIEW HEARING CHECKLIST

- ☐ Preliminary matters
- ☐ Inquiries regarding
  - Absent parents
  - Presence of child
  - Indian child/placement
  - Presence of foster parents
  - Relatives
  - Siblings
  - Education decision maker
- ☐ Rules of Evidence do not apply
- ☐ Views of the child
- ☐ CASA report, if applicable
- ☐ SCRB report, if applicable
- ☐ Decision to be reached at hearing
  - Child returns home and case dismissed
  - Child remains in CYFD custody while transition plan completed
  - Child is returned to parents' custody with conditions, such as protective supervision, or
  - The permanency plan is changed.
- ☐ Reasonable efforts to finalize plan
- ☐ Opportunities for activities for the child
- ☐ Transition planning for older youth
  - If child is 17, decide on transition plan
  - If child is almost 18, conduct discharge hearing
- ☐ Scheduling
  - Judicial review hearing
  - Discharge hearing before child turns 18
  - Hearings on pending motions for TPR or permanent guardianship

CHAPTER 23

PERIODIC JUDICIAL REVIEW

Judicial review hearings are held at least every six months. This chapter includes:

- Purpose of periodic judicial reviews.
- Timing of these reviews.
- Compliance with case plan (also known as treatment plan)
- Reasonable efforts to finalize the permanency plan in effect.
- Review and approval of the permanency plan as appropriate.
- Compliance with placement preferences for Indian children.
- Transition planning for older youth.
- Extension of jurisdiction in particular situations.

23.1 Purpose

Judicial reviews are held every six months, often combined with a permanency hearing. By the time the second, third, or fourth review is taking place, there is a good chance that the permanency plan is one that does not involve family reunification. Rather, the focus is on permanency for the child and meeting the child's needs.

Periodic judicial review hearings are an important tool for the court to use to ensure that progress is being made toward finding the child a stable and permanent home and to address any problems that arise. They are an important opportunity to ensure that CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child and to review the plan and determine whether it remains appropriate.

Because a judicial review of this nature means that the child has been in care for anywhere from a year to several years, it is important to look carefully at whether the child's educational needs are being met and how the child is doing in terms of his or her social, physical and mental well-being. The child may be within a year or two of aging out of the system, so particular attention needs to be paid to his or her transition plan.

23.2 Timeline

Under §32A-4-25 and Rule 10-346, the court should be scheduling a judicial review hearing every six months to review the department's progress in implementing the court's orders, including the case plan (also known as the treatment plan). These are often merged or scheduled together with permanency hearings held under §32A-4-25.1.

23.3 Initiation and Notice

As with the previous hearings, the children's court attorney has the responsibility for requesting the hearing and notifying the parties, including the child by and through the child's GAL or youth attorney, the child's CASA, the substitute care review board (SCRB), if one has been designated to review the case, and the child's foster parent, pre-adoptive parent, relative caregiver, or substitute care provider. §32A-4-25(D); §32A-4-27(F); Rule 10-104.1.

Prior to the review, CYFD will submit a progress report to the substitute care advisory council or the designated SCRB. If an SCRB has been designated, it may review the dispositional order or continuation of the order and CYFD's progress report and report its findings and recommendations to the court. §32A-4-25(B). (The former provision of §32A-4-25 making the CRB report part of the child's permanent record was repealed in 2016.)

23.4 Participants

The review may be conducted by the court or by a special master, provided the court approves the findings made by the special master. §32A-4-25(C). Participants in the hearing may include the parties and their attorneys, the child's GAL or youth attorney, the child, the child's foster parents, the CASA, the SCRB, if designated, and possibly treatment providers and witnesses.

The children involved in the case are parties. Counsel for the older child and a younger child's GAL need to again advise their children that they have a right to attend the hearing and notify the court regarding the child's attendance at the hearing. Rules 10-325 and 10-325.1. A child under 14 may be excluded from the hearing only if the court finds that exclusion is in the child's best interest. A child who is 14 or older may be excluded only if the court finds a compelling reason to do so and states a factual basis for so finding. §32A-4-20(E).

It is important to note that foster parents, pre-adoptive parents, and relative caregivers have a right to notice of the time, place and purpose of any judicial review hearing that is scheduled, as well as the right to be heard. §32A-4-25(D) and (E); §32A-4-27(F); Rule 10-104.1.

Practice Note. In some parts of the state, foster parents are given the option of providing a written report to the court.

23.5 Conduct of the Hearing

23.5.1 Compliance with Case Plan

In general, the court is expected to use the judicial review hearing to review CYFD's progress in implementing the court's orders. Rule 10-346. The court must determine the extent of compliance with the case (treatment) plan and whether progress is being made toward establishing a stable and permanent placement for the child. §32A-4-25(E).

CYFD must show that it has made reasonable efforts to implement the case plan approved at disposition and present a plan consistent with the Children's Code for any period of extension of the disposition order. ***See*** Handbook §18.7. In the case of an Indian child, CYFD should show that it has made active efforts.

The respondent must show that efforts to comply with the case plan and efforts to maintain contact with the child were diligent and made in good faith. §32A-4-25(E).

23.5.2 Status of the Child

The court should review the child's adjustment to placement, any change in the ability of the parent to meet the needs of the child, the quality and consistency of visitation, and any other matters touching on the child's welfare, including but not limited to placement with his or her siblings and educational continuity. Sibling placement and educational continuity for the child are concerns highlighted in the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 and the state Children's Code amendments in 2009. The court would have addressed both at disposition and should be sure to include them during the court's periodic reviews. It must also revisit the appointment of the educational decision maker for the child and change the appointment if necessary.

At the initial permanency hearing, the court will have heard or read a report from CYFD on the steps the department has taken

- to ensure the child's foster care provider is following the reasonable and prudent parent standard; and
- to ensure the child has regular, ongoing opportunities to engage in age and developmentally appropriate activities. 8.10.8.15(D) NMAC.

These efforts should be revisited at every subsequent hearing. 8.10.8.15(D) NMAC. This conforms with Title IV-E as amended by the federal Preventing Sex Trafficking and Strengthening Families Act in 2014. ***See*** Handbook §36.10.

As noted, the judicial review hearing is often held in conjunction with a permanency hearing. Annual permanency hearings must be held for the court to determine whether CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child, whether the plan is reunification, adoption, permanent guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement. For the

child to remain eligible for Title IV-E foster care payments, the court must make this finding at least once every 12 months while the child is in foster care. See §36.4 on ASFA.

23.5.3 Transition Planning for Older Youth

If the judicial review hearing is the first hearing after the child turns 17, then part of the hearing must be devoted to reviewing the transition plan for the child required by §32A-4-25.2. If the hearing is the last one before the child turns 18, then the court must conduct the discharge hearing described in §32A-4-25.3. The court will be asked to make findings during the discharge hearing portion of the judicial review. This is very important because it may be the last chance for the court (or CYFD) to influence the child's outcomes. ***See*** Handbook §19.9 and §21.9 for more details.

23.5.4 Indian Children

In cases involving Indian children, this hearing gives the court an opportunity to determine whether the placement preferences of the Indian Child Welfare Act or the child's tribe have been followed and whether the child's case (treatment) plan provides for maintaining his or her cultural ties. When placement preferences have not been followed, good cause for non-compliance must be clearly stated and supported. §32A-4-25(H); ***see*** Handbook §18.10 on placement preferences.

23.5.5 Special Immigrant Juvenile Status

If the child is an undocumented immigrant, CYFD may have filed a petition for special immigrant juvenile status (SIJS) and application for adjustment of status for the child. ***See*** Handbook §18.11. If this is the case, the case worker will advise the court of the status of the petition and application in the judicial review report.

It will be important for the court to determine whether the federal immigration agency has officially approved the petition and application. If the petition and application have not been granted by the time the child reaches 18, the court may retain jurisdiction until the petition and application are granted or the child turns 21. Jurisdiction would be retained to ensure that the child continues to satisfy the requirements for classification as a special immigrant juvenile. Retention would not affect the transition services available to the child. §32A-4-23.1.

Practice Note. If the child is an undocumented immigrant but CYFD has not filed for special immigrant juvenile status, the court should ask about the child's status at the judicial review. The child's eligibility for SIJS or the merits of petitioning for SIJS may have changed since the last hearing and the department may now be in a position to ask for the findings required for an SIJS order. ***See*** Handbook §18.11 for a discussion of the responsibilities of the court and the department under §32A-4-23.1.

23.5.6 Child Support

Parents have an obligation to pay to support the child in substitute care. If no child support order was entered previously, such as at the dispositional hearing, it should be entered at this time. In many courts, this means a referral to the Child Support Enforcement Division of the Human Services Department. ***See*** Handbook §18.15.

23.6 Evidence

All parties given notice of the hearing have an opportunity to present evidence and cross-examine witnesses. §32A-4-25(E). However, the formal Rules of Evidence do not apply. §32A-4-25(F); Rule 11-1101(D)(3). The court may admit testimony by any person who has information about the status of the child or status of the case (treatment) plan. §32A-4-25(F).

The foster parent, pre-adoptive parent, or relative caregiver has a right to be heard at this hearing. Rule 10-104.1.

23.7 Findings and Order

At the conclusion of the hearing, the court must make findings of fact and conclusions of law. §32A-4-25(G). A form of order, with findings, was approved by the Supreme Court in 2014. *See* Form 10-533.

23.7.1 Findings of Fact

Under §32A-4-25(E), the court's findings should address the reasonableness of CYFD's efforts to implement the case plan, the degree of compliance by the respondent, and whether continuation of custody is in the best interest of the child. The court must also review the placement status of any Indian child for compliance with ICWA, as noted in §23.5.4 above.

The judicial review hearing provides the court another opportunity, if appropriate, to determine whether CYFD is making reasonable efforts to preserve and reunify the family, with paramount concern being the child's health and safety. If the child is an Indian child, the question is whether CYFD has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. See Handbook Chapter 32.

The court may determine that reasonable efforts are not required because:

- the efforts would be futile; or
- the parent, guardian, or custodian has subjected the child to aggravated circumstances (***see*** Handbook §17.5.4 for definition). §32A-4-25(I)(5). Note: CYFD must plead and prove the existence of aggravated circumstances before the court can find that reasonable efforts are not required for one of these reasons.

However, any such determination does not relieve CYFD of the need to continue making active efforts in the case of an Indian child. See Handbook Chapter 32.

Note on Futility Findings at Judicial Review: In *State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701, an appeal from the termination of parental rights, the Court of Appeals discussed the making of futility findings at judicial review hearings at which the Rules of Evidence do not apply. At the third judicial review hearing in the case, the trial court found that CYFD had made reasonable efforts to reunite mother and children and that further efforts to do so would be futile. Mother argued on appeal that the trial court's reliance on hearsay evidence and oral argument and its failure to swear in witnesses and take formal testimony at the judicial review deprived her of a fair hearing.

The court observed, first, that, while a finding of futility results in the removal of a person's expectation of CYFD assistance, the parent still has the opportunity to receive assistance on her own and otherwise protect her parental rights. This argues against the need for additional procedural safeguards, particularly in the absence of objection by the parent. *Id.* ¶¶14-15. Also, Mother knew in advance of the hearing that CYFD was planning to seek a finding of futility based on past judicial review reports. The court believed that this advance notice and the mother's opportunity at the judicial review to contest the validity of the previous reports also reduced her interest in having additional procedural safeguards. Her right to due process was not violated. *Id.* ¶¶17-19. The court proceeded, however, to say:

> In view of the fundamental interests that are at stake in termination of parental rights cases, we recommend that in the future, if the real potential for an adverse ruling is in the offing at a judicial review hearing, and the adverse ruling might be avoided through the exercise of certain procedural safeguards, counsel should be prepared to present evidence and cross-examine witnesses. Although the rules of evidence do not necessarily apply in judicial review hearings, the hallmarks of the adversarial process—the presentation of evidence and the cross-examination of witnesses – are both contemplated in and permitted by our statutes. *Id.* ¶21.

As noted, it is important that the court make findings with regard to whether CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child. If the hearing is the last hearing before the child turns 18 then the court must make findings regarding whether CYFD has made reasonable efforts to take all of the steps required for discharge under §32A-4-25.3. If CYFD has not made reasonable efforts, the court must also determine whether termination of jurisdiction at 18 would be harmful to the young adult. If so, the court may continue to exercise jurisdiction for a period not to exceed a year from the child's 18th birthday. In this case, the court must also determine if the young adult consents to continued jurisdiction. §32A-4-25.3(C).

The court may also need to consider findings to support special immigrant juvenile status (SIJS), if requested and appropriate. If a petition and application for SIJS are pending and the child is approaching 18, findings to this effect would support an order extending jurisdiction past the child's 18th birthday. §32A-4-23.1(E).

23.7.2 Order

Given §32A-4-25.1, some of the following situations may no longer be part of the picture. Nonetheless, under §32A-4-25(I) and based on its findings, the court may select any one of five dispositional alternatives:

- Return the child to the respondent and dismiss the case, if the court finds that conditions in the home that led to the abuse have been corrected and it is now safe for the child to return home;
- Permit the child to remain with the respondent, subject to conditions, including protective supervision of the child by CYFD;
- Return the child to the respondent under the protective supervision of CYFD;
- Transfer to or continue legal custody in:
    - the non-custodial parent, if that is found to be in the child's best interest;
    - a relative or other individual who, after study by the department, is found by the court to be qualified to receive and care for the child and is appointed as the child's permanent guardian; or
    - CYFD, subject to additional orders as described below;
- Continue the child in the legal custody of CYFD, with or without parent involvement in the case (treatment) plan. ***See*** discussion of reasonable efforts in §23.7.1 above. §32A-4-25(I).

The court may make additional orders regarding the case plan or placement of the child to protect the child's best interests if it determines that CYFD has:

- failed to implement any material provision of the case plan; or
- abused its discretion in the placement or proposed placement of the child. §32A-4-25(I)(6).

Note on the "abuse of discretion" standard for reviewing placement decisions. The Court of Appeals has emphasized that the Children's Code does not grant the court the power to dictate to the legal custodian where a child should be placed. Legal custody is a legal status created by court order that vests in a person or agency the right to determine where and with whom a child will live. Once legal custody is in CYFD, the children's court does not have the authority to prohibit the department from placing physical custody with a particular person. *State ex rel. HSD in the Matter of Jacinta M.*, 1988-NMCA-100, ¶5, 107 N.M. 769; *see also State ex rel. CYFD v. Senaida C.*, 2008-NMCA-007, ¶11, 143 N.M. 335.

Jacinta M. is worth noting for another reason. The children's court ordered that the child not be placed with the child's homosexual brother despite favorable recommendations. The Court of Appeals stated: "We believe the sexual orientation of a proposed [physical] custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment." 1988-NMCA-100, ¶12.

If the court finds that the respondent has not complied with the court-ordered case (treatment) plan, the court may order:

- the respondent to show cause why the respondent should not be held in contempt of court; or
- a hearing on the merits of terminating parental rights. §32A-4-25(I)(7).

If the court has reviewed the permanency plan (as distinct from the case plan) to determine the appropriate plan, its order should reflect approval of a permanency plan for the child. ***See*** §23.5.2 above.

If this is the first hearing after the child turns 17, the court will order a transition plan for the child under §32A-4-25.2. If this is the last hearing before the child turns 18, the court will, in the discharge phase of the hearing, decide whether to continue jurisdiction until the requirements of §32A-4-25.3 are met.

If a change needs to be made in the appointment of an educational decision maker, this will be done by separate order. Rule 10-316; Form 10-564.

23.8 Duration of Dispositional Order

Dispositional orders entered at a judicial review hearing remain in force for six months, except for orders that provide for the transfer of the child to the child's noncustodial parent or to a permanent guardian. §32A-4-25(J). However, this provision should be compared with §32A-4-24, which describes the "shelf life," so to speak, of the judgment and disposition entered after the dispositional hearing. ***See*** Handbook §18.16.

23.9 Continuation of Jurisdiction When Child Turns 18

The court may extend jurisdiction for up to one year past the child's 18th birthday if the court finds that CYFD did not make reasonable efforts to implement the requirements for discharge and that termination of jurisdiction would be harmful to the young adult. However, the young adult must consent to continued court jurisdiction. §32A-4-25.3(C).

Similarly, the court may extend jurisdiction up to age 21 if a petition and application for special immigrant juvenile status for the youth have been filed and the federal immigration agency has not yet acted. Jurisdiction is extended only to ensure that the child continues to satisfy the requirements for classification as a special immigrant juvenile. §32A-4-23.1(E).

23.10 Checklist

PERIODIC JUDICIAL REVIEW CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
- ☐ Inquiry regarding
  - Absent parents
  - Presence of child
  - Indian child
  - Presence of foster parents
- ☐ Rules of Evidence do not apply
- ☐ CASA report, if applicable
- ☐ SCRB report, if applicable
- ☐ Case (treatment) plan implementation, compliance
- ☐ Reasonable efforts to finalize permanency plan
- ☐ Adoption of a new permanency plan, if appropriate
- ☐ Custody and visitation
- ☐ Placement preferences, if Indian child
- ☐ Sibling placement
- ☐ Educational continuity and decision maker
- ☐ Opportunities for activities for the child
- ☐ Transition planning for older youth
  - If child is 17, decide on transition plan
  - If child is almost 18, conduct discharge hearing
- ☐ Special immigrant juvenile status, if applicable
- ☐ Child support
- ☐ Scheduling
  - Further judicial reviews and permanency hearings
  - Discharge hearing before child turns 18

CHAPTER 24

TERMINATION OF PARENTAL RIGHTS

This chapter covers:

- Voluntary termination (relinquishment) of parental rights.
- Involuntary termination of parental rights (TPR).
- Special considerations in termination of parental rights proceedings, including:
    - Timing under the Children's Code and ASFA
    - Applicability of the Indian Child Welfare Act
    - Effect of a parent's incarceration
    - Relevance of prospective adoptive family situation
    - Right to effective assistance of counsel
    - Limits on use of summary judgment

24.1 Introduction

24.1.1 Effect of Parental Rights Termination

Civil abuse and neglect proceedings may result in the profound consequence of termination of parental rights. The legal effects of termination are substantial. After termination, a natural parent's custodial rights are completely abolished. The order of the court terminating parental rights divests the natural parent of all legal rights and privileges with respect to the child and dispenses with the necessity for consent to or notice of adoptive proceedings concerning the child. Only the child retains any rights, pending adoption, and that is solely to inherit. §32A-4-29(L). Another effect of an involuntary termination of parental rights is that it exposes the parent to a future finding of aggravated circumstances should the parent have another child come into the child abuse/neglect legal system. §32A-4-2(C).

Termination of parental rights is a necessary prelude to adoption. Adoption is the legal process by which a child acquires parents other than the natural parents and parents acquire a child other than their natural child. §32A-5-37(B). The resulting legal relationship is identical to that of a natural parent and child. Termination of parental rights severs the child's legal tie to his or her natural parents so that adoption can occur. Thus, termination of parental rights is a critical tool to achieve permanency for children in the foster care system who cannot return home.

In most ordinary adoption cases not involving abuse or neglect proceedings, the natural parents agree to give up their parental rights and consent to adoption. In cases where the child is under the jurisdiction of the children's court based on alleged parental abuse or neglect, termination of parental rights can also be voluntary. A voluntary termination of parental rights is called a "relinquishment." However, in abuse or neglect cases, terminations of parental rights are likely to be contested. An involuntary termination is called a "termination of parental rights" and may involve a contested judicial proceeding. Even if the parent has not been showing up for or otherwise participating in the proceedings, the state must prove by clear and convincing evidence that this absent parent's rights should be terminated. Proof must be beyond a reasonable doubt in the case of an Indian child. See §§32A-4-28 and 32A-4-29.

24.1.2 Due Process Concerns

Because termination of parental rights proceedings affect the fundamental liberty interest of natural parents in the care, custody and management of their children, they raise both procedural and substantive due process concerns. The U.S. Supreme Court has identified a fundamental privacy interest in raising one's children. The Court called the right to conceive and raise one's children "essential" in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court invalidated, on both due process and equal protection grounds, an Illinois law under which children of unwed fathers became state wards upon the death of the mother. The *Stanley* Court declared that all parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody. In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Court held that before a state may terminate the rights of parents regarding their natural child, due process requires the state to prove its allegations by at least clear and convincing evidence.

New Mexico case law in the area of termination of parental rights traditionally focused on the grounds for involuntary termination and the sufficiency of the evidence for termination in particular cases. In recent years, the state Supreme Court has underscored the importance of procedural due process guarantees. Quoting from *In re Ruth Anne E.*, 1999-NMCA-035, ¶¶17, 19, 126 N.M. 670, the Court wrote that "[d]ue process of law requires that termination proceedings be conducted with 'scrupulous fairness' to the parent" and that "[p]rocedural due process mandates that a person be accorded an opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶18, 133 N.M. 827.

In *State ex rel. CYFD v. Erika M.*, the Court of Appeals emphasized that termination of parental rights "implicates a significant deprivation of a liberty protected by due process" and that procedural due process "guarantees a parent a fair opportunity to be heard and present a defense." 1999-NMCA-036, ¶26, 126 N.M. 760. In *Ruth Anne E.*, the Court held that an

incarcerated father has the right to meaningful participation in the hearing, including the right to review the evidence presented against him and to present evidence on his behalf, and the opportunity to challenge the evidence presented. 1999-NMCA-035, ¶25. *See also State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶32, 142 N.M. 705.

24.1.3 Constraints under the Children's Code and ASFA

In order to comply with its state plan requirements under the federal Adoption and Safe Families Act (ASFA), the state must file or join in a petition to terminate parental rights if the child has been in foster care for 15 of the most recent 22 months. This is also reflected in the Children's Code, at §32A-4-29(G). There are certain exceptions to this rule under ASFA, including an exception for situations where the state has compelling reasons for deciding that filing a petition would not be in the best interests of the child in question or where a child is placed with relatives. ***See*** Handbook §36.4. The Children's Code contains a similar provision but it lists specific reasons that may be compelling, rather than require compelling reasons generally. *See* §32A-4-29(G). Both the Children's Code and ASFA consider the date the child entered foster care to be either the date of the first judicial finding that the child has been abused or neglected or 60 days after the child was removed from the home, whichever occurred first. §32A-4-29(H). ***See*** §24.5.2 below.

24.2 Voluntary Termination of Parental Rights (Relinquishment): Procedure

24.2.1 Overview

At times parents who are parties to an abuse and neglect action decide to voluntarily relinquish their parental rights. Relinquishment can be a positive gesture that allows a parent a greater sense of dignity and control than a full-blown contested termination of parental rights trial. A voluntary relinquishment may also be a way to avoid an involuntary termination of parental rights and thereby avoid a finding of aggravated circumstances in a future case. (Under §32A-4-2(C)(4), a finding of aggravated circumstances may be made against a parent who has had parental rights over a sibling of the child terminated involuntarily.)

A relinquishment to CYFD is heard in the context of the existing abuse and neglect proceeding, if a proceeding is pending, and is not a separate judicial proceeding. §32A-5-24(A). A parent may relinquish parental rights to CYFD only with CYFD's consent. §32A-5-23(B).

Relinquishment usually occurs as adoption plans are being made. However, relinquishment is sometimes sought where the likelihood of adoption is remote but a severance of the parent-child relationship is therapeutically necessary for the child's emotional or physical well-being. *See* 8.10.7.22(A) NMAC.

If a proposed relinquishment of parental rights is not in contemplation of adoption, under §32A-5-24(C) the court may not allow the relinquishment unless it finds that:

- good cause exists;
- CYFD has made reasonable efforts to preserve the family; and
- relinquishment is in the child's best interest.

The parent who is allowed to relinquish in this situation remains financially responsible for the child. The court may order the parent to pay the reasonable costs of the child's support and may use the child support guidelines to calculate a reasonable payment. §32A-5-24(C).

24.2.2 Counseling Required

Parent respondents in a civil abuse and neglect action must receive counseling before signing a relinquishment of parental rights, although counseling can be waived by the court for good cause. §32A-5-22(A). The counseling must meet the following specific requirements:

- Counseling may be provided by a trained counselor, CYFD or an agency, although generally it is provided by CYFD. §32A-5-22(G) and (H). CYFD has identified employees who are qualified to do the counseling.
- Counseling should be private for a minimum of one session for adult parents. §32A-5-22(D)(1). Parents who are minors must have counseling for a minimum of two sessions, one of which must be conducted without the minor parent's parent or guardian. §32A-5-22(D)(2).
- Counseling must be conducted in the primary language of the person receiving the counseling. §32A-5-22(E).
- Counseling must cover the alternatives to and the consequences of relinquishment and adoption. §32A-5-22(C)(2).
- After counseling is completed, a counseling narrative must be prepared pursuant to CYFD regulations to accompany the relinquishment form to be filed with the court. §32A-5-22(F).

24.2.3 Relinquishment Form

There are also specific requirements for the form of the relinquishment. §32A-5-21. The relinquishment must be in writing and must state all of the following under §32A-5-21(A):

- Date, place, and time of execution.
- Date and place of birth of the prospective adoptee and any names by which the prospective adoptee has been known.
- Name and address of CYFD or the licensed child placement agency to whom the relinquishment may be made.
- That the person executing the relinquishment has been counseled as provided in §32A-5-22 by a certified counselor of the person's choice and that with this

knowledge the person is "voluntarily and unequivocally" consenting to the adoption of the named prospective adoptee.
- That the consenting party has been advised of the legal consequences of the relinquishment by independent legal counsel or a judge.
- That the relinquishment cannot be withdrawn.
- That the person executing the relinquishment has received or been offered a copy of the relinquishment.
- That a counseling narrative has been prepared pursuant to CYFD regulations and is attached to the relinquishment form.
- That the person who performed the counseling meets the requirements of §32A-5-22 (G) and (H).
- That the person executing the relinquishment waives further notice of the adoption proceedings.
- That all parties in a closed adoption understand that the court will not enforce any contact, regardless of any informal agreements that have been made between the parties.

If English is not the first language of the relinquishing parent and the relinquishment is in English, the person taking the relinquishment must certify in writing under §32A-5-21(C):

- that the relinquishment document was read and explained in the person's first language;
- that the meaning and implications of the document were fully understood by the person; and
- the name of the individual who read and explained the document.

24.2.4 Execution of the Relinquishment

Relinquishments in a pending abuse and neglect proceeding are heard within the context of that proceeding. §32A-5-24(A). A court hearing for the purpose of taking a relinquishment must take place within seven days of the request for a setting. §32A-5-21(F). In all hearings concerning relinquishment of parental rights to CYFD, the child must be represented by a guardian ad litem (GAL). If the child is 14 years or older and in CYFD custody, the attorney appointed for the child under the Abuse and Neglect Act represents the child in any proceeding for TPR under §32A-5-24. §32A-5-24(B).

The relinquishment hearing enables the judge to review the relinquishment form with the relinquishing parent and that parent's counsel and to ascertain that the parent understands the legal consequences of relinquishment. If the parent's first language is not English, an interpreter might be present in court to confirm that the relinquishing parent does indeed understand the form and the consequences of the relinquishment. ***See*** Handbook §17.3 regarding interpreters. The judge can also use the opportunity to confirm that counseling was received as required by law and to ascertain whether CYFD consents to the relinquishment. ***See*** Handbook §37.7 for a checklist that judges may use when taking a party's relinquishment to CYFD.

The Adoption Act requires prospective adoptive parents to file a full accounting of their costs and expenses before the court may approve a consent to adoption or relinquishment. §32A-5-23(D). However, this accounting is only required in CYFD adoptions or in stepparent adoptions when ordered by the court. §32A-5-23(E).

Once the relinquishment is signed, it will be filed with the court. If an adoption petition is being heard outside the abuse or neglect proceeding (***see*** Handbook §37.3), the relinquishment must also be filed with the court in which the adoption petition is filed, before adjudication of the petition. §32A-5-23(C).

Practice Note: Several entities either want or require originally signed relinquishment documents. These include the court approving the relinquishment, the adoption worker, the adoption attorney, and the adoption court. Hence, it is recommended that multiple originals be signed at the time of relinquishment, although certified copies should be an acceptable alternative for all or most purposes.

24.2.5 Finality

Whether a relinquishment can be withdrawn depends on the governing law. Under the Indian Child Welfare Act, parents of an Indian child who are relinquishing may withdraw their consent "for any reason at any time prior to the entry of a final decree of termination or adoption…and the child shall be returned to the parent." 25 U.S.C. §1913(c). Because of ICWA, which imposes stringent requirements on relinquishments of Indian children (***see*** Handbook Chapter 32), parents of Indian children have a greater ability to withdraw their consent to relinquishments than do other parents.

In cases in which ICWA does not apply, a relinquishment may be withdrawn prior to the entry of a decree of adoption but only on the basis of fraud. §32A-5-21(I). The New Mexico Supreme Court has stressed that fraud is the only ground upon which a person can withdraw a relinquishment and consent to adoption. *State ex rel. HSD in re Kira M.*, 1994-NMSC-109, ¶20, 118 N.M. 563. In *Kira M.*, the Court affirmed denial by the children's court of a biological mother's motion to withdraw consent, which did not allege that consent was given due to fraud. The Court observed, though, that the children's court has "the ability under its reservoir of equitable power to protect the interests of natural parents in exceptional cases" and grant a request falling outside the grounds in what is now §32A-4-21(I). The Court saw no exceptional circumstances in that case.

24.3 Voluntary Termination of Parental Rights (Relinquishment): Special Circumstances

24.3.1 Minor Parents

A relinquishment executed by a minor parent cannot be revoked simply because of the parent's minority. §32A-5-17(C). New Mexico requires minor parents seeking to relinquish to undergo a minimum of two separate counseling sessions prior to relinquishment, one of

which must be outside the presence of the minor parent's parent or guardian. §32A-5-22(D)(2).

24.3.2 Parents of Indian Children

The Indian Child Welfare Act imposes specific requirements on a parent of an Indian child who voluntarily consents to termination of parental rights. 25 U.S.C. §1913(a). The consent must be in writing and recorded before a judge of a court of competent jurisdiction. The presiding judge must certify in writing that the consent's terms and consequences were fully explained in detail and fully understood by the parent. The judge also must certify either that the parent fully understood the explanation in English or that it was translated into a language that the parent understood. ICWA declares invalid any consent given prior to or within ten days after birth of the Indian child. ***See*** Handbook §32.2.10.

24.3.3 Conditions on Relinquishments

Under New Mexico law, "[u]nconditional consents or relinquishments are preferred." Conditional consents or relinquishments must be for good cause and must be approved by the court. If the desired condition is for specific adoptive parents or requires the other parent to consent before the adoption decree is entered, the condition is considered for good cause. §32A-5-21(D).

Practice Note: Where relinquishment is being made to CYFD and the condition being requested is for specific adoptive parents, CYFD requires that an adoptive home study be approved before it agrees to the conditional relinquishment. *See* 8.10.7.22(F) NMAC. This condition may be requested, for example, where the child is in a licensed relative or regular foster home and the birth parents are comfortable with it.

Even then, CYFD does not have to agree to the relinquishment and has the discretion not to place the child in that particular home. *See State ex rel. CYFD v. Jerry K.*, 2015-NMCA-047, ¶¶31-33. In *Jerry K.*, the district court terminated Father's parental rights after Father had refused to relinquish his rights to allow Children's present foster parents to adopt them. Father had been willing to relinquish if Children were placed with a certain family he called his fictive kin and whose home study had been approved by California, where the family lived, but not the present foster parents. ¶¶16, 34. Upholding the TPR, the Court of Appeals held that "once Children were [in the legal custody] of the Department, Father was not in a position to decide where or with whom Children would be placed." ¶31.

There are specific time frames for conditions. All conditions must be met within 180 days of the conditional consent or relinquishment or the conclusion of any litigation concerning the petition for adoption. The court may extend the 180 day time frame for good cause. §32A-5-21(D). If the condition is not met within the required time period, the relinquishment is not effective. Conditions, while they may seem like a good idea at the time, can also result in permanency being delayed.

In some situations, post-adoption contact between biological parents and the child may be desired. The only way to have continued contact, however, is through an open adoption.

> When a parent relinquishes the parent's rights [to the department under §32A-5-24], the parent shall be notified that no contact will be enforced by the court, regardless of any informal agreement, unless the parties have agreed to an open adoption ….

§32A-5-24(D). Open adoption agreements can be entered into under §32A-5-35 and are enforceable in court. Mediation provides a good environment to discuss and work out the terms of an open adoption and to develop a draft Post Adoption Contact Agreement. ***See*** Handbook §37.4.2.

Practice Note: CYFD rules prohibit CYFD from accepting a conditional relinquishment where the condition is that the relinquishing parent be a post-adoption contact. 8.10.7.22(F) NMAC.

Additionally, for all relinquishments the children's court attorney must create a court record that "the relinquishment is voluntary, and that no promises were made to the parent, no fraud was involved, that the parent understands the consequences and the finality of the decision, and unless the adoption is open, the court shall not enforce any agreements regarding contact with the child." 8.10.7.22(B) NMAC.

Finally, no one may relinquish parental rights to CYFD without CYFD's consent. §32A-5-23(B); 8.10.7.22(C) NMAC.

24.4 Involuntary Termination of Parental Rights: Grounds

24.4.1 Overview

The court is required under the termination of parental rights, or TPR, statute to give "primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated." §32A-4-28(A). The court should consider, for example, whether the child, if age 14 or over, will consent to an adoption. If the child will not agree, an adoption is unlikely (§32A-5-17) and the court may query whether termination of parental rights is appropriate.

There are three specific grounds for termination of parental rights in New Mexico:

- Abandonment. §32A-4-28(B)(1).
- Failure to ameliorate the causes and conditions of the abuse and neglect, despite reasonable efforts by CYFD. §32A-4-28(B)(2)
- Disintegration of the parent-child relationship accompanied by a psychological parent-child relationship between the child and his or her caretaker. §32A-4-28(B)(3).

At least one of the grounds must be pled and proven with some specificity for TPR to occur. *In re Termination of Parental Rights with Respect to R.W.*, 1989-NMCA-008, ¶12, 108 N.M. 332.

In the case of an Indian child, any party seeking TPR must make certain showings with the use of qualified expert witnesses, and the standard of proof is beyond a reasonable doubt. ***See*** §24.4.5 below.

Incarceration: Section 32A-4-28(D) provides that CYFD may not petition, nor join in another party's petition, to terminate parental rights when the sole factual basis for the motion is that the child's parent is incarcerated. This reflects prior case law**.** *In re C.P.*, 1985-NMCA-102, ¶19, 103 N.M. 616; *In re Adoption of Doe*, 1982-NMCA-183, ¶¶25-26, 99 N.M. 278.

While incarceration cannot be the basis for TPR by itself, the court may, for example, look to whether the crime committed relates to the parent's ability to care for the child now and in the foreseeable future, or consider the arrangements that the parent made to carry out his or her parental responsibility, the extent of age-appropriate contact between parent and child, or whether the parent took advantage of any treatment available in the correctional system. *See, e.g., State ex rel. CYFD v Joe R.*, 1997-NMSC-038, 123 N.M. 711; *State v. Raymond D.*, 2017-NMCA-067, ¶¶18-19; *State ex rel. CYFD v. Nathan H.*, 2016-NMCA-043, ¶¶40-41; *State ex rel. CYFD v. Hector C.*, 2008-NMCA-079, 144 N.M. 222; and *State ex rel. CYFD v. Christopher L.*, 2003-NMCA-068, 133 N.M. 653. *See also State ex rel. CYFD v. Keon H.*, 2018-NMSC-033.

24.4.2 Abandonment

Section 32A-4-28(B)(1) does not define abandonment but the term is defined elsewhere in the Abuse and Neglect Act. As defined in §32A-4-2(A), abandonment includes instances where the parent, without justifiable cause:

- Left the child without provision for the child's identification for a period of 14 days; or
- Left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:
    - three months if the child was under six years of age at the commencement of the three-month period; or
    - six months if the child was over six years of age at the commencement of the six-month period.

While termination based on abuse or neglect requires the implementation of a treatment plan (now called a case plan) (***see*** §24.4.3 below), termination based just on abandonment does not. *In re Grace H.*, 2014-NMSC-034, ¶52. However, the Supreme Court has made it clear in *Grace H.* that abandonment stands alone as a basis for termination of parental rights only when the parent is completely absent prior to termination. If the parent shows up prior to termination and expresses a legitimate desire to take responsibility for the child, §32A-4-

28(B)(1) is not available as a grounds for termination. This would be the case even if the parent met the technical definition of "abandonment" at some point before the parent presented him or herself to CYFD and expressed a desire to participate. *Id.* ¶¶41, 43.

However, termination could be based on the child being a neglected child because of abandonment, (§32A-4-28(B)(2)), abandonment being included in the definition of a "neglected child" (§32A-4-2(G)).The Supreme Court addressed the distinction between the two approaches to abandonment in *Grace H.* The Court held that §32A-4-28(B)(1) is to be used to terminate parental rights by a finding of abandonment where a parent is absent prior to termination. Section 32A-4-28(B)(2) is to be used when a parent is present and expresses a legitimate desire to take responsibility for the child prior to termination. *Grace H.*, ¶43.

In *State ex rel. CYFD v. Melvin C.*, 2015-NMCA-067, ¶23, CYFD had argued that, because Father had no contact with Child and made little effort to get in contact with Child for several months after CYFD took custody, Father had no "legitimate desire" to take responsibility for Child. The Court of Appeals wrote that "CYFD interprets the phrase 'legitimate desire' used in *In re Grace H*. too literally…. *In re Grace H.*'s 'legitimate desire' language references a parent who 'is present and willing to participate,' even if they do so late in the game, so long as they do so prior to termination." *Melvin C.*, ¶23, citing *Grace H*, 2014-NMSC-034, ¶41. *See also State ex rel. CYFD v Alfonso M.E.*, 2015-NMCA-021, ¶23.

In *Melvin C.*, seven months after CYFD took custody and shortly after he was served with the abuse or neglect petition in a prison in Colorado to which he had recently been sentenced, Father filed a motion indicating his desire to reunify with Child and his willingness to work a treatment plan. Soon afterwards, Father entered a no contest plea to the neglect allegation and the court made a finding of neglect. However, the department did not proceed to develop a treatment plan. Rather, it immediately pursued termination of parental rights on an abandonment theory alone. 2015-NMCA-067, ¶¶6-8. The Court of Appeals held that, where there is a finding of neglect or abuse, the plain language of §32A-4-22(C) requires a dispositional hearing and the creation of a treatment plan and any termination of parental rights must proceed under §32A-4-29(B)(2), not (B)(1). *Id*. ¶¶1, 17. ***See*** §24.4.3 below.

24.4.3 Failure to Change the Causes and Conditions of the Abuse or Neglect

24.4.3.1 In General

The second and, in the context of abuse and neglect cases, most common type of TPR focuses on whether the causes and conditions that led to the abuse or neglect are likely to change in the foreseeable future. In this type of TPR, the movant must show under §32A-4-28(B)(2) that:

- The child has been an abused or neglected child;
- The conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future: and

- reasonable efforts have been made by CYFD to assist the parent in adjusting the conditions which render the parent unable to properly care for the child.

The movant, typically CYFD, must offer evidence about the neglect or abuse of the child, the attempts the agency made to help the parents improve the conditions leading to the abuse and neglect, and the fact that, despite these efforts, the conditions and causes of the neglect or abuse are not likely to change in the foreseeable future. *In re Termination of Parental Rights of Reuben and Elizabeth O.*, 1986-NMCA-031, ¶¶15, 22, 104 N.M. 644.

In some cases, the parent fails to follow the treatment plan and does not make sufficient changes. In others, the parent has complied with the treatment plan, and even made some progress, but is still unable to change the conditions that caused the abuse or neglect. This was the case in *Athena H.*, where the mother's mental illness, coupled with "the severe psychological trauma and emotional damage … the children suffered while in mother's care," made it impossible for her to "safely parent her children and meet their psychological and emotional needs in the foreseeable future." *State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, ¶9, 140 N.M. 390. The Court found that CYFD's efforts were reasonable and upheld the termination of parental rights, explaining that "compliance with the terms of a treatment plan is not dispositive of the issue of parental termination." *Id.*

Practice Note: The emphasis of the statute is on the need for a change in the conditions that rendered the parent unable to properly care for the child, not on compliance with the treatment plan unrelated to the change needed. The court and the parties should be careful not to focus so much on the treatment plan that they lose sight of the statutory concern: Have the causes and conditions of the abuse or neglect been ameliorated to allow the child to return home?

The Court of Appeals has stated that CYFD is not required to return the child home and wait for negative consequences to occur to demonstrate that there would be negative consequences. *In re Termination of Parental Rights with Respect to R.W.*, 1989-NMCA-008, ¶29. Also, when more than one child is involved, "the court should not be forced to refrain from taking action until each child suffers an injury." *In re Termination of Parental Rights with Respect to I.N.M.*, 1987-NMCA-043, ¶27, 105 N.M. 664. In *I.N.M.*, the court upheld the TPR for a child who had been somewhat neglected but whose sibling had been severely abused.

24.4.3.2 Change in Foreseeable Future

Assessing whether the conditions and causes of the abuse and neglect are unlikely to change in the foreseeable future does not require the children's court to wait in cases of minimal parental improvement. The Supreme Court has recognized that avoiding TPR in cases where there has been minimal parental improvement may be detrimental to a child. "When balancing the interests of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children's interests." *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶24 (citations omitted). *See also Reuben and Elizabeth O.*, 1986-NMCA-031, ¶36.

What does "foreseeable future" mean? At least one court has construed "foreseeable future" to "refer to corrective change within a reasonably definite time or within the near future." *State ex rel. Patricia H.*, 2002-NMCA-061, ¶34, 132 N.M. 299, cited in *Alfonso M.E.*, 2016-NMCA-021, ¶33 and *Reuben and Elizabeth O.*, 1986-NMCA-031, ¶30. In *State ex rel. CYFD v. Raymond D.*, 2017-NMCA-067, ¶18, the time period from the date of the TPR hearing to Father's anticipated parole date was six months, which, according to the district court, was "really far away" for Child, in Child's experience. Even then the placement could well be temporary given Father's recidivism and inability to attend to Children's special needs. Child had already waited for over three years for his parents to remedy the cause of his neglect. *Id*. ¶¶18, 19.

24.4.3.3 Reasonable Efforts

The "reasonable efforts" required of CYFD do not demand a Herculean effort by it to assist the parents in adjusting the conditions that render the parent unable to care properly for the child. As the court opined in one case, "[t]he reasonable efforts requirement does not …compel unreasonable efforts." *In Re Kenny F.*, 1990-NMCA-004, ¶16, 109 N.M. 472. When it becomes clear that preserving the family is not compatible with protecting the child, further efforts at preservation are not required. *Id*.

Whether efforts are reasonable or not depends on the totality of the circumstances and is determined on a case by case basis. *State ex rel. CYFD v. Keon H.*, 2018-NMSC-033, ¶41. The health and safety of the child is a factor to be considered in determining whether the efforts to assist the parent were reasonable. *Id*. ¶52. In a concurring opinion for this case, Justice Vigil wrote to clarify that (1) even where a parent is recalcitrant and uncooperative or becomes incarcerated, CYFD must continue to make reasonable efforts, *Id*. ¶¶59, 63, and (2) making reasonable efforts is "an affirmative responsibility, not a passive one." *Id*. ¶61.

Efforts can also be reasonable despite language barriers, if there was a sufficient attempt to communicate with the parent about all aspects of the case. *State ex rel. CYFD v.William M..*, 2007-NMCA-055, ¶¶50-51, 141 N.M. 765.

On the other hand, CYFD's efforts will not be considered reasonable if it does not adequately inform a parent of the specific conditions that must change in order to avoid termination. In *State ex rel. CYFD v. Joseph M.*, 2006-NMCA-029, 139 N.M. 137, CYFD implemented a treatment plan addressing substance abuse, anger management, domestic violence, counseling, and parenting classes, but never "specifically and pointedly told [Father] that a failure to separate from Mother could constitute a basis for terminating his rights as a parent because that relationship rendered him unable to properly care for his children." *Id*. ¶20. According to the court, it was "incumbent on the Department to have a specific treatment plan or specifically alert Father to the consequences of his staying with Mother." CYFD's failure to do so led the court to conclude that CYFD did not make reasonable efforts in this case, despite an otherwise extensive treatment plan. *Id.* ¶¶22-23.

A parent's incarceration or deportation also does not relieve CYFD of its responsibility to make reasonable efforts to assist the parent. *See, e.g.*, *State ex rel. CYFD v. Alfonso M.E.*, 2015-NMCA-021, ¶51 (a case in which the father had been deported to Mexico), or *Melvin C.*, 2015-NMCA-067, ¶¶2, 26 (in which the Court of Appeals made no reference to the fact that the father was in prison when it required a disposition hearing and treatment plan). In addition, the Court of Appeals has noted that language barriers between a natural parent and the child are not necessarily "insurmountable obstacles to reunification." *Alfonso M.E.*, 2016-NMCA-021, ¶¶61-62. In *Alfonso M.E.*, there was no evidence presented by CYFD that Child, who was approximately eighteen months old at the time of trial and in the early stages of developing his language capabilities, possessed an inability to learn Spanish that fatally inhibited his reunification with Father. *Id*. ¶62.

The evidence of abuse or neglect, and of reasonable efforts, presented at the termination hearing should demonstrate that the parent is currently unable to care for the child despite CYFD's efforts to assist the parent in adjusting the conditions that render the parent unable to do so. *See Alfonso M.E.* ¶¶41, 45. In *State ex rel. CYFD v. Benjamin O.*, 2007-NMCA-070, ¶43, 141 N.M. 692, the Court of Appeals held that, when the adjudication was reversed on substantive grounds, CYFD had to offer allegations of abuse or neglect occurring after the adjudication. On the other hand, evidence of events that occurred prior to a denied TPR motion may be considered, along with more recent developments. *State ex rel. CYFD v. William C.*, 2017-NMCA-058, ¶¶23-25.

24.4.3.4 Futility; Aggravated Circumstances

Of course, in some instances, CYFD might not need to make any efforts to reunite the family. The reasonable efforts requirement does not compel unreasonable efforts. *Kenny F.*, 1990-NMCA-004, ¶16. In *Kenny F.*, the Court of Appeals suggested that after a mother had lost parental rights to three of her four children further efforts to reunite her with another child would be futile. *Id*. ¶¶16-17. Section 32A-4-28(B)(2) now allows the children's court to find that "efforts by the department or another agency are unnecessary" when:

- there is a clear showing that the efforts would be futile; or
- the parent has subjected the child to aggravated circumstances..

Section 32A-4-2(C) defines "aggravated circumstances" as circumstances where the parent has done one of the following:

- attempted, conspired to cause, or caused great bodily harm to the child or great bodily harm to the child's sibling;
- attempted, conspired to cause, or caused great bodily harm or death to another parent, guardian or custodian of the child;
- attempted, conspired to subject, or subjected the child to torture, chronic abuse, or sexual abuse; or
- had his or her parental rights over a sibling of the child terminated involuntarily.

In the *Amy B.* case, the Court of Appeals upheld the constitutionality of the aggravated circumstances provision as applied. The court, citing the legislative history of ASFA and cases from other states, concluded that the statute does not create a presumption of unfitness at the TPR trial but rather gives the trial court discretion not to require reunification efforts, if warranted by all the relevant facts. "[ASFA], in eliminating the requirement of reasonable efforts under certain circumstances, and in requiring the states to follow suit in order to be eligible for federal benefits, was responding to perceived excesses in the application of the reasonable efforts requirement." *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶7, 133 N.M. 136.

In *State ex rel. CYFD v. Raquel M.*, 2013-NMCA-061, the Court of Appeals held that the mother was not denied due process when the district court decided there were aggravated circumstances because her parental rights had been terminated to a sibling, even though the earlier termination was still on appeal. The Court applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976), and concluded that the finding did not engender a risk of an erroneous deprivation of the mother's parental rights. 2013-NMCA-061, ¶23.

24.4.4 Disintegration of the Parent-Child Relationship and Development of a New Psychological Parent-Child Relationship between the Child and Caretaker

The third ground for TPR in New Mexico is sometimes called the "foster parent bonding" ground. It enables the children's court to terminate parental rights when the child has been placed in the care of others, including relatives, either by court order or otherwise and when several conditions are present. §32A-4-28(B)(3). These conditions are:

- The child has lived in the home of others for an extended period of time;
- The parent-child relationship has disintegrated;
- A psychological parent-child relationship has developed between the substitute family and the child;
- The child no longer prefers to live with the natural parent, if the court determines the child is of sufficient capacity to express a preference; The substitute family desires to adopt the child; and
- A presumption of abandonment created by the conditions above has not been rebutted.

A finding by the court that all of the above conditions exist creates a rebuttable presumption of abandonment. §32A-4-28(C). Thus, the "foster parent bonding" ground for TPR is a type of presumptive abandonment. While the focus can be upon the parental conduct, the manner in which these factors are weighed is impacted by the child's perspective. *In re Samantha D.*, 1987-NMCA-082, ¶13, 106 N.M. 184.

In *In re Adoption of J.J.B.*, 1995-NMSC-026, 119 N.M. 638 , the Supreme Court pointed out that proof of abandonment required a showing that parental conduct evidenced a conscious disregard of obligations owed to the child and that such conduct led to the disintegration of

the parent-child relationship. The Court emphasized that "evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct." *Id.* ¶44. In *J.J.B.*, the Court reversed a finding of abandonment. In *State ex rel. CYFD v. Donna E.*, 2017-NMCA-088, ¶¶4, 63, the Court of Appeals, following *J.J.B.*, overturned the district court's abandonment determination. "Because Respondents did not cause the disintegration of the parent-child bond with Daughter and consistently tried to prevent the disintegration of that relationship from occurring, we hold that Respondents rebutted the presumption of abandonment. *Id.* ¶64.

The Court of Appeals has considered the "disintegration of the parent-child relationship" element at some length in cases in which parental conduct caused or contributed to the disintegration. In *State ex rel. CYFD v. John D.*, 1997-NMCA-019, 123 N.M. 114, the Court focused on the parental conduct toward the child, noting that if the disintegration of the parent-child relationship was not caused by the parent's conduct, the mother could rebut the presumption of abandonment. *Id.* ¶7. The *John D.* court concluded that the parent's physically violent conduct toward her child was "directly responsible" for the disintegration of the parent-child relationship and upheld the trial court's termination finding. *Id.* ¶9. In an earlier case, the Court of Appeals explained that the "requisite disregard may be inferred from purposeful parental conduct." *In re Termination of Parental Rights with Respect to C.P.*, 1985-NMCA-102, ¶20.

Generally, a TPR motion based on disintegration will involve psychological evidence that looks at the child's bonding to his or her biological parents and to the potential adoptive parents. Evaluation of a child's attachment to his or her caretaker should not involve comparisons of the biological home and the foster home, however. Case law emphasizes that it would be impermissible for the children's court to engage in a comparison of "the relative merits of the environments provided by the foster parents and by the natural parents." *State ex rel. HSD v. Natural Mother*, 1981-NMCA-103, ¶10, 96 N.M. 677. The fact that a child might be better off in a different environment does not constitute a basis for TPR. *In re Termination of Parental Rights with Respect to R.W.*, 1989-NMCA-008, ¶12.

24.4.5 Additional Standards for Indian Children Under ICWA

In cases involving Indian children, the Indian Child Welfare Act requires that the party seeking TPR under state law satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. The party must also satisfy the court that these efforts have proved unsuccessful. 25 U.S.C. §1912(d).

The active efforts requirement is a "'more involved and less passive standard'" than reasonable efforts. *State ex rel. CYFD v. Yodell B.*, 2016-NMCA-029, ¶¶20 (citation omitted). Federal regulations define active efforts at 25 C.F.R. §23.2.

Clear and convincing evidence is the proper standard of proof for active efforts determinations under ICWA §1912(d). *Yodell B.*, ¶¶16, 29.

The Court of Appeals has found that §1912(d) does not apply to facilitate the placement of the child in compliance with the placement preferences listed in §1915." *State ex re: CYFD v. Casey J.*, 2015-NMCA-088, ¶14. The focus of an active efforts challenge is on CYFD's efforts to provide the parent with remedial services and rehabilitative programs, not on placement. *Id.* ¶15.

In addition to the requirements of §1912(d), for TPR to be ordered, there must be a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(f). The "beyond a reasonable doubt" standard is obviously a higher standard than "clear and convincing," the standard in non-ICWA cases.

See Chapter 32 for further information about ICWA requirements.

ICWA Note: Regulations implementing ICWA and adding a new Subpart I to 25 C.F.R. Part 23 were adopted in June 2016. *See* 81 Fed. Reg. 38778. New guidelines were issued in December 2016 to complement the ICWA regulations and replace the 1979 and 2015 guidelines. These guidelines can be found at https://www.bia.gov/.

24.5 Involuntary Termination of Parental Rights: Procedure

24.5.1 Overview

Terminations of parental rights that take place in civil abuse and neglect cases are often highly emotional in nature. The consequences of a termination are profound. Children stand to lose a relationship with a parent who may be loved even if he or she has been neglectful or abusive. Children also risk losing contact with siblings and with extended family members. Parents facing terminations are generally sad and angry at their predicaments or, by virtue of mental illness, substance abuse or developmental disabilities, may be confused about what is happening to them. In addition to the high stakes involved, there generally has been a lengthy history of failed efforts to reunite the family. Because of that history, there may be some built-up frustration on the part of the professionals working with the family, including the case worker, therapists, lawyers and the judge, at the parents' inability to understand or to alter poor parenting or lifestyle choices that endanger their children. Following the appropriate procedures to comply with due process requirements becomes especially important under these circumstances.

Time Matters: In many cases, if a child is not going to be reunifying with the child's birth parents, the court and parties need to face this tough step so that the child can get on with his or her life. Compounding the emotional and procedural challenges inherent in the TPR proceeding are the deadlines for filing for termination imposed to make the parties take this step in a timely fashion. . The Children's Code requires the filing of a petition for TPR by the end of the child's 15th month in foster care, except in certain circumstances. §32A-4-29(G); ***see*** Handbook §24.1.3 above.

When a motion for TPR is filed, CYFD must perform concurrent planning. §32A-4-29(F). However, the department is likely to have begun concurrent planning at an earlier stage. ***See*** Handbook §3.4.

24.5.2 Initiation of TPR

An involuntary TPR is initiated by the filing of a motion for TPR in the abuse and neglect proceeding. §32A-4-29(A). Thus, a TPR does not require a separate judicial proceeding with separate pleadings and a separate case number. A motion to terminate parental rights may be filed at any stage of the abuse or neglect proceeding *by a party* to the proceeding. §32A-4-29(A).

If a party other than CYFD files a TPR motion concerning a child in state custody, CYFD either may litigate the motion filed by the other party or may move that the TPR motion be found premature and denied. §32A-4-29(E).

Practice Note. Section 32A-4-29 makes it clear that only parties may file a motion to terminate parental rights in the abuse or neglect proceeding. This means that persons who were not parties to the proceeding originally or who have not been joined as parties would have to move to intervene and become a party in order to file. *See* Rule 10-121 on parties and Rule 10-122 and 32A-4-27 on intervention; ***see also*** Handbook Chapter 27 on parties.

When a child has been in foster care for 15 of the previous 22 months, CYFD must file a motion to terminate unless:

1. a parent has made substantial progress toward eliminating the problem that caused the child's placement in foster care, it is likely the child will be able to safely return home within three months, and the child's return home will be in the child's best interest;
2. the child has a close and positive relationship with a parent and a permanent plan that does not include TPR will provide the most secure and appropriate placement for the child;
3. the child is 14 or older, is firmly opposed to TPR, and is likely to disrupt an attempt to place him or her with an adoptive family;
4. a parent is terminally ill, but in remission, and does not want his or her parental rights terminated, provided that the parent has designated a guardian for the child;
5. the child is not capable of functioning if placed in a family setting, in which case the court must reevaluate the child's status every 90 days (unless the court makes a final determination that the child cannot be placed in a family setting);
6. grounds do not exist for TPR;
7. the child is an unaccompanied, refugee minor and the situation regarding the child involves international legal issues or compelling foreign policy issues;
8. adoption is not an appropriate plan for the child; or
9. the parent's incarceration or participation in a court-ordered residential substance abuse treatment program constitutes the primary factor in the child's placement in substitute care and TPR is not in the child's best interest. §32A-4-29(G).

CYFD regulations also state that reasons for not filing a motion for TPR are "…the child is being cared for by a relative, or PSD [Protective Services Division] has documented compelling reason(s) for not filing; or PSD has not provided to the family those services deemed necessary for the safe return of the child within the time period in the case plan." 8.10.7.21 NMAC.

For purposes of §32A-4-29, a child is considered to have entered foster care on the earlier of (1) the date of the first judicial finding that the child has been abused or neglected, or (2) the date that is 60 days after the date the child was removed from the home. §32A-4-29(H).

Practice Note. The preferred practice is to obtain specific findings to support the decision not to seek TPR if the child has been in foster care for 15 out of the last 22 months. To support the decision not only under §32A-4-29(G) but also under ASFA, it would be preferable to state in the findings that the reason for not pursuing TPR is a "compelling reason."

Under Rule 10-121(B) the parties to a neglect or abuse proceeding are:

- the state;
- a parent, guardian, or custodian who has allegedly neglected or abused a child;
- the child alleged to be neglected or abused; and
- any other person made a party by the court.

If a motion to terminate parental rights is filed, a parent who was not already a party to the abuse or neglect proceeding must be named in the motion and joined as a party in the case at this time. Rule 10-121(D). "Parent," as defined in the Children's Code, includes a biological or adoptive parent who has a constitutionally protected liberty interest in the care and custody of the child. §32A-1-4(Q). Accordingly, a parent need not be joined if the parent has not established a protected liberty interest in his relationship with the child. ***See*** Handbook §2.2.

The *Djamila B.* case addressed the status of a kinship guardian in the abuse or neglect case. CYFD had made the kinship guardian a party as the guardian of the child but wanted to dismiss the guardian prior to terminating the rights of the parents. The New Mexico Supreme Court held that kinship guardians have a statutory right to a revocation hearing in accordance with the revocation procedures of the Kinship Guardianship Act, including an evidentiary hearing in compliance with the Rules of Evidence, before being dismissed from an abuse and neglect proceeding. *State ex rel. CYFD v. Djamila B.*, 2015-NMSC-003, ¶2. The revocation may occur in the abuse and neglect case as the children's court has jurisdiction over the kinship guardian and the ability to make decisions in the best interests of the children. *Id.* ¶37.

The Court also clarified that kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings because that concept is derived from the Rules of Civil Procedure, not the Children's Court Rules, and Rule 10-121(B) clearly directs that the guardian must be party to the action. *Id.* ¶¶39-40.

24.5.3 TPR Motion Requirements

The party seeking TPR must request it by motion, filed with the court. §32A-4-29(B). The motion must be substantially in the form approved by the Supreme Court. Rule 10-347; Form 10-540.

According to §32A-4-29(B), the motion must state all of the following:

- the date, place of birth, and marital status of the child, if known;
- the grounds for termination and the supporting facts and circumstances;
- the names and addresses of the persons or agency to whom custody might be transferred;
- whether the child resides or has resided with a foster parent who wishes to adopt the child;
- whether the motion is in contemplation of adoption;
- the relationship or legitimate interest of the moving party to the child; and
- whether the child is subject to the Indian Child Welfare Act.

Form 10-540, which is tailored for use when CYFD moves for TPR, enumerates the statutory grounds for TPR (§§32A-4-28(B)(1), (2), and/or (3)), provides that more than one person may be named as father per §§32A-5-17(A)(4) and (5) and as mother per *Chatterjee v. King*, 2012-NMSC-019, and enumerates additional information to be included in the TPR motion.

If ICWA applies to the child, the TPR motion must state all of the following under §32A-4-29(B)(7):

- the tribal affiliations of the child's parents;
- the moving party's specific actions to notify the parents' tribes and the results of such actions, including the names, addresses, titles, and telephone numbers of the persons contacted; and
- what specific efforts were made to comply with the placement preferences stated in ICWA or mandated by the appropriate tribe.

The moving party must attach to the TPR motion copies of any correspondence with the tribe or tribes. §32A-4-29(B)(7).

When a motion for TPR is filed, the moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement. §32A-4-29(D). Any agreement reached before TPR must be made part of the court record. *Id*.

24.5.4 Notice and Service

Under §32A-4-29(C), the moving party must serve all of the following persons with notice of the filing of the TPR motion and a copy of the motion:

- other parties;
- the foster parent, pre-adoptive parent, or relative providing care for the child with whom the child is residing;
- foster parents with whom the child has resided for 6 months within the previous 12 months;
- custodian of the child;
- any person appointed to represent any party; and
- any other person the court orders.

In serving notice, the party moving for TPR must comply with the Children's Court Rules for service of motions, except that foster parents and all attorneys of record must be served by certified mail. §32A-4-29(C). The notice must state that the person served is required to file a written response to the motion within 20 days if he or she intends to contest the motion. §32A-4-29(C).

The party moving for TPR need not serve a parent who was provided notice of the abuse and neglect proceeding under §32A-4-17 and who failed to make an appearance. §32A-4-29(C). Under §32A-4-17, the original summons is required to state clearly that the proceeding could ultimately result in termination of the respondent's parental rights.

On the other hand, a parent who is being joined in the case for the first time must be served with a summons and a copy of the motion in the manner provided in Rule 10-103 on service of process. Rule 10-121(D).

In any case involving a child subject to ICWA, the moving party must send notice by certified mail to the tribes of the child's parents and to any "Indian custodian" as defined by ICWA. §32A-4-29(C). ICWA imposes additional requirements for proper notice and service in TPR proceedings involving Indian children. ICWA requires the party moving for TPR to "notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." 25 U.S.C. §1912(a). If the identity or location of the parent or Indian custodian and the tribe cannot be determined, the moving party must notify the Secretary of the Interior. The Secretary then has 15 days after receipt of notice to notify the parent or Indian custodian and the tribe. *Id.* **See** Handbook Chapter 32 on ICWA.

Practice Note: As a matter of practice, when notice is sent to the Secretary, it is also sent to the regional office of the Department of the Interior's Bureau of Indian Affairs, https://www.bia.gov/regional-offices/.

24.5.5 Right to Counsel

In cases of involuntary TPR, parents have the right to legal counsel. The right to counsel arises at the inception of the abuse or neglect case and continues through any TPR proceedings. For parents who are unable to obtain counsel for financial reasons, or when the court determines that "the interests of justice [so] require," the court will appoint counsel.

§32A-4-10(B). Similarly, children are represented in all abuse or neglect proceedings, including TPR proceedings, by a guardian ad litem or a youth attorney, depending on the child's age. §32A-4-10(C). ICWA also guarantees appointment of counsel in TPR proceedings involving Indian children. 25 U.S.C. §1912(b).

In *In re Termination of the Parental Rights of James W.H.*, 1993-NMCA-028, ¶3, 115 N.M. 256, the Court of Appeals held that the right to effective assistance of counsel extends to TPR cases.

The Children's Court Rules prohibit the appointment of an attorney to represent more than one parent "[i]n any proceeding or case that may result in the termination of parental rights." Rule 10-314(B).

24.5.6 Timing of the TPR Hearing

The party filing the TPR motion should request a hearing on the motion. §32A-4-29(D). The hearing must be scheduled at least 30 days but no more than 60 days after service is completed on the parties entitled to service. *Id.* This 30-day time minimum comports with ICWA's requirement that there be at least 10 days notice to the parent and the tribe in a TPR proceeding involving an Indian child, with the opportunity, if requested, for a 20-day extension. 25 U.S.C. §1912(a).

The 60-day deadline for holding the hearing on a motion for TPR was the subject of discussion in *State ex rel. CYFD v. Anne McD.*, 2000-NMCA-020, 128 N.M. 618. Mother sought to have the motion dismissed for failure to hold a hearing within the 60 days required by statute. The Court noted that, in contrast to the statute on adjudicatory hearings, §32A-4-29 does not provide a remedy for failure to hold the TPR hearing within 60 days.

> The purpose of this provision is to ensure that the termination proceedings take place in a relatively timely manner, consistent with the best interests of the child…. Requiring that a motion be dismissed without prejudice serves no practical purpose since it would only lead to a subsequent refiling of the motion and further delays.

2000-NMCA-020, ¶40. The children's court did not abuse its discretion in permitting the hearing to occur outside the time limit. *Id*. ¶41.

The moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement. If an open adoption agreement is reached at any time before termination of parental rights, it must be made a part of the court record. §32A-4-29(D). The Children's Court Mediation Program conducts open adoption mediations before or after TPR, depending on the circumstances of the case. ***See*** Handbook §31.4 on mediation.

24.5.7 Conduct of the TPR Hearing

The children's court judge hears the TPR motion. There is no right to a jury trial in termination of parental rights proceedings under either the Children's Code or the state constitution. *State ex rel. CYFD in re T.J.*, 1997-NMCA-021, ¶¶4, 10, 123 N.M. 99.

Rule 10-101 provides that the Children's Court Rules govern procedure in the children's courts in all matters involving children alleged by the state to be abused or neglected, *including proceedings to terminate parental rights that are filed pursuant to the Abuse and Neglect Act.* Rule 10-101(A)(1)(d). As the Supreme Court made clear in *State ex rel. Djamila B.*, 2015-NMSC-003, ¶39, the Rules of Civil Procedure do not apply. The Rules of Evidence apply in termination proceedings. Rule 10-141; *see also* Rule 11-1101.

It is important to keep in mind that the child is a party to the proceeding. With this in mind, Rule 10-325 and Form 570, adopted in 2016, require youth attorneys to give notice to the court at least 15 days before each hearing that the attorney has notified the child of the hearing and has advised the child of the right to attend. Similarly, Rule 10-325.1 and Form 570.1 require that the GAL give notice to the court of the following: (1) the child has been advised, to the maximum extent possible given the child's developmental capacity, of the child's right to attend; (2) the child's declared position, if ascertainable given the child's developmental capacity, about whether to attend the upcoming hearing; and (3) the GAL's position about why attendance is or is not in the child's best interest.

A question posed in *Anne McD.* was whether the parent's due process rights were violated when the court permitted six out of the seven witnesses for CYFD to appear by telephone in a TPR hearing. The Court of Appeals held that the mother's rights to procedural due process were not violated under the circumstances in the case. *Anne McD.*, 2000-NMCA-020, ¶33. While so holding, the Court emphasized the importance of a parent's right to procedural due process prior to TPR and directed trial courts to be guided in the future by a series of criteria whenever a party requests permission to elicit telephone testimony from its witnesses in TPR cases. *See Anne McD.* ¶21 for the list of considerations. The Court also stated that, before such testimony can be elicited over objection, the children's court should state in the record the reasons why telephonic testimony is to be allowed and explain why the use of such testimony will not prejudice a party's rights or lead to an increased risk of deprivation of a parent's right to procedural due process. *Id.* ¶35.

The Court of Appeals has also addressed a situation where the district court had taken judicial notice of the file below, including all pleadings. The Court of Appeals used a balancing test to determine if the taking of judicial notice had violated the mother's due process rights. It determined that because the record reflected sufficient evidence presented at trial, other than the material subject to judicial notice, to support the findings of the trial court, the mother's due process rights to a fair trial had not been violated. The Court warned against the blanket use of judicial notice in termination of parental rights cases. *State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶32, 142 N.M. 705.

In *Rosalia M.*, the Court of Appeals considered a claim that Mother's due process rights were violated because CYFD improperly coached a witness by providing her with an outline prior to the termination hearing. *State ex rel. CYFD v. Rosalia M.*, 2017-NMCA-085. The Court found no due-process violation. ¶19. The risk of erroneous deprivation of parental rights was low because the outline was created from information that was part of the record, there was no indication that the information was inaccurate, and the district court took several measures to prevent the risk of an erroneous deprivation, even after stating that it appeared the witness was testifying from memory. ¶¶10-11.

In ICWA cases, the party seeking TPR must offer the testimony of one or more qualified expert witnesses. "No termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of *qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f) (emphasis added). ***See*** Handbook §32.2.9.2

In cases involving children who are eligible for enrollment in an Indian tribe, the children's court should ensure that CYFD has pursued enrollment on their behalf. In the *Marsalee P.* case, the Court of Appeals reversed a termination of parental rights because CYFD had not fulfilled its obligation under §32A-4-22(I) to pursue enrollment for the child in the Navajo Nation. The Court held that the district court had an affirmative obligation to ensure that CYFD complied with §32A-4-22(I) before terminating parental rights. *State ex rel. CYFD v. Marsalee P.*, 2013-NMSC-062, ¶27. However, "the statute does not require CYFD to implement all possible methods in its investigation [of enrollment eligibility]…. Each case must be determined on its own facts." *State ex rel. CYFD v. Nathan H.*, 2016-NMCA-043, ¶29.

24.5.8 Right of the Parent to Participate in the TPR Hearing

In *In re Ruth Anne E.*, 1999-NMCA-035, ¶¶16, 25, 126 N.M. 670, the Court found that a parent does not have a procedural due process right to appear in person at a TPR hearing but does have a right to participate meaningfully in the hearing. The parent in that case was incarcerated and unable to attend the TPR hearing. The Court stated that "because a fundamental liberty interest is implicated in proceedings involving the termination of parental rights, a parent who is incarcerated and is unable to attend the hearing on the state's petition to terminate …is entitled to more than simply the right to cross-examine witnesses or present argument through his attorney, or to present deposition testimony …." 1999-NMCA-035, ¶25. The Court found that a parent who is unable to attend the hearing must have the right to "meaningful participation" in the hearing. After reviewing the state's evidence, the parent must be able to present evidence by deposition or by telephone and to challenge the state's evidence through additional cross-examination or rebuttal testimony. *Id.* ¶¶28-29.

In *State ex rel. CYFD v. Christopher L.*, 2003-NMCA-068, the parties tried to secure the incarcerated father's presence but were unsuccessful. The judge offered the father the opportunity to participate in his TPR hearing by phone but he cursed the judge and hung up.

The Court of Appeals ruled that the father was not denied due process when the children's court proceeded without him, based on this fact among others. *Id*. ¶¶22-24.

In *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, the Supreme Court observed that the mother was suffering from severe mental illness and acute substance abuse and that the procedures discussed in *Ruth Anne E*. were simply unworkable given her mental and physical condition. "As the record demonstrates, the district court made every reasonable attempt to allow her to participate meaningfully in the proceedings." 2003-NMSC-015, ¶21. (*See* the case for a description of these efforts.) The Supreme Court concluded that "she needed an indeterminate amount of time to prepare herself to be in a position to participate in the proceedings" and that "[a]ny further delays in the proceedings would have been unwarranted and would have infringed upon the State's compelling interest in the welfare of the boys." Quoting an earlier case, the Court continued: "When balancing the interest of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children's interests." *Id*. ¶¶22-24.

Default Judgments. A common predicament occurs when the respondent does not show up for the hearing. This is **not** a situation for a default judgment. In *State ex rel. CYFD v. Stella P*., 1999-NMCA-100, 127 N.M. 699, the mother did not show for the termination of parental rights hearing. "The sanction of default is a drastic one and is not appropriate to the facts of this case." ¶23. The Court of Appeals quoted from *In re Adoption of J. J.B.*, 1995-NMSC-026, ¶42, 119 N.M. 638: "While proceedings that involve the termination of parental rights are not criminal in nature, they certainly demand a greater degree of factual certainty than ordinary civil proceedings."

The Court in *Stella P*. also held that a proffer of evidence is insufficient. "The children's court must enter its judgment regarding a TPR motion only with the utmost of circumspection and caution." *Stella P*., ¶33. Several findings are required before the court may sever the parent's legal relationship with the child and the termination must be in the best interest of the child, all to be proven by clear and convincing evidence. "Given its burden and the nature of the liberty interests affected, CYFD's mere proffer of evidence was insufficient to support the children's court determination." *Id*. ¶¶34-35.

Note also that the Children's Court rules have no provision for default judgments.

24.5.9 Burden of Proof on TPR Motions

The grounds for most termination of parental rights motions must be proved by clear and convincing evidence. §32A-4-29(I). This standard requires proof stronger than a mere "preponderance" and yet something less than "beyond a reasonable doubt." *In re Adoption of Doe*, 1982-NMCA-094, ¶31, 98 N.M. 340. Where a TPR motion involves a child subject to the Indian Child Welfare Act, the grounds for termination must be proved by the higher standard of beyond a reasonable doubt. §32A-4-29(I). Evidence, including testimony of qualified expert witnesses, must show beyond a reasonable doubt that continued custody with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *Id.*; 25 U.S.C. §1912(f); ***see*** Handbook Chapter 32.

CYFD carries the burden of proof and cannot rely on a lack of evidence to terminate parental rights. *See State ex rel. CYFD v. Alfonso M.E.*, 2015-NMCA-021, ¶¶27. In *Alfonso M.E., the* district court found that Father had not alleviated the causes and conditions of neglect. In support of this finding, the court noted that Father had an alcohol problem and that there was no evidence regarding whether he was still drinking. The Court of Appeals held that the lower court erred in relying on this *lack* of evidence regarding Father's alcohol and substance abuse. *Id.* ¶37. Similarly, the district court's findings pointed to the lack of certain information in the home study as a basis for termination. However, it was CYFD's statutory responsibility to present evidence that established that Father's home was unsafe or unstable, which CYFD failed to do. *Id.* ¶¶49-50.

24.6 Involuntary Termination of Parental Rights: Judgment

22.6.1 Judgment Granting TPR

At the conclusion of the hearing, upon request of a party, the court will allow counsel a reasonable opportunity to file requested findings of fact and conclusions of law, serve them on the parties, and provide them to the judge. The court will enter its judgment, which will include findings and conclusions numbered separately. Rule 10-351.

If the court terminates parental rights, it must appoint a custodian for the child and fix responsibility for the child's support. §32A-4-29(J).

If the TPR concerns a child to whom ICWA applies, the court must make specific findings that ICWA's requirements have been met. §32A-4-29(K). Presumably, this provision obligates the court to find that it has complied with ICWA's jurisdictional, notice, service, appointment of counsel, active efforts, and burden of proof requirements. ***See*** Handbook Chapter 32 on ICWA.

24.6.2 Effect of a TPR Judgment

A TPR judgment divests the parent of all legal rights and privileges with respect to the child and dispenses with the necessity of obtaining parental consent to adoption or notifying the parent of any subsequent adoption proceeding concerning the child. The judgment does not affect a child's inheritance rights from and through the child's parents unless and until there is an adoption. *See* §32A-4-29(L).

Section 32A-4-29(L) is silent on the subject of child support. The Court of Appeals, in a domestic relations case brought by a mother for child support arrearages, held that termination of parental rights terminated the child support obligation. *Aeda v. Aeda*, 2013-NMCA-095. The Court reached this result after an extensive analysis of the statute in effect at the time mother petitioned to terminate the father's parental rights. The statute, which was adopted in 1985, did not mention child support and the Court concluded that "[t]he fundamental and terrible act of severing the parent-child relationship cuts off all connection between them except as specifically excepted by the Legislature." 2013-NMCA-095, ¶38.

24.6.3 Attorney's Fees

The GAL or youth attorney for the child may recover attorney's fees from CYFD in one very particular situation involving termination of parental rights. To recover attorney's fees under §32A-4-30:

- the child must be in CYFD's legal custody;
- the GAL or the youth attorney must:
  - request in writing that CYFD move for TPR;
  - give CYFD written notice that, if CYFD does not move for TPR, the GAL or attorney will make the motion for TPR and seek attorney's fees;
  - successfully move for TPR; and
- CYFD must refuse to litigate the motion for TPR or fail to act in a timely manner.

The GAL or youth attorney would apply to the court for the award of fees under this statute.

24.6.4 Adoption in Same Proceeding

If TPR is granted, the court may proceed to grant adoption of the child in the same proceeding so long as the requirements for adoption of the child have been satisfied, the prospective adoptive parents are parties to the proceeding, and good cause exists to waive the filing of a separate petition for adoption. However, the court may proceed to grant the adoption in the proceeding only if the TPR is not appealed. §32A-4-28(F).

Proceeding with the adoption in the same proceeding as termination avoids a new petition and filing fees. However, the court may not enter a decree of adoption unless the court is satisfied that the adoption meets all of the requirements of the Adoption Act. Generally, the decree will not take effect until 60 days after the TPR to give CYFD time to provide counseling for the child and otherwise prepare the child for adoption. *Id.*

The adoption decree will have the same force and effect as other adoption decrees entered pursuant to the Adoption Act. The court clerk will assign an adoption case number to the adoption decree. *Id*. ***See*** Handbook Chapter 37 for further information on adoption.

24.6.5 Denial of TPR

When the court denies a motion for TPR, the court must issue appropriate orders immediately. The court must direct the parties to file a stipulated order and interim plan or a request for hearing within 30 days of the date of the hearing denying TPR. §32A-4-29(M).

Custody will not necessarily be awarded to the natural parent even if a TPR is reversed on appeal. *Donna E.*, 2017-NMCA-088, ¶66; *In re J.J.B.*, 1995-NMSC-026. Any such parental right is secondary to the best interest and welfare of the child. For example, in *Donna E.*, the young child had lived and bonded with a family by whom she wished to be adopted and had lost all memory of her biological parents after years of no contact. The Court of Appeals

reversed the district court's TPR but remanded the case to the district court for a custody determination. In deciding who will have custody, the Court directed the children's court to consider whether there are extraordinary circumstances that warrant depriving the parent of custody, citing *State ex rel. CYFD v. Lance K.*, 2009-NMCA-054, ¶¶47, 66. The Court discussed at length the facts and circumstances to be considered. ¶¶65-69.

24.7 Checklist: Voluntary Termination of Parental Rights (Relinquishment)

RELINQUISHMENT CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
  - Language or cognitive challenges
- ☐ If relinquishment to CYFD, consent by CYFD
- ☐ If not in contemplation of adoption:
  - Good cause
  - Reasonable efforts to preserve family
  - Best interests of child
- ☐ Counseling
  - Meets all requirements of §32A-5-22
  - Counseling narrative filed with court
- ☐ Form of relinquishment
  - Signed by parent relinquishing
  - Meets all requirements of §32A-5-21
  - Parent understands legal consequences
- ☐ If Indian child,
  - Terms/consequences explained to/understood by parent
  - Explanation in language parent understands
  - More than ten days since birth
- ☐ Unconditional relinquishment unless:
  - Good cause and approved by court
  - Condition satisfied w/in 180 days

24.8 Checklist: Involuntary Termination of Parental Rights

TERMINATION OF PARENTAL RIGHTS HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Service of motion
  - Notice of hearing
  - Appointment of counsel
  - Language or cognitive challenges
- ☐ Inquiries regarding
  - Absent parents*
  - Presence of child
  - Indian child
  - Concurrent planning
  - Mediated open adoption agreement
- ☐ Advising parent(s) of rights, if first hearing for parent(s)
- ☐ Stipulations, if any
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: usually clear and convincing
  - Burden of proof: if Indian child, beyond reasonable doubt
- ☐ Findings on alleged grounds for termination
  - Abandonment
  - Conditions and causes unlikely to change/reasonable efforts
  - Disintegration of parent-child relationship/foster care bonding
- ☐ If Indian child,
  - Notice to tribe and Indian custodian
  - Active Efforts
  - Beyond reasonable doubt, expert testimony
  - Findings that ICWA requirements were met
- ☐ If TPR ordered,
  - Custodian and child support
- ☐ If TPR denied,
  - Stipulated order and interim plan, or
  - Request hearing w/in 30 days
- ☐ Scheduling of judicial review w/in 6 months

***To free a child for adoption, all parents with a constitutionally protected interest must have relinquished parental rights or had their rights terminated.**

CHAPTER 25

PERMANENT GUARDIANSHIP HEARING

This chapter focuses on permanent guardianship in the context of an abuse or neglect proceeding. It covers:

- Filing and service of a motion for permanent guardianship.
- Findings required for permanent guardianship.

Opportunities for subsidized guardianships

- Comparison with guardianship under the Probate Code and the Kinship Guardianship Act.

25.1 Purpose

Four separate statutes potentially apply to a request for appointment of a guardian for a child:

- §§32A-4-31 and 32A-4-32, relating to appointment of a permanent guardian in the context of an abuse and neglect proceeding;
- §§45-5-201 to 45-5-212, relating to appointment under the Probate Code;
- §32A-2-14(K), relating to appointment of a guardian as a basic right guaranteed a juvenile in delinquency proceedings; and
- §§40-10B-1 to 40-10B-15, relating to the appointment of a guardian under the Kinship Guardianship Act, enacted in 2001. ***See*** Handbook, Chapter 38.

This chapter focuses on the first one, the appointment of a permanent guardian under the Abuse and Neglect Act.

Permanent guardianship under the Abuse and Neglect Act gives the guardian all of the rights and responsibilities of a parent except for those listed in the decree of permanent guardianship, if any. §32A-4-31(A). The decree is not a termination of parental rights and a child's inheritance rights are not affected. §32A-4-32(F). If the children are Title IV-E eligible, the guardians may be able to receive financial assistance to maintain the guardianship, similar to the adoption subsidy that has been available to children. ***See*** §25.14 below.

While termination of parental rights together with adoption provides permanency for many children, something not quite so final is the better option for others. For example, the child may be a 15 year old who does not wish to consent to adoption and who would prefer to live with his grandparents, or maybe the child's parent is in prison or otherwise unavailable for a period of

years and there are relatives happy and willing to raise the child. Guardianship may be an option in such cases. One consideration is that, although these are called "permanent" guardianships, they can be revoked under certain conditions. See §25.12 below.

25.2 Timeline

There is no specific timeline applicable to the appointment of a permanent guardian under the Abuse and Neglect Act. However, the court cannot act on a motion for permanent guardianship until it makes the findings required by §32A-4-31(C). For these findings, ***see*** §25.10 below.

25.3 Initiation

Any party may file a motion for permanent guardianship. If someone other than the prospective guardian files the motion, the motion must be verified by the prospective guardian. §32A-4-32(A) and (C).

The motion must state:

- The date, place of birth, and marital status of the child, if known;
- The facts and circumstances supporting the grounds for permanent guardianship;
- The name and address of the prospective guardian and a statement that the person agrees to accept the duties and responsibilities of guardianship;
- The basis for the court's jurisdiction;
- The relationship of the child to the petitioner and to the prospective guardian, if different from the petitioner; and
- Whether the child is subject to the Indian Child Welfare Act. §32A-4-32(B).

If the Indian Child Welfare Act applies to the child, the motion must also state:

- The tribal affiliations of the child's parents;
- The specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles, and telephone numbers of the persons contacted. Copies of any correspondence with the tribes must be attached as exhibits; and
- The specific efforts that were made to comply with the placement preferences in ICWA or the placement preferences of the tribes. §32A-4-32(B).

25.4 Service and Notice

Notice of the filing of the motion, together with a copy of the motion, must be served by the moving party on:

- the child's parents, including any parent who has not previously been made a party to the proceeding;
- foster parents with whom the child is residing;

- the foster parent, pre-adoptive parent, or relative providing care for the child with whom the child has resided for six months;
- the child's custodian;
- CYFD;
- any person appointed to represent a party, including the child's guardian ad litem or youth attorney; and
- other persons the court orders provided with notice. §32A-4-32(D).

If the child is an Indian child, in addition to the people listed above, notice must be served on the tribes of the child's parents and any Indian custodian as defined in the Indian Child Welfare Act. *Id*.

The notice and motion must be served in accordance with the Children's Court Rules for the service of motions. *Id.*

25.5 Issues to be Considered

In proceedings for permanent guardianship, the court must give primary consideration to the physical, mental, and emotional welfare and needs of the child. §32A-4-31(A).

Any adult, including a relative or foster parent, may be appointed as a permanent guardian, but an institution or agency may not. In any case involving a child in CYFD's custody, CYFD's consent to the guardianship must be obtained. If the child is 14 years of age or older, he or she may nominate his or her own guardian, and the court must appoint that person, unless the court finds the appointment is contrary to the child's best interests. §32A-4-31(B).

Besides finding that the guardianship is in the child's best interest, the court must also determine that: (1) the child has been adjudicated abused or neglected; (2) CYFD has made reasonable efforts to reunite the child with the parent, and further efforts would be unproductive; (3) reunification would not be in the child's best interests because the parent is unwilling or unable to properly care for the child; and (4) the likelihood of adoption is remote, or termination of parental rights would not be in the child's best interests. §32A-4-31(C). If the child who is the subject of the case is an Indian child, ICWA requires that the party seeking the placement out of the care of the parents must demonstrate that active efforts to assist the parents have been made. 25 U.S.C. §1912(d).

25.6 Stipulations

A stipulation to appoint a permanent guardian for a child must be made in the context of a pending motion. Guardians are ill-advised to enter into private informal agreements regarding guardianship of a child. It is doubtful that such agreements will be recognized as binding agreements between the parties to appoint one of the parties as the permanent guardian of the child. *See In re Guardianship of Ashley B.G.*, 1998-NMCA-003, 124 N.M. 468. However, nothing in the Children's Code precludes the court from entering an order appointing a

permanent guardian if the parties stipulate to the findings required by §32A-4-31(C) and the court is assured that the parent's consent is knowingly and intelligently given.

25.7 Contested Case

The finding on abuse and neglect required for permanent guardianship is that the child has been adjudicated an abused or neglected child. §32A-4-31(C). The allegation of abuse or neglect is not relitigated on the motion for permanent guardianship. However, other issues, such as reasonable efforts or best interests of the child, could be contested. While the appointment of a permanent guardian does not terminate parental rights, the children's court must conduct a trial and make the findings listed in §25.10 below.

Note that instead of finding that termination of parental rights *would be* in the child's best interests, the court must specifically find either that the likelihood of adoption is remote or that termination of parental rights *would not be* in the child's best interests.

25.8 Evidence

The Rules of Evidence apply to a hearing on a motion for permanent guardianship. Rules 10-141 and 11-1101.

25.9 Burden of Proof

The grounds for permanent guardianship must be proved by clear and convincing evidence**.** In the case of an Indian child, the grounds must be proven beyond a reasonable doubt and meet the requirements of 25 U.S.C. §1912(f). §32A-4-32(E). Section 1912(f) requires evidence, including expert testimony, that continued custody in the parent or Indian custodian is likely to result in serious emotional or physical harm to the child. Section 1912(d) also requires proof of active efforts to prevent the breakup of the Indian family and that those efforts were unsuccessful. ***See*** Handbook Chapter 32 on ICWA's evidentiary standards.

25.10 Findings and Order

In order to appoint a permanent guardian, the children's court must find that the guardianship is in the best interest of the child and must make four additional findings prior to the appointment:

- the child has been adjudicated abused or neglected;
- CYFD has made reasonable efforts to reunite the child with the parent, and further efforts would be unproductive;
- reunification would not be in the child's best interest because the parent continues to be unable or unwilling to properly care for the child; and
- either the likelihood of adoption is remote, or termination of parental rights would not be in the child's best interest. §32A-4-31(C).

If the child is 14 or older, the court must appoint a person nominated by the child, unless the

court finds the appointment contrary to the child's best interest. §32A-4-31(B).

Upon a finding that grounds exist for a permanent guardianship, the court may incorporate into the final order provisions for:

- visitation with the natural parents, siblings, or other relatives; and
- any other provision necessary to rehabilitate the child or provide for the child's continuing safety and well-being. §32A-4-32(G). This could include child support from the biological parents.

A Title IV-E guardianship assistance agreement has to be completed with the relative guardian before the legal guardianship is established, if assistance is sought. ***See*** §25.14 below.

The court retains jurisdiction to enforce its judgment of permanent guardianship. §32A-4-32(H).

25.11 Periodic Judicial Review

Section 32A-4-25(B) requires that a judicial review hearing be held within six months of the court's decision on a motion for permanent guardianship, and every six months thereafter. For information about periodic judicial review hearings, ***see*** Handbook Chapter 23.

25.12 Revocation of Order

Any party to the abuse or neglect proceeding may move for revocation of the order granting guardianship when there is a "significant change of circumstances," including that:

- the parent is able and willing to properly care for the child; or
- the guardian is unable to properly care for the child. §32A-4-32(I).

The court may revoke the order when a significant change of circumstances has been proven by clear and convincing evidence and it is in the child's best interest to revoke the order. §32A-4-32(K).

The court must appoint a GAL for the child in the revocation proceeding if the child is under age 14. The court must appoint an attorney for the child if the child is age 14 or older at the inception of the proceeding. §32A-4-32(J).

If there are allegations of abuse or neglect by the permanent guardian after establishment of the guardianship, the proceedings to revoke the permanent guardianship could lead to the ultimate termination of parental rights of the biological parent. *State ex rel. CYFD v. Browind C.*, 2007-NMCA-023, 141 N.M. 166.

25.13 Distinguishing Guardianship under Probate Code and Kinship Guardianship Act

25.13.1 Probate Code

The Probate Code provides that "[t]he court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order." §45-5-204. Unlike the Abuse and Neglect Act, the Probate Code does not provide authority for the appointment of a guardian in a situation where parental rights have not been terminated or suspended. *See, e.g., In re Guardianship of Ashleigh R.*, 2002-NMCA-103, 132 N.M. 772, and *In re Guardianship Petition of Lupe C.*, 1991-NMCA-050, 112 N.M. 116 .

In *Lupe C.*, the court held that a parent's right to custody is not suspended by circumstances if in fact the parent has lawful custody, is present, and has not voluntarily relinquished physical custody of the child. 1991-NMCA-050, ¶19. Rather, the Children's Code provides the mechanism for removing a child from the custody of a parent where the parent has and is exercising custody of the child. *Id*. ¶27.

The court in *Ashleigh R*. held that the district court erred in appointing the grandparents as guardians under the Probate Code when the mother contested the appointment, even though the child was living with the grandparents at the time they filed for guardianship. Parental rights are not "suspended by circumstances" just by virtue of the fact that the parent had voluntarily relinquished custody. 2002-NMCA-103, ¶¶7-11.

A question that the courts and members of the legal community debated for years was whether and how a prospective guardian, concerned about a child's well-being, could obtain guardianship when the parent still had a right to custody, had not consented to the guardianship, and was not the subject of a pending abuse or neglect proceeding filed by CYFD.
The Kinship Guardianship Act, passed by the Legislature in 2001, addresses many of these situations.

25.13.2 Kinship Guardianship Act

The Kinship Guardianship Act, §§40-10B-1 to 40-10B-15 addresses the need to establish a legal relationship between a child and a kinship caregiver when the child is not residing with either parent. The Act provides for a caregiver's affidavit, for short term situations where medical or educational issues need to be addressed. Also, a caregiver with whom a child resides and who provides the child with the care, maintenance and supervision consistent with what a parent provides, may petition the court for guardianship. The court may appoint a guardian if the parent consents in writing, the parent's rights have been terminated or suspended by prior court order, or the child has been residing with the petitioner for 90 days or more and the parent is currently unwilling or unable to care for the child or there are extraordinary circumstances.

Kinship guardianships enable caregivers to secure educational services and medical care and to meet other needs of the children in their care. They are also intended to provide children with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally. Again, though, it is important to recognize the limits of kinship guardianship as an option. For someone to be able to petition the court for appointment under the Kinship Guardianship Act, the person must be an adult *with whom the child resides* and who provides the child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child. Like guardianship under the Probate Code, kinship guardianship does not authorize the court to remove the child from the parents' home. ***See*** Handbook Chapter 38 for a more detailed summary of the Kinship Guardianship Act.

25.14 Guardianship Assistance Program (GAP)

The Fostering Connections Act of 2008 gave states the option to use federal Title IV-E funds (foster care funds) to finance guardianship assistance programs to help children in the care of relatives exit foster care into permanent homes. CYFD now has a subsidized guardianship program approved by the federal Children's Bureau. The program is important because it provides funding for a guardianship option in cases where adoption is not a viable permanency plan. This is sometimes the case with Indian children, for example, where termination of parental rights may not be culturally appropriate. This also may be the case where an older child does not consent to being adopted or where keeping the child with the extended family is the best option for the child.

CYFD has not adopted regulations on GAP, but has incorporated the criteria for the program in their permanency planning procedures, which can be obtained from the county offices.

To be eligible for Title IV-E guardianship assistance, the child must be eligible for federal Title IV-E foster care maintenance payments, must be in a licensed relative foster home, and must have lived with the licensed relative for at least six consecutive months. The term "relative" includes fictive kin as well as blood relatives. The situation must be such that reunification and adoption are not appropriate permanency options, the child has a strong attachment to the relative guardian, and the relative guardian has a strong commitment to caring permanently for the child. A child 14 or older must be consulted about the arrangement.

The court report included in the child's case plan is to document a number of things, including the steps taken by CYFD to determine that neither reunification nor adoption is appropriate, the reasons for any sibling separations during placement, and why a guardianship is in the child's best interest. This court report is typically the court report for the initial permanency hearing or any permanency hearing at which a change of plan to guardianship is requested. A Title IV-E guardianship assistance agreement has to be completed with the relative guardian before the legal guardianship is established.

According to CYFD procedures, if the child is determined eligible for Title IV-E guardian assistance payments, the department may also make payments for the child's siblings, if

placed in the same home. CYFD and the relative guardian must agree on the appropriateness of the placement of the siblings. Siblings are not required to meet Title IV-E guardianship eligibility criteria and do not have to be placed simultaneously with the eligible child but must enter into the Title IV-E guardianship assistance agreement at the same time as the eligible child.

Given these various requirements, children in the care of relatives by virtue of a guardianship under the Probate Code or the Kinship Guardianship Act are not eligible for subsidized guardianship.

Further information about the guardianship assistance program can be obtained from the Foster Care and Adoptions Bureau at CYFD (505-827-8400).

Tribal Program. The Navajo Nation also has an approved subsidized guardianship program. Contact the Navajo Department of Family Services for further information.

25.15 Checklist

PERMANENT GUARDIANSHIP HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Service of motion
  - Notice of hearing
- ☐ Inquiry regarding:
  - Absent parents
  - Presence of child
  - Indian child
  - Eligibility for subsidized guardianship
- ☐ Stipulations, if any
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: usually clear and convincing
  - Burden of proof: if Indian child, beyond reasonable doubt
- ☐ Findings
  - Child adjudicated abused or neglected
  - Reasonable efforts by CYFD; further efforts not productive
  - Reunification not in child's best interest
  - Likelihood of adoption remote; TPR not in child's best interest
  - Guardianship in child's best interest
- ☐ If 14 or older, has child nominated a person to be guardian?
- ☐ If an Indian child,
  - Notice to tribe and Indian custodian
  - Placement preferences
- ☐ Order
  - Visitation with parents, siblings, other relatives
  - Provisions for child's rehabilitation, safety, well-being.
- ☐ Scheduling of judicial review w/in 6 months

CHAPTER 26

APPEALS

This chapter covers some of the basic requirements for appeals, including:

- Filing and docketing an appeal.
- Deadlines under the different calendars.
- Jurisdiction during an appeal.
- Preserving error for review.

The chapter also covers expedited appeals from the ten-day custody hearing.

26.1 Overview

A significant number of abuse or neglect cases find their way into the appellate courts, and it is incumbent on both the children's court and the parties before the children's court to be prepared for the possibility of appeal. Considerations include, for practitioners, the importance of proposing and, for children's court judges, the importance of making sufficient findings, and for all the participants, the desirability of making a complete record to permit adequate review. Taking and docketing appeals properly is also critical.

26.2 Appeals as of Right

These final orders are appealable as of right to the Court of Appeals:

- An order dismissing an abuse and neglect petition.
  State ex rel. CYFD in re Vincent L., 1998-NMCA-089, 125 N.M. 452.
- An order finding a child is abused or neglected.
  State ex rel. CYFD v. Frank G. and Pamela G., 2005-NMCA-026, ¶41, 137 N.M. 137, *aff'd sub nom. In re Pamela A.G.*, 2006-NMSC-019, 139 N.M. 459.
- An order terminating parental rights.
  State ex rel. CYFD v. Erika M., 1999-NMCA-036, 126 N.M. 760.
- Any other final order. *See* the annotations to Rule 12-201 for examples.

For a discussion of what constitutes a final order, *see Kelly Inn No. 102, Inc. v Kapnison*, 1992-NMSC-005, ¶14, 113 N.M. 231, discussed in the Court of Appeals' opinion in *Frank G. and Pamela G.*, 2005-NMCA-026, ¶40.

Although not a final order, § 32A-4-18 provides the parties a right to an immediate appeal from a custody order entered under that section.

Appeals from Custody Orders. If the order issued under §32A-4-18 grants legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal is to be expedited and heard at the earliest practicable time. §32A-4-18(I). The statute as amended specifies that the children's court retains jurisdiction to take further action in the case pursuant to §32A-1-17(B).

Rules 10-315 and 12-206.1 establish special procedures for expedited appeals of orders that grant or withhold custody after the custody hearing pursuant to §32A-4-18. The rules depart from key provisions of the appellate rules, such as those on docketing appeals (Rule 12-208), calendar assignments (Rule 12-210), and computation of time (Rule 12-308). According to the commentary for Rule 12-206.1, the expedited appellate review process is intended to implement a party's right to an immediate appeal without delaying the subsequent stages of an abuse and neglect proceeding or tolling or extending the corresponding time limits. *See also* Rule 10-343(D) (stating that an appeal from an order under Rule 10-315 and §32A-4-18 does not affect the time limits for adjudicatory hearings).

26.3 Appeals by Leave

All orders not appealable as of right are appealable by leave of the Court of Appeals as an interlocutory appeal, if so certified with specific language by the children's court judge in the order from which review is sought. Rule 12-203.

26.4 Deadlines and Other Requirements

26.4.1 Filing an Appeal as of Right

Except for appeals of custody orders under §32A-4-18(I), an appeal as of right is taken by filing a notice of appeal with the district court clerk within 30 days after the entry of the order or judgment appealed from. Rule 12-201(A)(1). An appeal of a custody order under §32A-4-18(I) is initiated by filing a declaration of expedited appeal with the Court of Appeals within 5 days after the children's court's custody order. Rule 10-206.1(C). Trial counsel must file the declaration and serve it on the children's court, the trial judge, trial counsel of record for each party other than the appellant, and the court monitor or court reporter who took the record. *Id.*

The Court of Appeals has held that ineffective assistance of counsel is presumed where counsel fails to file a timely notice of appeal. In *In re Ruth Anne E., State ex rel. CYFD v. Lorena R.*, 1999-NMCA-035, ¶¶9-10, 126 N.M. 670, the Court deemed a parent's late appeal from an order terminating parental rights to have been timely filed and was considered on the merits. Similarly, when counsel did not file a timely notice of appeal from an adjudication of abuse and neglect, the Court of Appeals presumed ineffective assistance of counsel and deemed the appeal to be timely filed. *State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133,

¶22, 140 N.M. 578. "[I]t is well settled that failure to timely file a notice of appeal from either an adjudication of abuse or neglect or an order terminating parental rights constitutes ineffective assistance of counsel per se, such that the merits of an appeal will be considered notwithstanding the procedural deficiency." *State ex rel. CYFD v. Lance K.*, 2009-NMCA-054, ¶51, 209 P.3d 778. This does not mean that an appeal can be filed at any time regardless of the time limits found in the Rules of Appellate Procedure. A conscious decision by a respondent not to file an appeal is not the same as the failure of counsel to file an appeal in a timely manner even though the respondent wanted it filed. The reported cases deal only with the latter situation.

It is very important that respondents' counsel, in particular, consult Rule 10-352. The rule requires that a notice of appeal from a judgment on a petition alleging abuse or neglect or a judgment on a motion to terminate parental rights be signed by both the appellant and the appellant's counsel, unless the appellant is a minor child or state agency. The appeal may be filed without the appellant's signature if counsel certifies that the appeal is not frivolous or that:

- The appellant contested the proceedings and expressed an intention to appeal the judgment or disposition; and
- The appellant has failed to maintain contact with counsel and, despite diligent efforts, counsel has been unable to locate the appellant to sign the notice of appeal. In this case, counsel must specify the last date on which the appellant contacted counsel and the efforts counsel has made to locate the appellant. Rule 10-352(B)(2).

(Note that Rule 10-352 applies to judgments. It is not clear how or whether the rule will be applied to appeals from custody orders entered after the custody hearing.)

Appointment of Appellate Counsel. Under Rule 12-303, trial counsel has the responsibility for seeking an order from the Court of Appeals appointing appellate counsel, unless trial counsel intends to continue the representation or appellate counsel has already been retained to represent the respondent in the proceeding. Even when appellate counsel will be appointed, as in the case of an appeal by a respondent, the obligation of trial counsel to advocate for his or her client in the docketing statement cannot be understated. *See State ex rel. CYFD v. Alicia P.*, 1999-NMCA-098, ¶¶7-9, 127 N.M. 661.

As a practical matter, trial counsel will have to handle an appeal from a custody order under §32A-4-18 from beginning to end because the timeline for the appeal is so short. ***See*** §26.4.3 below.

26.4.2 Filing an Interlocutory Appeal

An interlocutory appeal is taken by filing an application for leave to file an interlocutory appeal with the Court of Appeals within 15 days after the entry of the order appealed from. Rule 12-203(A). An interlocutory appeal can only be filed if the trial court judge certifies in writing that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially

advance the ultimate termination of the litigation. §39-3-4(A).

26.4.3 Filing the Docketing Statement or Declaration of Expedited Appeal

Unless otherwise ordered by the Court of Appeals, or the appeal is being taken from a custody order under §32A-4-18, trial counsel is responsible for preparing and filing the docketing statement with the Court of Appeals within 30 days after the filing of the notice of appeal. Rule 12-208(A), (B). If the appeal is being taken from a custody order under §32A-4-18, trial counsel must file a declaration of expedited appeal with the Court of Appeals within five days of the filing of the children's court order. Rule 12-206.1(C). The required contents of the docketing statement or the declaration of expedited appeal are spelled out in Rules 12-208 and 12-206.1, respectively.

Practice Note. This is one of the most important parts of the appeal process. The instructions found in Rules 12-208 and 12-206.1 must be followed carefully and what is said in the docketing statement or declaration of expedited appeal must be clear with specific references to the record and legal authorities.

In the case of an appeal from a judgment, the docketing statement will most likely determine whether the appeal is assigned to the summary calendar or the general calendar under Rule 12-210. In the case of an appeal under §32A-4-18, the declaration of expedited appeal is the ***only*** chance that the appellant has to present the issues being appealed; no further briefing by the appellant may be made. *See* Rule 10-206.1.

26.4.4 Deadlines for Other Submittals

Appeals from §32A-4-18 Custody Orders. Within 10 days of the filing of the declaration of expedited appeal, the Court of Appeals may affirm the order of the children's court if it appears that the appeal is without merit or order the parties other than the appellant to file a response within 10 days of the date of the order requesting the response. The Court of Appeals has a very short timeline for making a decision. Rule 12-206.1(C) and (F).

The remainder of the discussion below applies only to appeals from judgments rendered at adjudication or on a motion for termination of parental rights.

Cases Assigned to the Summary Calendar. If the case is assigned to the summary calendar, no transcript of proceedings is to be filed. Counsel has 20 days from the date of service of the appellate court clerk's notice of proposed summary disposition to file a memorandum in response to the notice. Rule 12-210(D).

Cases Assigned to the General Calendar, Non-Expedited Bench. If the case is assigned to the general calendar, the case will be further assigned to the expedited bench or the non-expedited bench. For the non-expedited bench:

- A transcript of proceedings must be filed as provided by Rule 12-211. *See* §26.6 below.

- Briefs are to be filed in accordance with Rules 12-201(B) and 12-213.
- All documents filed with the Court of Appeals, including briefs, must be in 14 point typeface.
- Appellant's brief in chief must be filed within 45 days after the transcript is filed in the appellate court. Rule 12-210(B).
- Appellee's answer brief must be filed within 45 days after service of appellant's brief in chief. Rule 12-210(B).
- Appellant's reply brief must be filed within 20 days after service of appellee's answer brief. Rule 12-210(B).
- The brief in chief and answer brief are limited to 35 pages and the reply brief, if any, is limited to 15 pages. If the page limit is exceeded, the party filing the brief must certify the number of words or number of lines, and that number cannot exceed the number provided for in the applicable rule.

Cases Assigned to the General Calendar, Expedited Bench. The expedited bench decision program was created by order of the Court of Appeals in 1993 and modified and expanded over time, as recognized by Rule 10-210(E). Miscellaneous Order No. 01-57, issued on September 19, 2016 and available on the Court of Appeals' website.

If the Court of Appeals assigns a case to the expedited bench decision program, the parties may file written objections to the order assigning a case to the program within 10 days of the order. However, the decision as to whether the case will remain in the program remains with the Court of Appeals.

The following schedule applies to cases assigned to the expedited bench:

- The brief in chief is to be filed and served within 30 days after the transcript is filed, the answer brief is to be filed within 30 days of service of the brief in chief, and the reply brief is to be filed within 15 days of service of the answer brief.
- The brief in chief and answer briefs are limited to 20 pages, in 14 point typeface, and the reply brief, if any, is limited to 10 pages, except by leave of the court. The same rule regarding certifying the number of words or numbers of lines if the page limit is exceeded for briefs in cases on the general calendar, non-expedited bench, applies to briefs in the expedited bench decision program. Order No. 01-57 sets out the word or line limits for briefs in the expedited bench decision program.
- Once the case is briefed, it is submitted to a panel of three judges for decision at the next available submission date. A party may request oral argument and the Court of Appeals will automatically grant the request and schedule oral argument during the month the case is submitted. If oral argument is not requested, the panel will decide the case by the last day of the month that the case is submitted.
- If oral argument is held, a decision is ordinarily announced from the bench, and a written decision is usually filed within 24 hours.

Practice Note. There has been some confusion over the deadline for the filing of the brief of the child's guardian ad litem in an appeal. Although, unlike an amicus curiae, the child is a party to the case, guidance can be taken from Rule 12-215 governing the time for filing

briefs of amicus curiae, which provides that "[a]n amicus curiae shall file its brief within seven (7) days after the due date of the principal brief of the party whose position it supports." This means that if the GAL supports the trial court's judgment, the GAL's brief should be filed within the time frame of the appellee's answer brief; if the GAL opposes the trial court's judgment, the GAL's brief should be filed within the time frame of the appellant's brief in chief. Following this guideline allows the appellant or appellee to respond to the GAL's brief in addition to the primary brief in the case. The GAL can always file a motion with the Court of Appeals for direction on when the GAL's brief should be filed in a particular appeal.

26.5 Filing the Transcript of Proceedings

26.5.1 Audio Recorded Transcripts

If the transcript of proceedings is an audio recording, within 15 days after receipt of the general calendar assignment, the district court clerk must prepare and send the original and two duplicates of the audio recording and an index log to the appellate court, and must prepare and maintain one duplicate. Rule 12-211(B). For appeals of custody orders under §32A-4-18(I), trial counsel for the appellant must attach an audio recording of the custody hearing to the declaration of expedited appeal. Rule 12-206.1(D). (To facilitate this expedited appeal, the children's court is required to make an audio recording of the hearing and provide it immediately upon request to a party wishing to appeal. Rule 10-315(C).)

26.5.2 Other Transcripts

If the transcript of proceedings is not an audio recording, within 15 days after service of the general calendar assignment, appellant must file in district court a description of the parts of the proceeding the appellant intends to include in the transcript. Rule 12-211(C)(1). Within 15 days after appellant's designation, appellee may file in district court a designation of additional parts to be included or may apply to the district court for an order requiring appellant to designate such parts. Rule 12-211(C)(1).

Each party designating a portion of the transcript must make satisfactory arrangements with the court reporter for payment for the transcript. Proof of such arrangements must be filed with the district court within 15 days of the designation. Rule 12-211(C)(2).

Computer-aided transcripts must be filed within 30 days after the filing of the certificate of satisfactory arrangements. If the transcript is not a computer-aided transcript, it must be filed within 60 days after the filing of the certificate. Rule 12-211(C)(3).

The parties may agree upon a statement of facts and proceedings and stipulate that they deem the statement sufficient for purposes of review. They must file the statement as a transcript of proceedings within 60 days of service of the general calendar assignment, unless otherwise ordered by the court. Rule 12-211(I).

26.6 Priority of Cases

Rule 12-206.1 sets forth a short timeline for deciding appeals of orders granting or withholding custody under §32A-4-18. Within 10 days of the filing of the declaration of expedited appeal, the Court of Appeals must either affirm the order of the children's court, if it appears that the appeal is without merit, or order the parties to respond to the declaration within 10 days. In that case, the court must dispose of the appeal within 30 days of the filing of the declaration, although an extension of up to 15 days is available if necessary to protect the health and safety of the child. Rule 12-206.1(F).

Appeals from judgments in abuse and neglect and termination of parental rights cases are given priority by the Court of Appeals when scheduling cases for submission to a panel for a decision. The Court of Appeals has also adopted a policy aimed at expediting these appeals to the extent possible consistent with the due process rights of the parties.

Supreme Court Practice Note. Appellate practitioners should be aware that cases are being expedited at the Supreme Court level as well. The Supreme Court may order an expedited briefing and oral argument schedule in a time-sensitive case. Rule 10-502(M), added in 2017. Supreme Court Order No. 13-8500, issued on June 5, 2013, provides that the record forwarded to the Supreme Court by the Court of Appeals includes all briefs filed in the Court of Appeals if the case was on the general calendar and all memorandum filed in response to summary calendar notices. Order No. 13-8500 also provides for simultaneous supplemental briefs and simultaneous supplemental reply briefs on a shortened schedule and for oral argument to be scheduled within 60 days of the scheduling order issued by the Court when a petition for writ of certiorari is granted in an abuse or neglect or termination of parental rights proceeding.

The Court of Appeals' decisions on appeals from §32A-4-18 custody orders are not subject to further review. Rule 12-206.1(G).

26.7 Standard of Review

It is the state's burden to prove the statutory grounds for adjudication of abuse or neglect and for termination of parental rights by clear and convincing evidence, with a beyond a reasonable doubt standard required for termination of parental rights in the case of an Indian child. §§32A-4-20(H) and 32A-4-29(I); *State ex rel. CYFD in re Sara R.*, 1997-NMSC-038, ¶10, 123 N.M. 711; *State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, ¶13, 126 N.M. 664. The appellate court will uphold the judgment if, viewing the evidence in the light most favorable to the judgment, a fact finder could properly determine that the required standard was met. *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶3, 120 N.M. 463.

Questions of law are reviewed *de novo. Martinez v. Martinez*, 1979-NMSC-104, 93 N.M. 673. A claim that procedural due process was denied is also reviewed *de novo. In re Ruth Anne E.*, 1999-NMCA-035, ¶22.

26.8 Stay of Proceedings

The order of the children's court from which an appeal is taken is not suspended during the pendency of the appeal unless the children's court or the appellate court specifically orders the stay or suspension of the order. The Children's Code, the Children's Court Rules, and the Rules of Appellate Procedure set forth procedures and requirements for a stay. *See* §32A-1-17 and Rules 10-151 and 12-206.

The procedures and requirements for a stay of a custody order appealed under §32A-4-18 are somewhat different. *See* 12-206.1(G). Furthermore, the Court of Appeals may grant a stay of the order, but the stay may not preclude continuation of the proceedings in children's court or toll the time periods set forth in Rule 10-343. Rule 12-206.1(G).

26.9 Jurisdiction During an Appeal

26.9.1 Children's Court Jurisdiction During Appeal

The children's court judgment stands until reversed. The children's court retains jurisdiction while an adjudicatory judgment is on appeal to take further actions for the welfare of the child. This was reasonably clear given the ongoing responsibilities of the children's court in an abuse or neglect case under the Children's Code, together with the New Mexico Supreme Court's opinions in *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, and *Albuquerque Journal v. Jewell*, 2001-NMSC-005, 130 N.M. 64. In *State ex rel. CYFD v. Frank G. and Pamela G.*, 2005-NMCA-026, *aff'd, In re Pamela A.G.*, 2006-NMSC-019, the Court of Appeals confirmed the continuing jurisdiction of the district court:

> While an appeal of an abuse and neglect adjudication is pending, the children's court has jurisdiction to take further action in the case under Section 32A-1-17(B) which states that an appeal to this Court 'does not stay the judgment appealed from.' The Abuse and Neglect Act provides for additional services by CYFD and further hearings by the court to monitor the actions of CYFD, the well-being of the child, and the progress of the parent.

2005-NMCA-026, ¶42. With regard to appeals under §32A-4-18(I), the statute provides that the children's court has jurisdiction to take further action pursuant to §32A-1-17(B) while appeals of custody orders are pending.

26.9.2 Appellate Jurisdiction After Children's Court Dismissal

An appeal of an abuse or neglect adjudication is not necessarily rendered moot by the district court's dismissal of the underlying case while the adjudication is on appeal. In the *Amanda H.* case, the Court of Appeals observed that cases challenging the sufficiency of the evidence of abuse or neglect are capable of repetition but may evade appellate review because district courts are required to dispose of Children's Code cases quickly, and may do so before the Court of Appeals is able to complete its review. The Court decided that the case under

review fell within an exception to the mootness doctrine, heard the appeal, and reversed the adjudication of neglect. *State ex rel. CYFD v. Amanda H.*, 2007-NMCA-019, ¶¶13-18, 31, 141 N.M. 299.

26.9.3 Children's Court Jurisdiction After Appellate Reversal

"[A]fter an adjudication of abuse or neglect is reversed by [the Court of Appeals], the district court, on remand, retains jurisdiction to determine whether the parent prevailing on appeal should regain custody of the child…. We do not believe that an automatic return of a child to his or her parent following a reversal of an adjudication of abuse or neglect is necessarily in the child's best interests, particularly where … the parent has not had actual custody of Child for a number of years." *State ex rel. CYFD v. Benjamin O.*, 2007-NMCA-070, ¶35, 141 N.M. 692 (citations omitted). The presumption exists that "Child should be returned to [parent] at the time the adjudication was reversed, unless the district court determined that [parent] was unfit or that there were extraordinary circumstances that justified denying [parent] custody. Such findings should be expressly made by the court." *Id.* ¶36.

26.10 Preserving Error for Appeal

To preserve error for review, it is important to raise the issue in the trial court. According to the Court of Appeals in *Yeager v. St. Vincent Hospital*, 1999-NMCA-020, ¶8, 126 N.M. 598:

> Generally, "a party's failure to request findings and conclusions on specific factors or issues it wishes to be considered results in the waiver of any argument it may wish to raise on appeal as to those issues." *Cordova v. Taos Ski Valley, Inc*., 121 N.M. 258, 263, 910 P.2d 334, 339 (Ct. App. 1995). "However, where the record is sufficiently clear to allow the appellate court to understand which issues were raised and argued to the trial court, and not abandoned, the appellate court may address these issues on their merits."

Yeager, ¶8. This comports with the Rules of Appellate Procedure. According to Rule 12-321 (formerly 12-216), to preserve an issue for review it must appear that a ruling or decision by the district court was fairly invoked. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not prejudice the party later.

Note. Rule 12-321 does not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving general public interest, plain error, fundamental error or fundamental rights of a party. Rule 12-321(B)

The Court of Appeals addressed preservation of error in a case challenging the appointment of the grandparents as guardians under the Probate Code, over the mother's objections. In the court below, mother's attorney did not cite to past authorities or specifically argue that the district court did not have authority under the Probate Code to appoint guardians for the girls. Yet the Court of Appeals decided that requested findings of fact to the effect that the mother had not abused or neglected the girls, that she was a fit parent, and that her parental rights should not be terminated were sufficient to alert the trial court to the appropriate

standards to apply. *In re Guardianship of Ashleigh R.*, 2002-NMCA-103, ¶12, 132 N.M. 772.

The Supreme Court addressed preservation in a case asserting that the respondent mother had a due process right to have an expert appointed at the State's expense to assist in her defense. The Court found that the mother had preserved the issue for appeal by raising it in post-trial motions before the district court entered its findings and judgment because "they alerted the trial court to the alleged error before the entry of the court's final findings and judgment, giving the trial court the opportunity to correct the error." *State ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018, ¶10, 141 N.M. 535.

A word of caution is due about no contest pleas. A claim that a plea was involuntary or unknowing may be waived if the respondent does not move to revoke or withdraw the plea when she first learns the consequences and if she does not appeal at the time. *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶9, 133 N.M. 136. In *Amy B.*, the mother raised the issue for the first time in the Court of Appeals after the children's court had terminated her parental rights. Yet she had entered the no contest plea at adjudication and did not move to revoke or withdraw it at disposition when she learned the consequences of the plea, nor did she appeal the disposition. As a result, she waived any issue concerning an involuntary or unknowing plea.

CHAPTER 27

PARTIES; INTERVENTION

This chapter describes:

- The parties to the abuse or neglect proceeding.
- Persons who may intervene in the proceeding.
- The unique role of the foster parent or other care provider, as well as CASAs and CRBs.

27.1 Original Parties to the Proceeding

Children's Court Rule 10-121(B) lists the parties to an abuse or neglect action:

- the state;
- a parent, guardian, or custodian who has allegedly neglected or abused the child;
- the child alleged to be neglected or abused;
- any other person made a party by the court (***see*** §§27.2 and 27.3 below).

There may be situations in which both the parent and the guardian are alleged to have abused or neglected the child, in which case both will be brought into the proceeding as parties. *See, e.g., State ex rel. CYFD v. Djamila B.*, 2015-NMSC-003, ¶29. In cases where the guardianship is based on the Kinship Guardianship Act, §§40-10B-1 through 15, "kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is first properly revoked in accordance with the revocation procedures of the KGA and our Rules of Evidence." *Id.* ¶24.

The state may also join as parties the non-custodial parent or parents, the guardian or custodian of the child, or any other person permitted by law to intervene in the proceedings. Rule 10-121(C).

If a motion for termination of parental rights (TPR) is filed in the case, the list of necessary parties under Rule 10-121 expands to include any parent who has a constitutionally protected liberty interest in the child (***see*** Handbook Chapter 2). If that parent was not already a party, he or she must be joined in the action and served with summons and a copy of the motion. Rule 10-121(D).

The Term "Parent." The term "parent" is defined in the Children's Code only by way of example: According to §32A-1-4(Q), the term "includes a biological or adoptive parent if

the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child." There may be other persons who should be joined as parents, such as a presumed father who is not the biological father. The Adoption Act requires the consent of the presumed father for an adoption to take place, which makes it particularly important that the presumed father be brought into the case if TPR is a possibility. *See* §32A-5-17, as well as the definition of presumed father at §32A-5-3(V). The same is true of an acknowledged father, which is defined in §32A-5-3(F).

27.2 Intervention as of Right

27.2.1 Statute

Under §32A-4-27, the following persons are entitled to intervene as a matter of right and may do so during any stage of the proceeding:

- the child's parent, if not named in the petition alleging abuse or neglect; or
- when the child is an Indian child, the Indian child's tribe. §32A-4-27(D).

The child's foster parent is also entitled to intervene as a matter of right when the following conditions are met:

- the foster parent desires to adopt the child;
- the child has resided with the foster parent for at least six months within the year prior to the termination of parental rights;
- a motion for termination of parental rights has been filed by a person other than the foster parent; and
- bonding between the child and the child's foster parent is alleged as a reason for terminating parental rights in the motion for termination. §32A-4-27(E).

27.2.2 Rule

Rule 10-122 also provides that the child's parents and Indian tribe may intervene as a matter of right. In case of the foster parents described above, the rule only addresses permissive intervention and provides for intervention by persons with a statutory right to intervene "upon timely application" and subject to "such terms and conditions as the judge may prescribe." ***See*** §27.3.2 below.

27.3 Permissive Intervention

27.3.1 Statute

Under §32A-4-27, the court may permit any of the following people to intervene as a party, with a motion for affirmative relief, at any stage of the proceeding:

- a foster parent with whom the child has resided for at least six months;

- a relative within the fifth degree of consanguinity with whom the child has resided;
- a stepparent with whom the child has resided; or
- a person who wishes to become the child's permanent guardian. §32A-4-27(A).

Motions for affirmative relief might include, for example, a motion to adopt, a motion for permanent guardianship, a motion for visitation, or any other motion regarding the interaction with the child. Failure to bring to the court's attention the motion for affirmative relief can defeat the attempt to intervene. *In Re Marcia L.*, 1989-NMCA-110, ¶9, 109 N.M. 420.

When determining whether the movant should be permitted to intervene, the court must consider:

- the person's rationale for intervening; and
- whether intervention is in the best interest of the child. §32A-4-27(B).

When the court determines that the child's best interest will be served by the intervention, the court may grant the motion unless the party opposing it can demonstrate that:

- a viable plan for reunification with the respondents is in progress, and
- intervention could impede the progress of the reunification plan. §32A-4-27(A)-(C).

27.3.2 Rule

Rule 10-122 provides that, upon timely application, the following persons may be permitted to intervene under such terms and conditions as the judge may prescribe:

- the child's guardian or custodian;
- any person with a statutory right to intervene; or
- any person who has a constitutionally protected liberty interest in the proceeding if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties;
- or any other person permitted by law.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rule 10-122(B).

The decision of the court on a motion for intervention can be reviewed on appeal for abuse of discretion only. *In re Melvin B., Sr.,* 1989-NMCA-078, 109 N.M. 18

Case Note: *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057, involved a situation in which Colin, a cousin to the child, had been allowed to intervene in the children's court proceeding, pursuant to the parties' stipulation. The issue on appeal was whether Colin had standing to appeal, and the Court of Appeals decided that he did. In the course of reaching that conclusion, the Court wrote: "As reflected in the order granting Colin status as an intervenor, the Department in effect stipulated that Colin had a sufficient legal interest under Section 32A-4-25.1 to seek consideration as a viable placement for Child so as to preserve family connections." *Id.* ¶48.

27.4 Non-Party Participants

27.4.1 Foster Parents, Pre-adoptive Parents, Relatives Providing Care

The Abuse and Neglect Act requires that the foster parent, pre-adoptive parent, or relative providing care for the child be given notice of, and an opportunity to be heard in any review or hearing with respect to the child. The foster parent, pre-adoptive parent, or relative need not become a party to the review or hearing to participate in this manner. §32A-4-27(F), and Rule 10-104.1.

Similar provisions are found in other sections of the Act:

- The foster parent, pre-adoptive parent or relative providing care must be given notice and an opportunity to be heard at the dispositional phase. §32A-4-20(C).
- The children's court attorney must give notice to the foster parent or substitute care provider of the time, place and purpose of judicial review hearings. §32A-4-25(D).
- The children's court attorney must give notice to the foster parent or substitute care provider of the time, place and purpose of permanency hearings. §32A-4-25.1(G).

The Children's Court Rules emphasize the importance of ensuring that foster parents, pre-adoptive parents, or relatives providing care for the child are informed of their right to be heard at permanency and periodic judicial review hearings. *See* Rule 10-104.1.

27.4.2 CASA Volunteers and SCRB Representatives

Once the adjudication is concluded, the court appointed special advocate (CASA), if appointed, will become increasingly involved:

- The CASA assists the court in determining the best interests of the child and often submits reports to the court during the course of the proceeding post-adjudication. Rule 10-164.
- The children's court attorney sends notice of judicial reviews and permanency hearings to the CASA in the case. §§32A-4-25(C) and 32A-4-25.1(G)).

Prior to the initial judicial review, CYFD will send copies of the adjudicatory and dispositional orders and notice of the judicial review to the substitute care advisory council

so that the council can decide whether to designate the case for review by a substitute care review board (SCRB) pursuant to §32A-8-6, as amended in 2016. If the case is designated for review:

- a representative of the SCRB may attend and comment to the court at the initial judicial review. §32A-4-25(A).
- Prior to the permanency hearing or any subsequent judicial review, CYFD is to send a progress report to the council or designated SCRB. The designated SCRB may review the dispositional order and the report and submit its findings and recommendations to the court. §32A-4.25.1(B) and §32A-4-25(B).
- The Citizen Substitute Care Review Act, as amended in 2016, requires that the SCRB submit a report to the court for each case that it reviews. The parties in the proceedings are to be given notice of the review board meeting and an opportunity to participate fully in the meeting. §32A-8-6.

See Handbook Chapters 11 and 13 on CASAs and SCRBs respectively.

CHAPTER 28

DISCOVERY AND DISCLOSURE

This chapter covers:

- The rules on discovery.
- The rules on disclosure.

28.1 Overview

A series of discovery rules applies to both abuse and neglect cases and delinquency proceedings. *See* Rules 10-131 through 10-138. For abuse and neglect cases, the Supreme Court has also adopted requirements for the disclosure of certain information irrespective of any requests for discovery. These disclosure rules are similar but not the same as the disclosure rules in Article 2 for delinquency cases. *See* Rules 10-331 through 10-333, described in §28.3 below.

28.2 Discovery Rules

28.2.1 Scope of Discovery

Rule 10-133 of the Children's Court Rules describes the scope of discovery as follows:

> Unless limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the act charged or alleged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The rule provides for two forms of discovery, "statements," and depositions, as described in this chapter.

28.2.2. Forms of Discovery; Procedures

Statements: Any person, other than the respondent, with information subject to discovery must give a statement if requested by a party. If the person refuses, the party may obtain the statement by serving a "notice of statement" upon the person to be examined and upon other parties at least 5 days before the date scheduled for the statement. A subpoena may be served to secure the presence of the person to be examined or the materials to be examined during the statement. Rule 10-133(A).

Depositions: Depositions may be taken upon:

- agreement of the parties; or
- order of the court at any time after the petition is filed, upon a showing that it is necessary to take the person's deposition to prevent injustice. Rule 10-133(B)

Attendance of witnesses can be compelled by subpoena. Rule 10-133(D). If a subpoena duces tecum for the production of documents or things is to be served, the designation of materials to be produced must be attached to or included with the notice of deposition. Rule 10-133 (E)(1).

Rule 10-133 describes in extensive detail the procedures to be followed for depositions, which are similar but by no means identical to the procedures outlined in the Rules of Civil Procedure. Rule 10-134 provides very specific practices and procedures to be followed when a deposition is to be recorded by audiotape or videotape. Rule 10-132 allows the parties to vary procedures by written stipulation. Rule 10-136 allows for motions for orders compelling discovery in depositions, and sanctions for failure to comply. All of these rules should be reviewed in their entirety when depositions are under consideration.

Rule 10-135 allows for the use of depositions in court proceedings for any purpose permitted by the Rules of Evidence. It also addresses the effect of errors and irregularities in a deposition to be used in court.

28.2.3 Protective Orders

Either a party or the person from whom discovery is sought may move for a protective order for good cause shown, and the order may be issued by the court in which the action is pending or the court in the district where the deposition or statement is to be taken. Rule 10-138. The court may make any order which justice requires in order to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery, or economic reprisals. Rule 10-138 lists a number of restrictions that may be included in the order, including that the deposition or statement be conducted with no one present but the persons designated by the court.

If the moving party is concerned that a showing of good cause requires the disclosure of information that should not be disclosed, the party may make the showing of good cause in the form of a written statement for inspection by the court in camera. If the court does not permit the in camera showing, the statement will be returned to the movant upon request or sealed. Rule 10-138(B).

28.3 Disclosure Rules

28.3.1 Disclosure by Parties Required

Rules 10-331, 10-332, and 10-333 provide specifically for the disclosure of certain information by CYFD, the respondent, and the child's guardian ad litem or attorney, respectively. These rules are similar but not identical to the rules that apply in delinquency proceedings (Rules 10-231 and 10-232).

Practice Note: Rules 10-331, 10-332 and 10-333 require that the parties disclose the witnesses they intend to call. When thinking about potential witnesses, it is important to keep in mind any need for an interpreter. Rule 10-167 sets forth the procedures for the use of court interpreters. The rule, for example, requires that the court be notified in writing of the need for an interpreter for a witness *upon service of the notice of hearing*, which could be before the deadline for disclosure. Rule 10-167 allows the court to assess costs against a party for failing to provide timely notification of a need for a court interpreter, unless the party establishes good cause for the delay. Rule 10-167(B); *see also* Forms 10-440 to 10-443. ***See*** Handbook §17.3 for a more detailed discussion of Rule 10-167.

28.3.2 Disclosure by CYFD under Rule 10-331

CYFD must disclose certain information and make it available to the parties at least 15 days before the adjudicatory hearing or termination of parental rights hearing, although the court may shorten the time. CYFD must disclose and make available:

- statements made by the respondent or a co-respondent, or copies thereof, which are within the possession, custody, or control of CYFD and the existence of which is known, or by the exercise of due diligence may become known, to the children's court attorney;
- books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are in CYFD's possession, custody, or control and which are intended as evidence at the hearing, or were obtained from or belong to the respondent;
- results or reports of physical or mental exams, and of scientific tests and experiments made in connection with the case, which are within CYFD's possession, custody or control and the existence of which is known, or by the exercise of due diligence, may become known to the children's court attorney; and
- a written list of the names and addresses of all witnesses the children's court attorney intends to call, together with any recorded or written statement made by the witness. Rule 10-331(A).

The parties may examine, photograph, or copy material so disclosed. Rule 10-331(B).

The court may order any other discovery permitted by the Rules of Civil Procedure and may order or limit the production of books, documents, photographs, tangible objects, reports, or

other information as may be necessary to ensure a fair consideration of the allegations while considering the best interests of the child. Rule 10-334.

Unless otherwise ordered, the children's court attorney is not required to disclose material if:

- the disclosure will expose a confidential informer; or
- there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment which outweighs any usefulness of the disclosure to defense counsel. Rule 10-331(D).

When material is withheld under this rule, the children's court attorney must disclose to the parties that material has been withheld, together with a description of the nature of the documents, communications or things not disclosed that is sufficient to enable a party to contest the failure to disclose. Rule 10-331(D).

At least 10 days before the hearing, the children's court attorney must file a certificate stating that all information required to be produced has been produced, except as specified. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-331(C).

Rule 10-331(C) requires that certificates filed by the children's court attorney acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §28.3.5 below.

28.3.3 Disclosure by Respondent under Rule 10-332

The requirements for disclosure by the respondent are similar but not the same as for CYFD. The respondent must disclose the following information and make it available to the parties at least 15 days before the adjudicatory hearing or TPR hearing, unless the court orders a shorter time:

- books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the respondent and which the respondent intends to introduce in evidence or which were prepared by a witness whom the respondent intends to call;
- results of reports of physical or mental exams and of scientific tests or experiments made, or copies thereof, within the possession or control of the respondent, which the respondent intends to introduce or which were prepared by a witness the respondent intends to call; and
- a list of the names and addresses of the witnesses the respondent intends to call, together with any recorded or written statement made by the witness. Rule 10-332(A).

The parties may examine, photograph, or copy any material so disclosed. Rule 10-332(B).

Except as to scientific or medical reports, the rule does not authorize the discovery or inspection of:

- reports, memoranda, or other internal defense documents made by the respondent or respondent's attorneys in connection with the investigation or defense of the case, or
- statements made by the respondent to respondent's agents or attorneys. Rule 10-332(C).

Like the children's court attorney, the respondent must file a certificate stating that all required information has been produced, except as specified. This certificate must be filed at least 10 days before the hearing in question. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-332(D).

Rule 10-332(D) requires that certificates filed by the respondent acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §28.3.5 below.

28.3.4 Disclosure by Child's GAL or Youth Attorney under Rule 10-333

The requirements for disclosure by the GAL or youth attorney for the child are similar but not the same as the requirements for disclosure by CYFD and the respondent under Rules 10-331 and 10-332, respectively. Unless the court orders a shorter time, the GAL/youth attorney must disclose certain information and make it available to the parties at least 15 days before the adjudicatory hearing or TPR hearing. The GAL/youth attorney must disclose and make available:

- a statement of the child's declared position;
- a statement of the GAL's position (but not the youth attorney's since the youth attorney is client-directed and does not have a separate position);
- any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the GAL/youth attorney and which the GAL/youth attorney intends to introduce in evidence or which were prepared by a witness whom the GAL/youth attorney intends to call;
- results or reports of physical or mental exams and of scientific tests or experiments made, or copies thereof, within the possession or control of the GAL/youth attorney, which the GAL/youth attorney intends to introduce or which were prepared by a witness the GAL/youth attorney intends to call; and
- a list of the names and addresses of the witnesses the GAL/youth attorney intends to call, together with any recorded or written statement made by the witness. Rule 10-333(A).

The parties may examine, photograph, or copy any material disclosed. Rule 10-333(B).

Except for scientific or medical reports, the rule does not authorize discovery or inspection of:

- reports, memoranda, or other internal defense documents made by the GAL/youth attorney in connection with the investigation or defense of the case; or
- statements made by the child to the GAL/youth attorney unless such statements contradict prior statements made by the child in connection with any allegation of abuse or neglect. Rule 10-333(C).

Like the children's court attorney and the respondent, the GAL or youth attorney must file a certificate stating that all required information has been produced, except as specified. This certificate must be filed at least 10 days before the hearing in question. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-333(D).

Rule 10-333(D) also requires that certificates filed by the GAL/youth attorney acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §28.3.5 below.

28.3.5 Continuing Duty to Disclose

All three of the disclosure rules require that the parties acknowledge in their certifications the continuing duty to disclose additional information. Under Rule 10-137, the parties have a continuing duty to disclose information that would have been subject to disclosure if known at the time:

> If, subsequent to compliance with Rule 10-231, 10-232, 10-331, 10-332, 10-333 or 10-334 NMRA and prior to or during the adjudicatory hearing or termination of parental rights hearing, a party discovers additional material or witnesses which the party would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, the party shall promptly give written notice to the other party of the existence of the additional material or witnesses.

28.3.6 Sanctions for Failure to Disclose

All three of the disclosure rules close with the statement:

> If [CYFD, the respondent, or the GAL/youth attorney] fails to comply with any provision of this rule, the court may enter an order pursuant to Rule 10-137 NMRA or Rule 10-165 NMRA.

Under Rule 10-165, an attorney who willfully fails to observe requirements of the rule may be held in contempt of court and subject to disciplinary action. Under Rule 10-137, the court may order discovery or inspection of the materials not previously disclosed, grant a

continuance, prohibit the non-disclosing party from calling the witness or introducing into evidence the material not disclosed, or make other orders appropriate under the circumstances.

28.4 Court-Ordered Diagnostic Examinations and Evaluations

At the conclusion of the custody hearing, the court may order the respondent or the child alleged to be neglected or abused, or both, to undergo appropriate diagnostic examinations or evaluations. Copies of the reports must be provided to the parties at least five days before the adjudicatory hearing, but not to the court. §32A-4-18(G). Rule 10-335 also provides for court-ordered diagnostic examinations and evaluations:

> At any time after the commencement of an abuse or neglect proceeding, upon motion of a party or upon the court's own motion, the court may order a respondent or any child alleged to be neglected or abused to undergo a diagnostic examination or evaluation. Copies of any diagnostic examination or evaluation report shall be provided to the parties. If the examination is ordered prior to the adjudicatory hearing, copies of the diagnostic or evaluation report shall be provided to the parties at least five (5) days prior to the adjudicatory hearing. Diagnostic or evaluation reports shall not be provided to the court prior to the adjudicatory hearing.

Section 32A-4-11 allows the children's court attorney to apply for use immunity for the statements of a respondent made in a court-ordered psychological evaluation or treatment program to a professional designated by CYFD in furtherance of the court order. ***See*** Handbook §29.5.2 for more details on immunity.

28.5 Discovery in Practice

Traditional discovery as practiced in other types of civil litigation has not played a large role in civil abuse and neglect proceedings to date. One of the reasons for the limited use of discovery is the short timeline. The custody hearing is held within 10 days of the filing of the petition alleging abuse or neglect and the adjudicatory hearing takes place within 60 days of service of the petition. Another reason is that informal discovery does take place. Affidavits filed early in the case provide information to the parties, the case worker submits a written or verbal report at the custody hearing, CYFD usually makes its files available to the GAL, youth attorney, and respondents' attorneys, and the pre-adjudicatory and pre-permanency meetings all provide further opportunity for information-sharing.

Important Note: The disclosure rules reflect the fact that the timelines are short in these cases and that there is little time for the back-and-forth process involved in more formal discovery. They are significant requirements and the consequences of non-compliance can be serious. If the disclosures are not made, the court can prohibit the party from using the witnesses and materials that have not been disclosed, with obvious ramifications. Continuances ordered so that other parties can review surprise information can also pose problems, given busy court dockets and the time-sensitive nature of the proceedings.

CHAPTER 29

EVIDENCE

This chapter covers general evidentiary issues in civil abuse and neglect proceedings; rules applicable to specific stages of the proceedings are discussed in the chapters on those stages. The chapter addresses:

- Evidentiary rules and procedures applied to child witnesses, with emphasis on eliciting testimony from children.
- Hearsay and exceptions to the hearsay rule.
- Rules governing privileges and use immunity.

Please note:

- Proceedings under the Abuse and Neglect Act are civil in nature. Criminal standards do not apply. *Crawford v. Washington* and related cases, which deal with the Confrontation Clause, are discussed briefly in §41.6.7 of this Handbook.

The rules of evidence apply to all proceedings in children's court except where a rule specifies otherwise. Rule 10-141. Evidence Rule 11-1101(D) provides that the rules of evidence, other than those governing privileges, do not apply to the issuance of *ex parte* custody orders, custody hearings, dispositional hearings, permanency hearings, or judicial reviews.

29.1 Competency of a Minor to Testify

29.1.1 The Law

Rule. Rule 11-601 of the Rules of Evidence: "Every person is competent to be a witness unless these rules provide otherwise."

Case Law. Children have been accepted as competent witnesses in federal court, *see Wheeler v. U.S.*, 159 U.S. 523, 524-25 (1895), and New Mexico courts for over 100 years. In *Territory v. DeGutman*, 1895-NMSC-015, ¶7, 8 N.M. 92, a ten year old child was declared competent to testify. The court observed that trial judges should inquire into the "degree of understanding possessed [by the child], and if it then appears that the child has sufficient natural intelligence, and understands the nature and effect of an oath, he [should] be permitted to testify, whatever his age may be."

The statement in *DeGutman* essentially summarizes the rule as it remains today. To testify, a witness must possess all of the following:

- capacity to observe;
- sufficient intelligence;
- adequate memory;
- ability to communicate;
- awareness of the difference between truth and falsehood; and
- appreciation of the obligation to tell the truth in court.

These requirements apply to all witnesses, including children. *Myers on Evidence of Interpersonal Violence*, §2.01. Provided they meet the criteria for testifying, children of any age may testify. There is no particular age below which children are automatically disqualified from testifying. *Id*. In *State v. Hunsaker*, 693 P.2d 724 (Wash. 1984), a three year old child was found competent to testify about what had happened to her when she was age two.

New Mexico Cases. Cases addressing this issue include:

- *State v. Armijo***,** 1913-NMSC-057, 18 N.M. 262. An "apparently ignorant and illiterate" 15 year old was permitted to testify. The appellate court will not review the discretion of the trial court in permitting a child of tender years to testify, except in a clear case of abuse of discretion.

- *State v. Ybarra*, 1918-NMSC-093, 24 N.M. 413. A child of "tender years" was permitted to testify. The court held that although the child stated that he did not understand the nature of an oath, that "is not of itself sufficient ground for his exclusion as a witness, where it clearly appears that the child has sufficient intelligence to understand the nature of an oath and to narrate the facts accurately, and knows that it is wrong to tell an untruth and right to tell the truth, and that if he told an untruth he would be punished, and from other facts, that he is in fact competent."

- *State v. Noble*, 1977-NMSC-031, 90 N.M. 360. A 7-year old eyewitness understood her duty to tell the truth and thus was competent to testify. The court can determine, after inquiring into the child's capacities of observation, recollection, and communication, and also the child's appreciation or consciousness of a duty to speak the truth, whether the witness's testimony is competent.

- *State v. Fairweather*, 1993-NMSC-065, 116 N.M. 456. "A child witness, or any competent witness for that matter, need not know the consequences of perjurious testimony, or even what the term 'perjury' means; he or she need only know that lying is wrong." Thus, even though there were inconsistencies in one of the boys' testimony, this did not mean the boy was incompetent to testify.

- *State v. Manlove*, 1968-NMCA-023, 79 N.M. 189. A 6-year old girl victim of sexual assault was permitted to testify. The court stated there is no rule of law setting a birth date for presumed competency, and the burden of showing incompetency is on the party asserting it. The court held that "the trial court must determine from inquiries the child's capacities of observation, recollection and communication, and also the child's appreciation or consciousness of a duty to speak the truth."

- *State v. Barnes*, 1972-NMCA-032, 83 N.M. 566. Two boys aged 10 and 11 were held competent to testify. The issue of competence was within the trial court's discretion.

- *State v. Estrada*, 1974-NMCA-039, 86 N.M. 286. The trial court did not abuse its discretion in finding a child witness competent to testify who had just turned 8 and stated that to tell a lie meant you were not telling the truth and that he would get into trouble if he told a lie.

- *State v. Macias*, 1990-NMCA-053, 110 N.M. 246. "Competency means that the witness appreciates the duty to speak the truth and possesses the intelligence and the capacities to observe, recollect, and communicate." In order for the videotaped interviews of children aged 3 and 4 to fall within the Rule 11-804(B)(2) exception to the hearsay rule that requires witness to be unavailable, the children had to be declared incompetent to testify. The court concluded that the incompetency determination was inadequate because the children were not questioned about their ability to recall or the duty to tell the truth.

- *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54. While this case involved an adult witness with Down Syndrome, an expert testified that the witness had the mental capacity of a six year old and that she had a concrete simple understanding of the difference between the truth and a lie. The victim herself testified that she understood that she could get in "big trouble" if she failed to tell the truth and promised the court she would tell the truth. ¶23. The court admitted the victim's testimony under *Manlove*, as modified by Rule 11-601. ¶24.

- *State v. Ruiz*, 2007-NMCA-014. The competency of a child victim was challenged based on a claim of non-reliability due to suggestive questioning and interviewing techniques. "Although New Mexico's courts have recognized the dangers associated with suggestive interviewing techniques in cases of this nature [citation omitted], neither this Court, nor the New Mexico Supreme Court, has adopted the novel *Michaels* approach, which places a heavy burden on the proponent of child victim testimony to establish its reliability." (*Michaels* refers to *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).) "When an individual's competency to testify is challenged, the district courts are merely required to conduct an inquiry in order to ensure that he or she meets a minimum standard, such that a reasonable person could 'put any credence in their testimony.' "

- *State v. Perez*, 2016-NMCA-033. This is a case involving multiple counts of sexual abuse and an eight year old victim. Although Dr. Sachs stated that he believed, based on his opinion as a psychologist, that C.S. was incompetent to testify, it was incumbent upon the district court to apply the legal standard set forth in *Hueglin* to Dr. Sachs' testimony. Dr. Sachs testified that C.S. had the capacity to tell the difference between the truth and a lie and knew that there were consequences for lying, which meets the minimum standard for witness competence. ¶¶16-18. *See Hueglin*, 2000-NMCA-106, ¶24.

29.1.2 Procedure for Determining Testimonial Competence

At any proceeding with a child witness, the trial judge must decide whether the witness is competent to testify. Starting with the assumption that any witness is competent unless shown otherwise, it has been unclear what methods and procedures the court should use for determining testimonial competency when a minor witness's ability is questioned. It should be kept in mind that the basic inquiry: "…to determine competency under Rule 11-601as requiring a witness to possess "a basic understanding of the difference between telling the truth and lying, coupled with an awareness that lying is wrong and may result in some sort of punishment." *Hueglin*, 2000-NMCA-106, ¶ 24 (internal quotation marks and citation omitted). Some basic rules, however, apply to this determination

Competency Examination. When testimonial competence is questioned and properly raised before the court, the judge may conduct a competency examination. The approach is similar to that used for *voir dire* of experts or other witnesses whose testimony must be evaluated under the balancing tests of Rules 11-401 and 11-403.

Burden of Proof. The burden of proof in such proceedings is upon the party challenging the child witness's competency. The party questioning competency must raise the issue to the court and must make an objection if the party believes that a particular procedure in making the inquiry is incorrect. *State v. Manlove*, 1968-NMCA-023, ¶13, 79 N.M. 189.

Application of Rules of Evidence. Except for the rules relating to privilege, the Rules of Evidence do not apply to the court's inquiry. Rule 11-104(A); *see Myers on Evidence of Interpersonal Violence*, §2.13. The court should exercise its discretion based upon the child witness's responses to questions, as well as by observing the child's overall demeanor and maturity. The court may also rely on extrinsic evidence, such as testimony or reports from doctors, psychologists, therapists, or evaluators, if determined necessary. *See Myers*, §218. As with most other evidentiary issues, the court has broad discretion to admit or exclude the testimony of a child witness, and reversal is only upon a showing of abuse of discretion. *State v. Macias*, 1990-NMCA-053, ¶11, 110 N.M. 246; *see also Myers*, §2.13.

Continuing Duty. The court's duty to determine competency does not end after a threshold decision is made to allow a child to testify. Throughout the child's testimony, the court must continue observing and evaluating the child for competence and, after a child finishes testifying, the court may properly consider a motion to reconsider its earlier decision to allow

the testimony or to strike the witness's evidence. *Kentucky v. Stincer*, 482 U.S. 730 (1987).

Evaluation Format. The examination format should be governed by the needs of the child, and lies within the discretion of the trial judge. *Manlove*, 1968-NMCA-023, ¶12; *People v. District Court of El Paso County*, 776 P.2d 1083, 1087 n.4 (Colo. 1989). During the competency evaluation, the court typically does not discuss with the child the facts or merits of the case, but has discretion to do so if the judge finds it an important area to explore with respect to the competency question. *People v. Trujillo*, 923 P.2d 277, 281 (Colo. App. 1996); *but see State v. Scott*, 501 N.W.2d 608, 613-615 (Minn. 1993). The accused need not be present during this *voir dire* of the child witness. *Kentucky v. Stincer*, 482 U.S. 730 (1987); *see also* 18 U.S.C. §3509(c)(5). Courts have been permitted to conduct *voir dire* of the child with or without the participation of counsel during or before trial. The judge may choose a setting other than the courtroom (such as chambers) for the competency evaluation. Leading questions are not prohibited in the court's evaluation hearing. *Burkett v. State*, 439 So.2d 737, 745 (Ala. Crim. App. 1983).

Child Development Considerations. Recent research has revealed that generally a majority of 5-year old children correctly identify truthful statements and lies and recognize that lying is bad. However, most children up to the age of 7 cannot define the terms "truth" or "lie" or explain the difference between them. Because children may be capable of testifying truthfully despite their limited vocabulary and linguistic immaturity, age appropriate and developmentally sensitive techniques should be used to elicit information useful to the court for determining competency. In their paper *Young Maltreated Children's Competence to Take the Oath*, Applied Developmental Science, Vol. 3, No. 1, 1999, Professors Lyon and Saywitz propose various strategies for the court to consider in determining whether a child is competent to testify and be placed under oath. All areas important to the court's determination (capacity to observe, memory, differentiation of truth from falsehood, differentiating fact from fantasy, understanding of the duty to testify truthfully, etc.) can be effectively evaluated with age sensitive techniques yielding high confidence in the final determination.

29.1.3 Use of Psychological Testimony or Reports Regarding Competence

In the *Hueglin* case, 2000-NMCA-106, the Court of Appeals held that the trial court did not abuse its discretion in allowing a young witness to testify and it based its holding in part on expert testimony in the case. ¶23. One question is whether the court has the discretion, to order a psychological evaluation of a child if such information would be probative of the competency issue. New Mexico courts have not dealt directly with this issue. The children's court may order a diagnostic examination or evaluation under Rule 10-334 but testimonial competency is a preliminary issue of trial administration and whether Rule 10-334 would apply is not clear. *But see Anderson v. State*, 749 P.2d 369, 371-372 (Alaska App. 1988), in which the Alaska court discusses the inherent authority of the trial judge to acquire information in this manner. ***See also*** the discussion of psychological evaluations in Handbook §41.6.5.

29.2 Alternatives for Presenting Child Testimony

29.2.1 Videotape: Civil Proceedings

Statute. ***See*** the Uniform Child Protection Measures Act, described in §29.2.2 below.

Rules. Rule 10-135 provides that any part or all of a deposition may be used for any purpose permitted by the Rules of Evidence. Rule 10-134, which sets forth detailed requirements for videotaped depositions, requires that a party desiring to use a videotaped deposition pursuant to Rule 10-135 is responsible for having appropriate playback equipment and an operator available at trial. Rule 10-134(D). Rule 10-340, adopted by the Supreme Court in 2016, is intended to supplement the Uniform Child Witness Protective Measures Act. ***See*** §29.2.2 below.

Case Law. Depositions are not intended to substitute for live witnesses at trial, nor are they intended for use by the deposed party at trial. The party seeking to use the deposition instead of a live witness has the burden of showing one or more of the circumstances set forth in the rules. *Niederstadt v. Ancho Rico Consolidated Mines*, 1975-NMCA-059, ¶6, 88 N.M. 48; *Arenivas v. Continental Oil Co.*, 1983-NMCA-104, 102 N.M. 106; *Reichert v. Atler*, 1992-NMCA-134, ¶¶16-17, 117 N.M. 628, *aff'd*, 1994-NMSC-056, 117 N.M. 628; *Albuquerque National Bank v. Clifford Industries, Inc.*, 1977-NMSC-098, ¶11, 91 N.M. 178.

The question of using videotaped depositions or the admission of any other type of hearsay as to the child's statements arises when the child is unable to testify or when testimony in a traditional courtroom setting would be traumatic for the child. Although the stricter requirements of the Confrontation Clause, as discussed in *Crawford v. Washington*, 541 U.S. 36 (2004), do not apply in civil cases, due process considerations do apply and in-court testimony with confrontation is preferred. If there is a sufficient basis for in court testimony not to occur, however, the trial court "should explore alternatives for the questioning of a child," including videotaped depositions, in-camera testimony or other methods at the discretion of the trial court. *In re Pamela A. G.*, 2006-NMSC-019, ¶18, 139 N.M. 459.

29.2.2 Uniform Child Witness Protective Measures Act

The Uniform Child Witness Protective Measures Act, §§38-6A-1 to 38-6A-9 allows for alternative methods of providing child testimony. The Act should be interpreted consistently with Rule 10-340. The statute contains different provisions for criminal and noncriminal proceedings. In a noncriminal proceeding, the court may allow a child witness under the age of 16 to testify by closed-circuit television, deposition, or other means if the presiding officer finds that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination or cross-examination by each party, subject to such protection of the child witness as the presiding officer deems necessary.

The New Mexico Supreme Court adopted Rule 10-340 in 2016 to supplement the Act for

civil child abuse or neglect cases.

When a request to permit a child witness to testify by an alternative method is made, a hearing on the request will be conducted on the record. The child's presence is not required at the hearing unless ordered by the court. In conducting the hearing, the court is not bound by the Rules of Evidence except the rules of privilege. Rule 10-340(A).

The court must find by a preponderance of the evidence that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the court. Rule 10-340(B) lists the factors that may be considered. Once the court considers these factors and decides to permit an alternate method, it must then consider:

(1) alternative methods reasonably available for protecting the interests of or reducing mental or emotional harm to the child;

(2) available means for protecting the interests of or reducing mental or emotional harm to the child without resort to an alternative method;

(3) the nature of the case;

(4) the relative rights of the parties;

(5) the importance of the proposed testimony of the child;

(6) the nature and degree of mental or emotional harm that the child may suffer if an alternative method is not used; and

(7) any other relevant factor. Rule 10-340(C)

The alternative method ordered by the court may be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order. Rule 10-340(D).

29.3 Rules of Evidence and Application to Child Witnesses

29.3.1 Use of Leading Questions on Direct Examination

Rule. Rule 11-611(C): Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. On cross examination, or when a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.

New Mexico appellate courts have held that leading questions are often permissible when a witness is immature, timid, or frightened, although the words of a prosecutor cannot be substituted for the testimony of the witness. *State v. Orona*, 1979-NMSC-011, ¶¶28-30, 92 N.M. 450. In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 1990-NMCA-052, ¶24, 110 N.M. 237. *See also State v. Luna*, 2018-NMCA-025, ¶34.

29.3.2 Hearsay

General Rule. Rule 11-801(C): Hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

The hearsay rule and its exceptions are the subject of considerable litigation when the testimony of a child is offered in legal proceedings. Some of the most common uses of the rules for purposes of admitting or excluding a child's out-of-court statements are set forth below.

To begin with, it should be noted that not all out-of-court statements by a witness are hearsay. As the rule states, only if the-out of-court statement is offered to prove the truth of the matter asserted is it hearsay. There can be relevant purposes for a statement other than to prove the truth of the matter asserted. For example, a young child's explicit and detailed out-of-court statements to police or interviewers about sexual activity the child has experienced may not be admissible to prove that the child actually engaged in such acts with the accused, but may be relevant and admissible for another purpose, such as to prove that the child has sophisticated sexual knowledge and familiarity with various sexual activities or adult physical/anatomical sexual phenomena that is inconsistent with her/his age. *In Re Jean Marie W.*, 559 A.2d 625, 629 (R.I. 1989); *Drumbarger v. State*, 716 P.2d 6, 10 (Alaska App. 1986).

Similarly, written or drawn assertions (such as pictures or a diary, written or drawn outside of the courtroom) may be admissible to prove knowledge inconsistent with age or fear of the accused, while the specific acts depicted in the writings and drawings, if offered to show that the child and the accused engaged in such conduct, may violate the hearsay rule.

Rule 11-801(D) identifies certain types of statements that are not hearsay if they meet certain conditions:

Prior Statement of a Witness, Rule 11-801(D)(1): A prior statement by a witness is **not** hearsay if :

> [t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement
>
> > (a) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,
> > (b) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying, or
> > (c) identifies a person as someone the declarant perceived earlier.

Rule 11-801(D)(1)(b) is often overlooked by counsel in child abuse litigation. Statements of the witness meeting the criteria of the rule are not hearsay**.** The statements become important and powerful evidence especially when it is asserted that the child's testimony is "coached" or the result of improper or influential questioning by social workers, police detectives or

others who initially received the reports of abuse or prepared the child to testify. *Tome v. U.S. (Tome I)*, 513 U.S. 150 (1995); *State v. Sandate*, 1994-NMCA-138, 119 N.M. 235. This rule applies when the child, or any other witness, has testified.

Opposing Party's Statement, Rule 11-803(D)(2): Statements by a party opponent are not hearsay when offered against the party who made the statement.

29.3.3 Exceptions to the Rule Against Hearsay

Rule 10-803 identifies exceptions to the rule against hearsay that apply regardless of whether the declarant is available as a witness. Exceptions most commonly used when the child is a witness are set forth below.

Statements for Medical Diagnosis or Treatment, Rule 11-803(4) (formerly Rule 11-803(D)): "A statement that (a) is made for – and is reasonably pertinent to -- medical diagnosis or treatment, and (b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause" may be admitted regardless of whether the declarant is available as a witness.

This exception to the hearsay rule is one of the most commonly used methods of introducing into evidence a child's statement of injury, abuse, etc. A party seeking introduction of the testimony has the burden of proving that all elements of the rule are satisfied. *State v. Altgilbers*, 1989-NMCA-106, 109 N.M. 453 (criminal case). The proponent of the testimony must show that the physician can testify that the out-of-court statement was elicited for purposes of diagnosis or treatment, and the statement assisted in reaching such goals. *See also U. S. v. Tome (II)*, 61 F.3d 1446 (10th Cir. 1995). In sexual abuse cases particularly, the child's statements admitted under this rule may be the only evidence of what happened.

In *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, a criminal case, the New Mexico Supreme Court overruled portions of *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, and held that statements made by a child to a nurse with the sexual assault nurse examiner program (SANE) may fall within the 11-803(4) hearsay exception. The court stated: "The trial court must therefore carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant." *Id.* ¶43.

State ex rel. CYFD in re Esperanza M., 1998-NMCA-039, 124 N.M. 735, contains extensive discussion of this rule in the context of a civil abuse and neglect proceeding. Esperanza M. was 13 years old when she reported to a school counselor that her father had sexually abused her. The child was subsequently interviewed by a CYFD social worker, the staff of the Children's Safe House, and a medical doctor. The child repeated her allegations to the pediatrician, but the physical examination was essentially normal, with no evidence of sexual abuse. The child later was interviewed by a psychologist and again repeated allegations of sexual abuse perpetrated by her father.

At the trial, neither the child nor her parents testified. The court admitted the child's statements implicating her father through the testimony of the pediatrician and the psychologist, finding that the child made the statements to each witness under the circumstances contemplated by Rule 11-803(D) (now Rule 11-803(4)).

- Pediatrician Testimony: The doctor testified on what the child said happened and who the child identified as the perpetrator. The parents argued that the statements made to the doctor shortly after the child first disclosed abuse were made in the context of an "investigation" of abuse, and were not genuine "treatment or diagnosis" statements. The Court dismissed this objection, holding that it is "immaterial whether the examination was part of an investigation, so long as it was for diagnosis or treatment." [*See Mendez*, noted above, for a thorough discussion of these issues.]

  The parents also argued that the pediatrician's testimony, including the child's identification of her father as the perpetrator of sexual abuse, should not have been admitted because it invaded the fact finder's function under the holding in *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156 . Again, the Court rejected any suggestion that testimony elicited through Rule 11-803(D) should be limited except as stated in the rule. The test for admissibility of diagnosis or treatment statements is whether the statements were "reasonably pertinent" to the physician's diagnosis or treatment. The proponent of testimony through 11-803(D) witnesses must lay an adequate foundation that the witness indeed relied upon the statements in forming his or her opinions about the diagnosis and treatment of the patient. Examination of the record revealed that such a foundation was established and the testimony therefore was properly admitted.

- Psychologist Testimony: The parents challenged the trial court's admission of the child's statements to the psychologist identifying her father as the perpetrator of abuse. The psychologist testified that she did not need to know the identity of the alleged perpetrator to form her opinions or to provide treatment. Accordingly, the Court should not have admitted the child's statements implicating her father as the abuser. Absent the proper foundation – that the psychologist relied upon the statements to form a professional opinion – Rule 11-803(D) was not available as a method of introducing hearsay statements.

- Social Worker and School Counselor Testimony: The parents also sought reversal of the trial court's admission of testimony elicited from the social worker and the school counselor who interviewed the child. The Court reviewed each witness's testimony and found the foundation inadequate in each situation to permit hearsay testimony to be introduced under Rule 11-803(D). The Court did not rule out the possibility that such testimony may be admissible in other cases if a proper foundation were laid.

It may be proper to allow the physician to testify who the child patient believed was the perpetrator of the injury or abuse, as the child's statements identifying the perpetrator may be "pertinent" to the physician's diagnosis or treatment and therefore admissible. *U.S. v. Tome*

(II), 61 F.3d 1446, 1450 (10th Cir 1995). In *State v. Skinner* a criminal case, the New Mexico Court of Appeals upheld under Rule 11-803(D) the district court's admission of the child's statements to a doctor during a SANE exam concerning the nature and scope of the abuse and the identity of the perpetrator. The Court noted that victim statements involving identification of the abuser may be admissible where the identity of the abuser is pertinent to psychological treatment or where treatment involves separating the victim from the abuser. *State v. Skinner*, 2011-NMCA-070, ¶¶18-19, 150 N.M. 26.

In addition, statements made by a child that are "reasonably pertinent to" "medical diagnosis or treatment" need not be made to a medical doctor. As one court held: "[t]hose who treat child abuse must be attentive to emotional and psychological injuries as well as physical harm. [citation omitted] We cannot conclude that therapy for sexual abuse, as an exercise in healing, differs materially from other medical treatment for the purposes of [the rule]." *In the Dependency of M.P.*, 882 P.2d 1180, 1184 (Wash. App. Div. I 1994). The *Esperanza M.* court indicated (perhaps) its willingness to consider the applicability of Rule 11-803(D) to witnesses other than medical doctors and psychologists, stating "[t]here is support for the broadening of this hearsay exception in child abuse cases to embrace statements identifying abusers and describing their acts because such cases involve abuse victims who talk to psychologists and social workers." The court did not reach the issue, however, because inadequate foundation was laid for the evidence to be considered. 1998-NMCA-039, ¶20.

Excited Utterances, Rule 11-803(2) (formerly Rule 11-803(B)): "A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused" is not excluded by the hearsay rule.

In *State v. Apodaca*, 1969-NMCA-038, 80 N.M. 244, a 4-year old child victim of sexual assault was crying and "looked scared" when she awakened the morning after she was allegedly sexually assaulted and made statements implicating the defendant. The court quoted from an earlier New Mexico decision stating that "the element of spontaneity [required under the common law *res gestae*] is not to be determined by time alone. It is sufficient for the statement to be substantially contemporaneous with the shocked condition, but not necessarily with the startling occurrence." *Id*. ¶14.

For admissibility, the court must determine that there was some shock, startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting, and that the utterance was made before there was time to contrive and misrepresent. *State v. Maestas*, 1978-NMCA-084, ¶23, 92 N.M. 135.

The holding that the timing of the statement by itself is not determinative of admissibility is of special importance in cases involving children. While the amount of time passing between the event and the statement is an important issue, no particular amount of time will render a statement inadmissible under this rule. The startled condition of the declarant and level of distress the declarant has suffered, together with all other evidence of the circumstances of the statement itself, are the determinative factors. *State v. Robinson*, 1980-NMSC-049, ¶13, 94 N.M. 693; *State v. Suazo*, 2017-NMSC-011, ¶11, *State v. Maestas*, 1978-NMCA-084, ¶21, 92 N.M. 135; *State v. Mares*, 1991-NMCA-052, ¶35, 112 N.M. 193;.

Records of Regularly Conducted Activity, Rule 11-803(6) (formerly Rule 11-803(F)): Not excluded by the hearsay rule, even if the declarant is available, are:

> [a] record of an act, event, condition, opinion, or diagnosis if (a) the record was made at or near the time by – or from information transmitted by – someone with knowledge, (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit, (c) making the record was a regular practice of that activity, and (d) all of these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12)NMRA or with a statute permitting certification. This exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

New Mexico's child abuse reporting statute, §32A-4-3, has resulted in hospitals, clinics, physicians, social workers, school teachers, school administrators, etc., developing business practices of recording and keeping writings that memorialize statements made alleging abuse. CYFD has formal procedures for receiving and recording reports of abuse and neglect and for creating investigative reports. If a proper foundation is laid, such materials may meet the tests for admissibility set forth in the rule. The rule, however, does not automatically imply admission of all the recorded information after the foundation is established. Information contained in the records needs to be scrutinized to determine whether it meets this or other exceptions to the hearsay rule, or is otherwise admissible. Hearsay within hearsay problems are common when lawyers invoke this exception. There may also be issues of privilege; ***see*** §29.5.1 below.

Public Records, Rule 11-803(8) (formerly Rule 11-803(H): Certain public records can be admitted as an exception to the hearsay rule if the conditions of the rule are met.

> (8) Public records. A record or statement of a public office if it sets out
>
> (a) the office's activities,
>
> (b) a matter observed while under a legal duty to report, … or
>
> (c) in a civil case …., factual findings from a legally authorized investigation.
>
> This exception does not apply if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

"When questions are 'raised about the manner in which the record was made or kept' or when other 'sufficient negative factors are present,' a determination of trustworthiness must be made by the trial court before admitting the record." *State v. Soto*, 2007-NMCA-077, ¶¶27, 142 N.M. 32 (citations omitted.) The trial court can also exercise its discretion to admit a record for a limited purpose. *Id*. ¶29. In some instances, the public record would have to be properly authenticated as well. *State v Ellis*, 1980-NMCA-187, ¶5, 95 N.M. 427. *See Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶¶23-27, 120 N.M. 133, for a discussion of the public records exception.

Residual Exception, Rule 11-807: "Under the following circumstances, a hearsay statement is not excluded by the hearsay rule even if the statement is not specifically covered by a hearsay exception in Rule 11-803 NMRA or Rule 11-804 NMRA: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice."

The rule further specifies that a "statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."

The court in *Esperanza M.*, 1998-NMCA-039 discussed the use of the catch-all hearsay exception (now known as the residual exception) in children's court proceedings. The petitioner, CYFD, argued that various hearsay statements should be admitted under this exception, asserting that "the best interests of the child must be recognized and harmonized with the rules of evidence ... when out-of-court statements are needed to establish that the child was sexually abused." The Court of Appeals concluded that there should be no "best interests of the child" analysis where the court is considering whether particular evidence is or is not admissible under the rule. The Court acknowledged its "strong tradition of protecting a child's best interests," but cautioned that the catch-all nature of this exception to the hearsay rule is not intended to permit admission of evidence which "almost, but not quite, fits another specific exception." The rule "cannot be used to circumvent the strict requirements of the other hearsay exceptions ... which are designed to promote guarantees of reliability and trustworthiness." *Id.* ¶¶24-30.

In a criminal case decided in 2002, a divided New Mexico Supreme Court rejected as too narrow the view that the catch-all exception should not be used when the out-of-court statement is of a type expressly considered by other exceptions but which do not satisfy the rules for those exceptions. *State v. Trujillo*, 2002-NMSC-005, ¶16, 131 N.M. 709. In the majority's opinion, the catch-all exception could be used to admit hearsay that otherwise bears indicia of trustworthiness equivalent to those other specific exceptions. *Id.*

In *State v. Massengill*, the Court of Appeals upheld the lower court's decision in a criminal child abuse case to allow the admission of out-of-court statements made by a 2 1/2 year old child to a doctor and her parents. The statements to her parents were not sufficiently contemporaneous for admission under the present sense impression exception but were properly admitted under the catch-all and medical diagnosis or treatment exceptions. 2003-NMCA-24, ¶¶10, 12, 21, 133 N.M. 263. ***See*** Handbook §41.6.7 for a summary of the case.

In *Frank G. and Pamela G.*, the Court of Appeals affirmed the judgment of the children's court in favor of CYFD (and the amicus brief filed by the National Association of Counsel for Children) upholding admission of a child's out-of-court statements under the residual and medical diagnosis or treatment hearsay exceptions. *State ex rel. CYFD v. Frank G. and Pamela G.*, 2005-NMCA-026, 137 N.M. 137 (affirmed on due process grounds in *In re*

Pamela A.G., described below). The Court of Appeals held that the child's hearsay statements were properly admitted through testimony by the foster mother, CYFD social worker, safe house interviewer, and program therapist under the catch-all exception to the hearsay rule. The Court found that the record supported sufficient guarantees of trustworthiness and that: 1) each statement was offered as evidence of a material fact, 2) each statement was more probative on the point offered than any other reasonably obtained evidence, and 3) justice and the purpose of evidentiary rules would be served by admission of each statement. *Id*. ¶¶16-23.

The Court of Appeals also held that the testimony of the program therapist, a licensed master social worker (LMSW), was properly admitted under the medical diagnosis or treatment exception, Rule 11-803(D) (now (4)). This expands the exception beyond medical doctors and psychiatrists to include social workers providing treatment. It is also important to note that the therapist's testimony included identification of the defendant. The court distinguished *Esperanza M.*, noting that in the case at hand the required foundation had been laid to establish that the identity of the perpetrator was "reasonably pertinent" to the therapist's diagnosis or treatment. *Id.* ¶¶28-32.

The Court of Appeals held that the trial court did not need to find the child competent in order to admit her hearsay statements. 2005-NMCA-026, ¶¶24-27. The Court also held that the parents' due process rights were not violated by admission of the hearsay statements, applying the *Mathews v. Eldridge* balancing test and noting that the Confrontation Clause does not guarantee face to face cross-examination in civil proceedings. *Id.* ¶¶34-37.

In its opinion on certiorari, *Pamela A.G.*, 2006-NMSC-019, the Supreme Court reiterated that procedural due process is a "flexible right" and that the amount of due process afforded a party depends on the particular circumstances of each case. The Court restated the parents' important constitutional rights that the law shields from unnecessary intrusion, and the government's significant (and sometimes competing) interest in the safety of children. Balancing this tension requires that parents be given reasonable opportunities to cross-examine and confront an accusing witness. Invoking *Matthews v. Eldridge*, the Court summarized the analysis as an inquiry into whether the procedures used by the trial court increased the risk of erroneous deprivation of the private interest, namely, the parents' fundamental right to maintain their relationship with the child. *Id.* ¶¶12-13.

The Court focused on what the parents *did not do* in the trial court to insure they obtained a fair trial. The parents never tried to call the child as a witness, they did not ask to question her, and did not indicate what questions either at the trial court or on appeal they would have asked. The parents sought the exclusion of the statements, but did not challenge any part of the statements themselves. They were given the opportunity to cross-examine the witnesses who repeated the child's statements in trial, and to challenge the methods used to obtain the incriminating out-of-court statements. *Id*. ¶¶15,20.

Relying on *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶50, 136 N.M. 53, the Court acknowledged that cross-examination almost always enhances "the integrity of the fact-finding process." It also recognized that there are circumstances when other procedural

safeguards must supply the "scrupulous fairness" required when the State "interferes with a parent's right to raise their children." *Pamela A.G.*, 2006-NMSC-019, ¶18. Examining all of the factors in the record, the Court concluded the test was met in this case because the trial judge established an adequate procedure and utilized adequate safeguards of fairness based upon the child's age, the nature of the relationship between child and accused, and the emotional state of the child.

29.4 Expert and Lay Opinion Testimony

Under Rule 10-701, if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- rationally based on the witness's perception;
- helpful to clearly understanding the witness's testimony or to determining a fact in issue, and
- not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 on expert witnesses.

Under Rule 11-702, the prerequisites for admission of expert witness testimony are that:

- the witness is qualified as an expert by knowledge, skill, experience, training, or education; and
- scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

If a witness is qualified as an expert, the witness may testify in the form of an opinion or otherwise. Rule 11-702. For summaries of cases in the criminal child abuse context involving issues around expert testimony, ***see*** Handbook §41.6.6.

Whether a lay witness may give an opinion on a particular matter and the extent to which it is admissible are questions that come up in abuse and neglect cases in Children's Court. These issues were raised but not addressed in *State ex rel. CYFD v. Raymond D.*, 2017-NMCA-067, ¶¶9, 17.

29.5 Privileges and Evidentiary Immunities

29.5.1 Privileges

Rule 11-509(B). "A child alleged to be delinquent or in need of supervision and a parent, guardian or custodian who allegedly neglected a child has a privilege to refuse to disclose, or to prevent any other person from disclosing confidential communications, either oral or written, between the child, parent, guardian or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry."

This privilege has not been discussed by the New Mexico appellate courts, nor are its purpose, use and meaning clear from the text. While for parents, guardians, and custodians it applies only to those who have been accused of neglect (and not abuse), and only to statements that the party intended to be "confidential," there is little guidance in the rule itself as to when the privilege is appropriate. The rule refers to a "preliminary inquiry," which is not defined in the Children's Code or Children's Court Rules in the abuse/neglect context, although preliminary inquiries are a part of delinquency proceedings (Rule 10-211). CYFD policies for investigation of neglect allegations include the procedure for informing parents of certain procedures that implicate their rights. At the outset of the investigation, CYFD is to inform the parents that prior to any legal proceeding, the parents' interactions with CYFD are voluntary and the investigation, findings and disposition are confidential under §32A-4-33. *See* 8.10.3.12 NMAC.

Rule 11-504. Physician-patient and psychotherapist-patient privilege.
Generally, statements made by persons to their physicians, psychotherapists, or licensed mental-health therapists are made with the expectation of confidentiality and this privilege supports that expectation. The communications must be intended to be confidential and must be for the purpose of diagnosis or treatment. The communications can include family members if they are participating in the diagnosis and treatment. Rule 11-504(B).

There is an exception for this privilege relating to any statutory duty that the physician, psychotherapist, licensed mental health therapist, or patient may have to report to a public employee or public agency. Rule 11-504(D)(4). The duty to report child abuse or neglect is found at §32A-4-3 and extends to "every person, including a licensed physician; a resident or intern examining, attending or treating a child; … a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged." In a criminal case alleging criminal sexual contact of a minor, *State v. Strauch*, 2015-NMSC-009, the Supreme Court made it clear that both privately and publicly employed social workers are mandatory reporters under the child abuse reporting statute. As a result, statements made to a social worker by an alleged child abuser in private counseling sessions are not protected from disclosure in a court proceeding by the evidentiary privilege in Rule 11-504(D)(4). ¶2.

Case Note. In *Strauch*, the argument was made that only people explicitly listed in §32A-4-3 are mandatory reporters. The Court dismissed this argument. In reaching the conclusion that the reporting statute must be read broadly, the Court reviewed at length the history of the requirement. The Court pointed out, for example, that for many years the statute provided that "every person, including but not limited to" the people listed, must report child abuse. In 2003, the phrase "but not limited to" was taken out as a matter of routine clerical cleanup in accordance with the Legislative Drafting Manual, which instructed that the word "include" already implies an incomplete list. The Court wrote: "There is absolutely no indication in the legislative history that by complying with its own technical drafting manual, the Legislature intended to make an unannounced policy change from the universal reporting requirement that had existed for thirty years to a sharply limited requirement." 2015-NMSC-009, ¶37.

When a report of child abuse or neglect is required to be made under §32A-4-3, §32A-4-5(A) provides for the admissibility of the "report or its contents or any other facts related thereto or to the condition of the child who is the subject of the report," notwithstanding the physician-patient privilege or any similar privilege or rule against disclosure. *See In re* C*andice Y.*, 2000-NMCA-035, ¶¶35-36, 128 N.M. 813 (upholding admission of mother's counseling records and testimony related to the records as to matters about which the counselor was required to make a report of child abuse or neglect).

29.5.2 Use Immunity

§32A-4-11: This statute authorizes the children's court attorney to apply for use immunity at any stage of an abuse and neglect proceeding for:

- Respondent's in-court testimony. The in-court testimony of a respondent who is granted use immunity "shall not be used against that respondent in a criminal prosecution," although the respondent may be prosecuted for perjury. §32A-4-11(A).
- Records, documents and other physical objects produced by an immunized respondent under court order. §32A-4-11(B).
- Respondent's statements made in a court-ordered psychological evaluation or treatment program to a professional designated by CYFD in furtherance of the court order. Immunity attaches only to statements made during the course of the actual evaluation or treatment, and does not attach to statements made to CYFD employees, agents or representatives during investigation of alleged abuse or neglect. §32A-4-11(C). Immunized statements that are in writing must be deleted before any report is released to law enforcement officers or district attorneys. §32A-4-11(E).

The children's court attorney must request a hearing on the immunity application and give at least 48 hours' notice to all parties and the district attorney for the county in which the abuse or neglect allegedly occurred. The district attorney has standing to object to the order of immunity. §32A-4-11(G). Use immunity orders cannot be entered *nunc pro tunc*. §32A-4-11(F).

Additionally, §32A-4-12 (Protective Orders) provides:

- At any stage of an abuse or neglect proceeding, the children's court attorney may apply for a protective order restricting the release of immunized testimony, immunized verbal statements for the purpose of psychological evaluation or treatment, or records, documents or other physical objects produced by an immunized respondent under court order. A protective order applies to everyone, except as otherwise stated in the order. Its purpose is to allow respondents to engage in evaluation and treatment programs as ordered by the court and to ensure that their statement will remain confidential without disclosure to anyone, including law enforcement officers and district attorneys. §32A-4-12(A).
- The children's court attorney must request a hearing and give at least 48 hours' notice to all parties and to the district attorney for the county in which the abuse or neglect allegedly occurred. The district attorney has standing to object to a protective order. §32A-4-12(B).
- After the hearing, the court may issue a protective order if doing so will reasonably assist in the provision of diagnostic and therapeutic services to the respondent and the respondent is otherwise likely to refuse to make statements on the basis of the privilege against self-incrimination. §32A-4-12(C).

In *State v. Belanger*, a criminal child abuse case, the defendant sought use immunity for a witness but the prosecutor refused to apply for it. The New Mexico Supreme Court departed from the rule in place at the time that use immunity is only available at the request of the prosecutor, finding that not giving the courts a role in granting use immunity raised constitutional concerns for the defendant. The Court ruled that district courts may grant use immunity in limited circumstances with or without the concurrence of the prosecutor. 2009-NMSC-025, ¶35, 146 N.M. 357. If the prosecutor objects to granting use immunity to a defendant, under the balancing test established in *Belanger* the defendant must show the proffered testimony is admissible, relevant, and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. Once the defendant meets its burden, the state must prove that "'immunity would harm a significant governmental interest.'" *State v. Ortega*, 2014-NMSC-017, ¶¶12-13 (citing *Belanger*, ¶38). Cost and inconvenience to the state is not a sufficient reason for a district court to deny use immunity. *Id.* ¶13.

After *Belanger*, the criminal court rules were amended to allow the court to issue an order granting use immunity upon application of either the prosecutor or the accused, or on the court's own motion. *See* Rule 5-116. The children's court rules on use immunity were also revised following *Belanger*. *See* Rule 10-341, described below.

Rule 10-341. Rule 10-341 provides for witness immunity to any person who may be called to testify, including but not limited to the respondents, or to produce records, documents or objects. The rule was amended effective January 7, 2013, to allow *any party* or the court, on its own motion, to apply for immunity for the witness.
To issue an order for use immunity under Rule 10-341, the court must find that:

- the testimony, or the record, document, or other object may be necessary to the public interest;
- the person has refused or is likely to refuse to testify or to produce the record, document or other object on the basis of the person's privilege against self-incrimination; and
- the district attorney was properly served.

Evidence compelled under the order, or any information directly or indirectly derived from such evidence, may not be used against the person in a criminal case except as provided by Rule 11-413 of the Rules of Evidence. Rule 10-341(C).

Case Law. In *State v. Olivas*, 1998-NMCA-024, 124 N.M. 716, the court held that the U.S. Supreme Court analysis in *Kastigar v. U.S.*, 406 U.S. 441 (1972), applied to criminal prosecutions of child abuse where the accused has provided testimony in companion children's court proceedings alleging the same misconduct. Quoting earlier cases, the court stated that "[o]nce defendants have shown that they have testified under a grant of immunity, the prosecuting attorneys then 'have the burden of showing that their evidence is not tainted [by exposure to prior immunized testimony] by establishing that they had an independent, legitimate source for the disputed evidence.'" 1998-NMCA-024, ¶6.

The issue of immunity most frequently arises in the civil child abuse or neglect case when the children's court attorney seeks an order at the custody hearing to compel respondent parents to undergo psychological evaluation. *See* Rule 10-335. The respondents, concerned that statements made during the evaluation could later be used against them in criminal proceedings, might refuse to participate without use immunity. The children's court proceedings would be frustrated as information vital to determination of the respondents' fitness to care for the child and/or their need for and amenability to treatment may be permanently unavailable to the parties and the court.

CHAPTER 30

COURT ORDERS DURING PENDENCY OF PROCEEDING

This chapter covers:

- Provisions of the Children's Code authorizing the court to address situations that may arise.
- The equitable powers of the Children's Court.

30.1 Introduction

Situations that give rise to allegations of child abuse or neglect, the family circumstances involved in those cases, and the needs of the children over time all increase the odds of problems arising in a case "in between" hearings. Problems may also arise for which the Children's Code provides no ready solution. This chapter is an effort to compile in one place some of the statutory tools available to the court and also to describe its equitable powers.

30.2 *Ex Parte* Custody Orders

While most motions for an *ex parte* custody order will be filed at the same time as the petition alleging abuse or neglect and commencing the proceeding, the Children's Code allows an *ex parte* custody order to be issued at any time during the proceeding. §32A-4-16. Such an order could be used, for example, where a child needed to be retaken into the legal custody of CYFD due to an emergency situation, after the parent/respondent had been granted legal custody of the child at some stage of the proceedings. An order may be issued upon the same type of sworn statement of facts required for an *ex parte* order at the beginning of the proceeding. ***See*** Handbook §§14.5 and 14.6.

30.3 Temporary Restraining Orders

Either on the court's own motion or the motion of a party, the court may make an order restraining the conduct of any party over whom the court has obtained jurisdiction if:

- the court finds that the person's conduct is or may be detrimental or harmful to the child and will tend to defeat the execution of any order of the court; and

- due notice of the motion and the grounds for the motion and an opportunity to be heard on the motion have been given to the person against whom the order is directed. §32A-1-18(D).

Pursuant to the section of the Code prior to the 1993 recompilation which essentially had the same provisions of §32A-1-18(D), the Court of Appeals found that, with proper notice and opportunity to defend, a person not previously a party could be restrained and held in contempt for violation of the terms of the restraining order. *In re Doe,* 1983-NMCA-025, 99 N.M. 517.

30.4 Change of Placement

Under §32A-4-14, the court may be asked to consider whether CYFD has abused its discretion in changing a child's placement during the course of the abuse or neglect proceeding. Under the statute, if CYFD decides to change a placement, it must send notice to the child's GAL, all parties (which includes the child but, as with other parties, notice is sent to the child's attorney), the child's CASA, the child's foster parents, and the court ten days prior to the placement change, although in an emergency CYFD can move the child and send notice within three days of the move. When the child's GAL files a motion hearing to contest the proposed change and requests a court, the department may not change the placement pending the results of the court hearing, unless an emergency requires changing the placement prior to the hearing. While the statute is silent, this last provision arguably applies when the attorney for an older child contests a proposed change as well.

ASFA Note: Section 32A-4-14, like §32A-4-25(I)(6), appears to contemplate review of the department's placement decision, not substitute placement by the court. This is an important distinction. According to the regulations under the federal Adoption and Safe Families Act, federal financial participation in foster care payments is not available when a court orders a placement with a specific foster care provider. ***See*** Handbook §36.4.

30.5 Contempt of Court

The children's court may punish a person for contempt of court for disobeying an order of the court or for obstructing or interfering with the proceedings of the court or the enforcement of its orders. §32A-1-18(C).

The court has the power and authority to issue orders at any stage of the proceeding to compel the appearance of witnesses, the giving of testimony, and the production of evidence by witnesses, including any party. (Production of evidence includes an order to the respondent to undergo a psychological diagnostic evaluation and treatment.) Failure or refusal to obey the court's order may be punished as contempt. A claim of self-incrimination does not excuse the person from complying with the court's order, as in the case of a court-ordered psychological evaluation. §32A-4-13; ***see*** Handbook §29.5.2 on immunity.

In 2017, the Supreme Court adopted a Children's Court rule on criminal contempt. New Rule 10-169 provides that the children's court may hold an adult in direct or indirect criminal contempt of court only as provided by Rule 1-093. It also provides that the children's court may **not** hold a child in direct or indirect criminal contempt of court and explains its rationale in the Committee Commentary. Note that the rule does not affect the authority of the children's court to hold a child in civil contempt of court. Rule 10-169.

30.6 Findings and Remedies as Appropriate

The Children's Code provides in §32A-1-18(A) for the court to make findings or afford remedies as appropriate:

> When it appears from the facts during the course of any proceeding under the Children's Code that some finding or remedy other than or in addition to those indicated by the petition or motion are appropriate, the court may, either on motion by the children's court attorney or that of counsel for the child, amend the petition or the motion and proceed to hear and determine the additional or other issues, findings or remedies as though originally properly sought.

The Code allows for flexibility in reaching solutions for children, and essentially allows the court to conform the proceedings to the facts that are established during the course of the proceeding. This can be true even if no finding of abuse or neglect is made. In a case in which the Trial Court found that DHS (predecessor to CYFD) had not presented clear and convincing evidence that the child had been abused, but all parties agreed that the child was in need of treatment and the Trial Court entered an order that DHS provide treatment for the child, the Court of Appeals upheld the jurisdiction of the Trial Court to enter such an order based in part on this section. *State ex rel. DHS v. Patrick R.*, 1986-NMCA-116, 105 N.M. 133

However, it is important to be attentive to the parties' rights to be heard on the issues that develop. The Court of Appeals has held that the instructions in §32A-1-18(A) to "*proceed to hear* and determine the additional or other issues, findings or remedies" required the trial court to give the father a hearing and opportunity to defend after allowing CYFD to amend a petition post-trial to add a claim of abuse in addition to neglect to conform to the evidence. *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, ¶11 (emphasis added).

30.7 Equitable Powers of the Court

The New Mexico Supreme Court has discussed the "strong tradition of protecting a child's best interests in a variety of circumstances" and observed that it is "well-settled law" that when the case involves children, the trial court has broad authority to fashion its rulings in the "best interests of children." The court's authority under the "best interest of the children" rule is essentially equitable. *Sanders v. Rosenberg*, 1997-NMSC-002, ¶10, 122 N.M. 692. *Sanders* was a case involving a custody dispute after a divorce, but it was cited approvingly in *State ex rel. CYFD v. C.H., In re A.H.*, 1997-NMCA-118, 124 N.M. 244, which continued

to note that a court of equity has the power of devising a remedy to fit the circumstances of the situation. *Id*. ¶8.

This power to devise remedies is subject to legislative direction, and nothing in the appellate courts' discussions suggests that a children's court's equitable powers override the dictates of the Children's Code. In *Sanders*, the Supreme Court noted:

> [W]hen dealing with children, the district court is exercising its equitable powers. … The touchstone of equity is that it is flexible; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties … The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.

1997-NMSC-002, ¶10, quoting *In re Adoption of Francisco A.*, 1993-NMCA-144, ¶17, 116 N.M. 708. What these discussions suggest is that the court may, and should, exercise its equitable powers as appropriate to address the best interests of a child, within the broad scope and subject to the specific provisions of the Children's Code. *See also State ex. rel. HSD in re Kira M*., 1994-NMSC-109, ¶21, 118 N.M. 563; *In re Adoption of J.J.B.*, 1995-NMSC-026, ¶69, 119 N.M. 638

CHAPTER 31

CASE MANAGEMENT AND MEDIATION

This chapter addresses:

- One family-one judge concept.
- Dockets and scheduling.
- Special masters.
- Mediation, including:
  - History and use in New Mexico.
  - Elements of a successful program.
  - Child protection mediation resources and guidelines.

31.1 One Family-One Judge Concept

31.1.1 Purpose

Continuity and consistency are fundamental to prompt and appropriate resolution of abuse and neglect cases. This is most attainable by the assignment of a case to a single judge for the duration of the proceedings. The judge in an abuse or neglect case presides over a process. Everyone involved should have the benefit of clearly defined goals and consistency in moving towards them. The one family-one judge concept helps provide that consistency.

Where possible, courts should create children's court divisions to assign responsibility for abuse and neglect cases to one judge. This requires the judge to assume responsibility for an entire docket and usually results in a degree of specialization not previously attainable. Creation of divisions generally requires the cooperation and agreement of the other judges on the court. If judges in the district rotate through division assignments, it is recommended that an assignment to the children's court division should be for more than two years.

31.1.2 Coordination of Cases

Another aspect of the one family-one judge concept is coordination of abuse and neglect cases with other related cases on the docket. It is not uncommon for families involved in abuse and neglect cases to have juvenile delinquency, domestic relations, domestic violence, paternity, custody, child support, or visitation cases occurring simultaneously. This presents the court with a serious risk of inconsistent, even conflicting, court orders directed to the same parties. This situation can be avoided by assignment of these cases to the judge

handling the abuse and neglect case. Alternatively, it would be helpful if the courts and parties in the different cases would communicate sufficiently to avoid or minimize conflicting court orders. At a minimum, the judge handling the abuse or neglect case should be aware of the other cases and their potential to adversely affect the case plan.

> **Project One**. An initiative of the National Council of Juvenile and Family Court Judges (NCJFCJ), Project One stands for "One family-one judge, No wrong door, and Equal and coordinated access to justice." One of the initiative's goals is to develop and share resources about innovative practices around the country, where courts effectively demonstrate multi-court collaboration in practice. *See* http://www.ncjfcj.org/our-work/project-one.

Many times permanence cannot be attained until custody and visitation orders in all related domestic cases are aligned with the treatment plan and permanency goal in the abuse and neglect case. The judge hearing the abuse and neglect case may have resources available that are not available in domestic relations courts. The judge handling the abuse and neglect case should be willing to address the issues in a related domestic relations case as necessary to achieve the safety, permanence, and well-being of the child. The judge, for example, could handle the adoption of the child within the abuse and neglect case. Certainly, the judge must be aware of the status of any adoption proceeding pending in another court.

When criminal proceedings arise out of the same facts as the abuse or neglect case, the prosecutor should be aware of and support the goals of the children's court with regard to the family. If this is not attainable, at a minimum the judge should proceed with the abuse or neglect case in a manner that avoids undue delay in attaining permanency for the child.

Similarly, the judge hearing the abuse or neglect case should be made aware of any delinquency proceedings that may be pending before a different judge and that affect a child who is a party to the abuse or neglect case. This would assist the judge in ensuring, for example, that appropriate services were being provided to the child and family.

Young people who are both adjudicated abused or neglected and adjudicated a delinquent child are often referred to as dually adjudicated or crossover youth. It is especially important to emphasize the one family one judge policy in this class of cases. Additionally, procedures should be considered for establishing a requirement that the permanency planning worker or other case worker and the GAL/YA communicate with juvenile probation officer and/or the youth's delinquency attorney and that they attend hearings for their child in the delinquency case. These procedures could also require that the defense attorney and the assistant district attorney assigned to the delinquency case attend or at least be invited to attend hearings in the abuse or neglect case. The court clerk or trial court administrative assistant could develop procedures for ensuring that notices of hearings in both cases are provided to the stakeholders in each case

31.2 Dockets and Scheduling

31.2.1 Urgency of Resolution

Abuse and neglect cases present a serious scheduling challenge because they always involve a number of parties and attorneys, and potentially many witnesses. Yet the emphasis on deadlines in federal law, in the New Mexico Children's Code, and in court rules reflects a policy determination that these cases need to move promptly to a resolution. This focus on expediting permanency is the result of an acute awareness that children in abuse and neglect cases are left in limbo during these protracted proceedings. The longer a child is in placement, the greater the chance that he or she will move from one foster placement to another, placing the child at further risk of negative social and emotional outcomes.

Poor docketing and scheduling can seriously undermine the statutory and rule-based urgency that policy makers strive to create. Abuse and neglect cases should enjoy a priority over essentially all other matters on the court's docket. Many judges are not assigned exclusively to these matters and need to juggle other docket assignments, such as criminal or civil, as well.

The perception of the parties that the court will allocate all necessary judicial resources to these cases is essential. There will be times when it will be necessary to scramble to make the deadlines, but failure to do so runs the risk of creating the perception that the court does not share the commitment of policy makers to urgency regarding these matters. Other risks of not meeting required time frames include possible dismissal of the petition alleging abuse or neglect if adjudication does not commence within 60 days of service of the petition, or the withdrawal of federal foster care funds, as required by the Adoption and Safe Families Act and regulations when certain timelines are not met. ***See*** Handbook §36.4.

Some situations require frequent status hearings so that urgent or ongoing concerns can be addressed. There may be a perception that only the judicial officer can recognize the need for such hearings and require them. Parties and their counsel should be urged to engage in motion practice and request hearings to address issues that require judicial direction or decision.

If a deadline is approaching for a review hearing or the child is about to turn 18 and needs a discharge hearing but the department has not requested the hearing, what happens? Who should ensure that the hearing is set? Statutorily, this obligation lies with the department but it is possible that the situation could be avoided by advance calendaring, described in §31.2.3 below.

31.2.2 Regular Dockets

Regular dockets should be established allocating certain days of the week and certain weeks of the month or year to abuse and neglect proceedings, with sufficient time allowed for each hearing. The court should have time available every week for custody hearings and review hearings, with time allocated for adjudicatory hearings every month. Judges might also

coordinate with other judges in their district who also hear abuse and neglect cases to minimize attorney and case worker conflicts.

While most cases will resolve with agreements at the adjudicatory hearing, some could require long, even multi-day, hearings. Adroit use of pretrial hearings and prompt notice to the court of settlements arising from the pre-adjudicatory meeting will help identify those adjudicatory hearings that may be lengthy and require more time.

Occasionally the involvement of expert witnesses and complex issues will call for the court to be intensely involved in pretrial management of the case, similar to a complex, multi-party civil case. It is preferred that hearings be set at a particular time rather than on trailing dockets to allow Children, Youth and Family Department (CYFD) employees, therapists, court appointed special advocates (CASAs) and others to plan to be available and participate. Continuances and other extensions of time limits should never become commonplace.

31.2.3 Advance Calendaring

Advance calendaring involves setting upcoming court dates and related events at the earliest possible point in an abuse or neglect case and as far in advance as reasonable. Ideally, at the conclusion of the custody hearing, the court would schedule the mandatory pre-adjudicatory meeting, the adjudicatory and dispositional hearings, the initial judicial review, the mandatory pre-permanency meeting, and the permanency hearing. Alternatively, at the conclusion of the adjudicatory and dispositional hearings, the court would schedule the initial judicial review, the mandatory pre-permanency meeting, and the permanency hearing. Advance calendaring may also include advance notice about the court's expectations in terms of reports and other information to be presented at the different hearings, and their timely submittal. A scheduling order would be entered and distributed to the parties.

A variation on advance calendaring is special calendaring, where certain situations in the case set up special requirements for hearings or other activities. One of the most common situations is where the court finds that reasonable efforts to reunify the family are no longer required, either because such efforts would be futile or because the parent has subjected the child to aggravating circumstances, in which case a permanency hearing must be held within 30 days. ***See*** Handbook §21.2. As a best practice, the court would set a date and time for the permanency hearing at the time the finding is made, and a scheduling order would be entered and distributed to the party. Similarly, if the child is approaching 15 out of the last 22 months in foster care, the court would set a date for the filing of a motion to terminate parental rights, or for CYFD to appear in court to explain why moving to TPR would not be appropriate at this time. ***See*** Handbook §24.5.2

Advance calendaring is particularly important in child abuse and neglect cases where time frames are firmly fixed in federal and state law. Advance calendaring is also instrumental in ensuring that efforts to achieve permanency for the child are moving forward as efficiently and effectively as possible. Calendaring becomes critical, as well, when it appears that the young person will age out before achieving permanency. Transition planning and the discharge hearing are needed before the child turns 18 and the court loses jurisdiction.

31.3 Special Masters

A special master may be appointed by a children's court judge pursuant to Rule 10-163 to assist with a children's court proceeding. Rule 10-163 requires all special masters to have been licensed to practice law in New Mexico for at least three years before appointment and to be familiar with children's court cases. They may perform any of the functions of a children's court judge, but concurrence of the parties is required before a special master may preside at adjudicatory and dispositional hearings.

Practice Note. As discussed earlier in this chapter, continuity and consistency are fundamental to prompt and appropriate resolution of abuse and neglect cases. District courts are urged to designate certain judges as children's court judges and to assign a single judge to a case for the duration of the proceedings. ***See*** §31.1.1 above. The children's court judge should similarly keep the need for continuity and consistency in mind when deciding whether to appoint a special master to a case. Of course, it is possible that this continuity and consistency can be preserved by a judge and special master who are working on the same cases together on a regular basis. At the same time, the special master is freeing up the judge's time so that the judge can focus on the most important hearings and the hard decisions that must be made.

All recommendations of a special master are contingent upon approval of the children's court judge. At the end of a proceeding, the special master prepares and files a report with proposed findings of fact, conclusions of law, recommendations, and orders. This report does not become an order of the court until approved by a children's court judge. Once the report is filed, the parties may file exceptions to the report. After receipt of the special master's report, the court must:

- review the special master's recommendations and determine whether to adopt them;
- if a party files timely, specific objections, conduct a hearing appropriate and sufficient to resolve the objections (the hearing consists of a record review unless the court determines that additional evidence will aid the resolution of the objections); and
- make an independent determination of the objections.

The court may adopt, modify or reject the recommendations. The court may also receive further evidence or recommit the recommendations to the special master with instructions. After the hearing, the court will enter a final order, with findings and conclusions when required by law. Rule 10-163(C) - (F).

Rule 10-163(H) provides that the time limits in the rules may not be tolled or enlarged because of the appointment of a special master. This should be taken into consideration when the court is deciding whether to appoint a special master in a given case.

31.4 Mediation

31.4.1 Overview of Mediation in Abuse and Neglect Cases

The use of mediation in abuse and neglect cases began in the early 1980s in a limited number of courts across the nation and has expanded rapidly since that time, both in the U.S. and other countries. Sometimes referred to as child protection, dependency, permanency, or child welfare mediation, the practice refers to the use of trained, neutral, third party mediators in child abuse and neglect cases as a means of resolving disputes and expediting permanency for children in foster care.

Following decades of experience with child protection mediation programs, a group of experts developed a set of Child Protection Mediation Guidelines. The Guidelines were adopted and approved by the Association of Family and Conciliation Courts Board of Directors in 2012 and can be found on their website at: http://www.afccnet.org/ResourceCenter/PracticeGuidelinesandStandards. The boards of directors of the National Council of Juvenile and Family Court Judges and the Association for Conflict Resolution have also endorsed the Guidelines.

The NCJFCJ's 2016 Enhanced Resources Guidelines, noted in Handbook Chapter 4, endorse the use of mediation and other alternative dispute resolution techniques in juvenile cases. The Guidelines provide, at page 57:

> All juvenile and family court systems should have alternative dispute resolution (ADR) processes available to the parties so that trials can be avoided whenever possible and appropriate. Such systems should include mediation and settlement conferences. These systems expedite sound decision-making and can avoid lengthy appeals because they often produce full or partial agreement of the parties. These practices can achieve these results by: providing parents with factual information that offers a realistic prospect of trial outcome and helps to separate personal issues and biases from factual information; giving parents a sense of participation in future case planning; helping the child, parents, and relatives to understand the importance of permanency; and providing a forum to discuss the appropriateness of permanency options. Even when mediation, settlement conferences, and other ADR techniques fail to produce agreements and avoid contested hearings and trials, they can help to narrow the number of contested issues, shorten the duration of trials, and ensure that all parties are well-prepared.

More information about alternative dispute resolution in child welfare cases can be found on pages 57 through 65 of the Guidelines, http://www.ncjfcj.org/resource-library/enhanced-resource-guidelines.

Individual programs vary in the way they are structured, the stage in the case at which mediation occurs, and the issues that are mediated. For example, some programs use

volunteer or contract mediators, while others use court employed mediators. In some courts, cases are mediated only at the adjudication stage or only at the permanency or termination stage while, in others, cases may be mediated at multiple stages. Finally, there are programs that limit the types of issues that are mediated (e.g. visitation) while others mediate all topics including placement, treatment plans, compliance issues, relinquishment, termination of parental rights, guardianship, and adoption. To date there is no evidence that any one model of mediation is more effective than another, although there is some evidence that mediation tends to be most successful when offered early in the case.

In some jurisdictions, mediation has become so established over the years that specific rules have been put in place to guide the implementation of mediation in abuse and neglect cases. *See, e.g.*, Michigan Court Rule 3.970, adopted by the Michigan Supreme Court effective May 2018, http://courts.mi.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx.

Evaluative studies of abuse and neglect mediation programs nationwide reveal that:

- Most cases settle in mediation, with agreement rates ranging from 70 to 90 percent.
- Families are generally very satisfied with the mediation process.
- There is evidence that parties are more likely to comply with mediated agreements, that mediated cases are less likely to return to court for a contested hearing, and that mediation reduces the amount of time spent in contested hearings.
- Mediated and non-mediated agreements are generally comparable. To the extent that there are differences, mediated agreements tend to be more detailed and likely to reference specific services to be provided for the child. Additionally, mediated agreements typically provide more visitation than do litigated plans, an important predictor of a successful reunification.
- Professionals are often resistant to mediation initially. Once they try it, however, they tend to like it. Attorneys and agency workers report that it is useful to have everyone in the same room at the same time to resolve as many issues as possible, and that, while mediation may involve more time up front, it actually saves time later.
- Finally, there is also some objective evidence that mediation may result in significant time and cost savings.
- Quite a number of program evaluations have been done on a variety of child protection mediation programs.

    - New Mexico Children's Court Mediation Program evaluations can be found at: https://adr.nmcourts.gov/childrens-court-mediation.aspx.

    - Other recent evaluation reports and articles include:
        - *Assessing Efficiency and Workload Implications of the King County Mediation Pilot*, National Council of Juvenile and Family Court Judges, Alicia Summers, Steve Wood, and Jesse Russell (2011) http://www.ncjfcj.org/sites/default/files/King%20County%20Mediation%20Pilot%20Article.pdf.

- *New York City Child Permanency Mediation Program Evaluation*, Center for Policy Research, Nancy Thoennes and Rasa Kaunelis (2011) http://nycourts.gov/ip/cwcip/Publications/permMediation.pdf
- *Child Protection Mediation: An Evaluation of Services Provided by Cook County Juvenile Court,* Resolution Systems Institute, Jennifer Shack (2010) https://www.aboutrsi.org/mediation_efficacy_studies/child-protection-mediation-an-evaluation-of-services-provided-by-cook-county-juvenile-court
- *What We Know Now: Findings From Dependency Mediation Research*, 47 Family Court Review 21 (2009) (citing numerous other articles and studies)

31.4.2 Abuse and Neglect Mediation in New Mexico

The Children's Court Mediation Program is a partnership between the Administrative Office of the Courts (AOC) and CYFD that provides mediation services in child abuse and neglect cases in New Mexico. The primary purpose of the program is to assist in meeting the Adoption and Safe Families Act (ASFA) goals of permanency, child safety, and child well-being. By providing a non-adversarial approach, the mediation program assists the courts, CYFD and families facing long-term issues such as substance abuse, domestic violence, poverty, and mental illness, work together to reach permanency solutions for children. The program, first piloted in March 2000, now serves families in twelve judicial districts in New Mexico and works closely with the First Judicial District's in-house child welfare mediation program.

Cases are mediated at all stages of an abuse and neglect case, from investigation to reunification or termination of parental rights (TPR), including open adoption referrals. A trained professional mediator meets with the parents, attorneys, workers, and other interested parties and assists in achieving agreements regarding placement, visitation, treatment, and permanency. Any party involved with abuse and neglect cases may request mediation. Approximately 600 - 800 cases are referred to the program each year.

The flexible organizational structure of the program allows for centralized coordination through the AOC with local autonomy by the district courts and local CYFD offices. The AOC oversees regional coordinators who work directly with the implementation teams comprised of judges, respondents' attorneys, guardians ad litem (GALs), youth attorneys, CYFD staff and attorneys, CASAs, and other interested parties. The teams are a decision-making body responsible for developing protocol that meets the needs of that particular court. The AOC works with each site to provide quality assurance by offering ongoing training and education for mediators, professionals, and families and supervising program evaluation.

Independent evaluation results indicate that mediation conserves both judicial and CYFD resources by reducing the time parties spend in post-mediation court hearings and that it improves the quality of and compliance with case or treatment plans. Mediation in abuse

and neglect cases also facilitates enhanced communication and problem solving by clarifying issues, exploring new options, and providing opportunities for collaboration.

The Children's Court Mediation Program operates in the context of New Mexico's Mediation Procedures Act, §§44-7B-1 through 44-7B-6, and the "Statewide Court-Connected Mediation Guidelines" developed in 2016 and adopted in 2017 by New Mexico Supreme Court Order No. 17-8500-013, https://adr.nmcourts.gov/adr-commission-information.aspx.

31.4.3 How the Children's Court Mediation Program Works

Implementation teams for each local program may determine specific program procedures including the types of cases referred, scheduling process, and logistics, but all Children's Court mediation programs abide by the following general protocol.

Case Referral - All child abuse and neglect cases, from investigations to reunification or the termination of parental rights, including open adoption referrals, may be referred to mediation. Any party involved in a child abuse and neglect case may request mediation, including CYFD staff, respondents' attorneys, GALs, youth attorneys, or the court. Referrals for mediation are made directly to the regional program coordinators.

Notification - Mediation often starts with a court order/stipulated court order, filed by the CYFD children's court attorney (CCA) with endorsed copies mailed to the parties entitled to notice. These include respondents' attorneys, GALs, youth attorneys, permanency planning workers, CCAs, CASAs, and the regional program coordinator.

Case Development - The regional coordinator assigns a mediator who contacts all the parties to confirm scheduling and logistics, identify issues, gather additional information that could affect the mediation process, and answer any questions the parties may have about mediation. Mediators are responsible for checking with CYFD or the court about any necessary logistical arrangements.

Pre-mediation - Mediators may meet with, or contact by telephone, the parties prior to the mediation to discuss the mediation process, confidentiality, expectations, and willingness to participate.

Mediation - The mediation may include individual and joint meetings, and multiple sessions, as appropriate. Mediators are responsible for bringing the *Report of Mediation* form, Children's Court Form 10-563, to the mediation and ensuring that it is completed before giving it to the CCA for filing with the court. An *Agreement to Mediate* must be signed for any mediations conducted without a court order.

Reports - Mediators will provide, upon request, a summary report to all the parties attending the mediation. A summary report is not signed by the parties and is distributed by either the mediator or the CCA.

Agreements - If an agreement is reached during mediation, the mediator is responsible for

assisting parties with drafting the written agreement for review by all parties. The CCA is typically responsible for securing signatures and ensuring that the agreement is filed with the court and/or entered into the court record. The court will monitor the enforcement of any agreement between the parties and CYFD in a pending case.

In open adoption mediations, the mediator generally distributes a draft post adoption contact agreement (PACA), which includes the terms of contact, to all parties for review. The adoption attorney, or other designated attorney, then drafts the formal agreement, circulates it to all parties and attorneys, and ensures that the agreement is signed by birth and adoptive parents and filed with the court. The Child Protection Best Practices Bulletin titled *Open Adoption and Mediated Post Adoption Contact Agreements (PACA)* provides detailed information about mediating open adoptions. To download a copy of this Best Practices Bulletin visit: http://childlaw.unm.edu/resources/publications/.

Case Closing - Mediators are responsible for distributing the *Feedback Forms* to the parents and children (if in attendance) at the conclusion of the mediation and sending all required paperwork to the regional program coordinator within 15 days of the completion of a case.

31.4.4 Elements of a Successful Program

The literature in this area, as well as New Mexico's experience, suggest six factors that are critical to a successful mediation program:

Central coordination with local autonomy. The ability of the courts, CYFD and the professionals involved with mediating the cases to make decisions at a local level is critical to ensuring the long-term viability of a mediation program. Centralized oversight, accountability, evaluation, training, and technical assistance should be balanced with localized program control, flexibility, and day-to-day management.

- **Support of the local judiciary.** The local judiciary must support the project. Lawyers, case workers, and others are often initially resistant to mediation. However, once they participate they are virtually unanimous in their support of the process. The support of the local children's court judge is crucial to get the program off the ground and to maintain its ongoing viability.
- **Competent and professional mediators.** Mediators must understand the legal issues as well as the child welfare system and the emotional/psychological issues specific to abuse and neglect cases. They need both mediation experience and training specific to abuse and neglect mediation.
- **Informed and educated professional participants.** "Buy-in" from lawyers, case workers, treatment service providers, CASAs, and others is essential during both the planning and the implementation stage. Once the program is in place, there should be regular contact with participants to address any concerns that they may have. Mediation participants training should also be provided to those professionals who will be participating in mediation on a regular basis.
- **Quality assurance.** To ensure the delivery of consistent, high quality mediation services, it is important to establish the parameters for and monitor program

evaluation and assessment of outcomes, mediator qualifications and assessment, and ongoing training and education for mediators, professionals, and families. The performance and effectiveness of a program should be monitored through a variety of methods that include the collection and analysis of evaluation data such as number of cases, who attended, hours spent, total cost, issues mediated, demographic information about the families, levels of agreement, and satisfaction.

- **Stable and consistent funding.** It is difficult to attract competent mediators and secure the trust and confidence of the parties and the courts in the absence of a stable funding source. Possible funding sources include private, state, and federal grants as well as state recurring funds.

The Children's Court Mediation Program has developed the following steps to create, implement, and maintain the ongoing viability of a successful local mediation program:

Step One: Gain Judicial Support

Participation of a willing and supportive judge is the first step. Typically, a local judge or court administrator contacts the AOC with an interest in the mediation program. The AOC then meets with the local judge(s) and court administrator to provide information, answer questions, and confirm interest in developing or continuing a program.

Step Two: Connect with Regional Program Coordinator

The court and the AOC work together to connect the court with the regional coordinator. The regional coordinator, with AOC oversight, works with the implementation team and mediators to implement the plan and assist with ongoing monitoring of the program.

Step Three: Form an Implementation Team

The AOC and/or regional program coordinator works with the court and CYFD to form an Implementation Team to develop a plan for the program and to oversee the plan's implementation. The Team includes representatives from the various stakeholder groups, including judges, court administrators, CYFD staff, respondents' attorneys, GALs, youth attorneys, CASAs, and mediators.

Step Four: Develop a Plan

The AOC and/or a regional program coordinator works with the team to develop a plan that best meets their needs. The plan should include, at a minimum, the following information:

- case referrals (*i.e.*, types of cases to be mediated, pre-legal, legal, open adoption);
- scheduling process (who can make referrals and how, who is responsible for filing and/or notification, who may attend, logistics, etc.);
- how mediated agreements will be handled;
- mediator qualifications aligned with the statewide program;
- mediator list;
- implementation team list;
- reporting process aligned with the statewide program;
- an evaluation plan aligned with the statewide program; and
- all related forms.

Step Five: Establish the Mediator Pool
The AOC and regional coordinator will recruit and train mediators to establish a local pool of qualified mediators. Programs may access mediators from other judicial districts, as needed.

Step Six: Train the Professionals
The AOC and regional coordinator will provide the professionals involved in child abuse and neglect cases with an orientation to the mediation program and introduction to the mediation process. These participant trainings or workshops may be repeated as needed.

Additional information about the Children's Court Mediation Program can be obtained from the AOC at the website: https://adr.nmcourts.gov/childrens-court-mediation.aspx

31.4.5 References

The Family Court Review produced a special issue titled *Mediating and Conferencing in Child Protection Disputes*, 47 Family Court Review No. 1 (2009). Several articles of particular interest include:

- *Reflections on the State of Consensus-Based Decision Making in Child Welfare*, by Bernie Mayer, pp. 10-20;
- *What We Know Now: Findings from Dependency Mediation Research*, by Nancy Thoennes, pp. 21-37;
- *A Guide to Effective Child Protection Mediation: Lessons Learned from 25 Years of Practice*, by Marilou Giovannucci and Karen Largent, pp. 38-52;
- *Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases*, by Kelly Browe Olson, pp. 53-68.
- *Child Protection Mediation: A 25-Year Perspective,* by Hon. Leonard Edwards, pp. 69-80;
- *Child Protection Mediation: The Cook County, Illinois Experience – A Judge's Perspective,* by Hon. Patricia M. Martin, pp. 81-85; and
- *Empowering Parents in Child Protection Mediation: Challenges and Opportunities,* by Gregory Firestone, pp. 98-115.

A prior issue of this same publication was also devoted to abuse and neglect mediation, 35 Family and Conciliation Court Review No. 2 (1997).

Additional articles of interest include:

- Edwards, Hon. Leonard, *Mediation in Child Protection Cases*, 5 Journal of the Center for Families, Children, and the Courts 57 (2004).
- Largent, Karen, *Child Protection Mediation and Family Engagement*, 25 Protecting Children 229 (2010).
- Olson, Kelly Browe, *Lessons Learned from a Child Protection Mediation Program*, 41 Family Court Review 480 (2003).

CHAPTER 32

INDIAN CHILDREN AND ICWA

This chapter covers:

- Overview and purpose of the Indian Child Welfare Act (ICWA).
- ICWA regulations and new Guidelines.
- Specific ICWA provisions, including scope, applicability, exceptions, jurisdiction, procedural and evidentiary requirements, and full faith and credit.
- ICWA placement preferences for foster care and adoption.
- Relationship of ICWA and ASFA.

32.1 Overview of the Indian Child Welfare Act (ICWA)

Throughout this Handbook, we have described the unique requirements imposed by the Indian Child Welfare Act as they arise at different moments in a case and the life of a family. Although it is important to understand when each of ICWA's procedural and substantive requirements applies, a piecemeal approach alone would fail to convey why adherence to ICWA is critically important for Indian children, their families, and their tribes. Such an approach also fails to provide a cohesive view of the Act and its internal coherence. With this chapter, we hope to provide a sense of the original and ongoing need for ICWA, as well as an integrated look at ICWA's specific provisions.

32.1.1 Purpose

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901-1923, was enacted in 1978 to:

> [p]rotect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.... 25 U.S.C. §1902.

Congress enacted ICWA as a result of several studies finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C.

§1901(4). Depending on the state, the number of Indian children being removed was from three to eight times higher than the number of other children being removed, either temporarily or permanently. The numbers were particularly disproportionate given that the Native population at that time was less than 1% of the population of the United States.

ICWA protects the interests of Indian children, their parents, and tribes. In the context of child welfare law, protecting the interests of a tribe in its children is unique. While the rights of parents, grandparents, stepparents, and foster parents have been statutorily protected, ICWA was the first statute to protect a group's interests in a child. It did so because the history of unwarranted removal of Indian children from their families not only impacted individual children and family groups, but threatened the continued existence and integrity of the tribes themselves. Indeed, the ICWA expressly recognized that "there is no resource ... more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. §1901.

Unfortunately, nationwide, nearly 40 years after ICWA's passage, Indian children are still

> disproportionately more likely to be removed from their homes and communities than other children. Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies. Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times their presence in the general population. In some States, Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of that State.

See Frequently Asked Questions, Bureau of Indian Affairs, Final Rule: Indian Child Welfare Act (ICWA) Proceedings pp. 3-4 (June 17, 2016) (citing National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care tbl. 1 (June 2015)).

Because of continued disproportionality, and its negative impacts on children, families, and tribes, as well as inconsistent implementation of ICWA across the states, the Department of Interior, Bureau of Indian Affairs (the BIA), adopted regulations that became effective for all ICWA proceedings on December 12, 2016.

In the same year, the BIA also issued Guidelines for Implementing the Indian Child Welfare Act (Guidelines); these Guidelines replace earlier versions issued in 1979 and 2015. Although the Guidelines do not impose binding requirements on states, they "explain the statute and regulations and also provide examples of best practices" for ICWA implementation. *See* Guidelines, Purpose. The Guidelines provide extensive commentary on ICWA and the regulations, not all of which can be incorporated into this Chapter. The regulations and Guidelines should be consulted in all ICWA cases.

The Act can be found at P.L. 95-608, 92 Stat. 3069, 25 U.S.C. §§1901-1923. The regulations can be found at 25 C.F.R. Part 23. The 2016 Guidelines are available on the BIA website: https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

32.1.2 Summary of Key Requirements

When thinking about ICWA's many substantive and procedural requirements, it is important to remember that ICWA is a remedial statute, which requires the court to resolve all "ambiguities liberally in favor of the Indian parent and tribe in order to effectuate the purpose of the Act, which is to prevent the unnecessary removal of Indian children." *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶19, 149 N.M. 315.

Some of the key aspects of ICWA include:

- Exclusive tribal jurisdiction or concurrent jurisdiction as the two options for cases involving Indian children, depending on residence or domicile:
    - Exclusive tribal jurisdiction for member Indian children residing or domiciled within the reservation or who are wards of the tribal court regardless of domicile; and
    - Concurrent jurisdiction with the state, but with a preference for tribal jurisdiction, when an Indian child is not residing or domiciled on the reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).
- Definition of "best interest of the child," broadened to incorporate protection of the Indian child's cultural and tribal identity, preferably within the jurisdiction of the child's tribe.
- Stringent standards of evidence, more strict than most state standards, for the removal of children from their families.
- Procedural and substantive protections.
- Specified placement preferences, which cannot be waived without good cause, for voluntary and involuntary foster care placements and adoptions.

32.1.3 ICWA and the Children's Code

The New Mexico Children's Code has been amended over the years to ensure that each child's cultural heritage is protected and that cases involving Indian children comply with ICWA. There are specific references to Indian children throughout the Code and, in some instances, the Code's requirements are more stringent that those found in the federal act. State laws that set a higher standard of protection govern over the provisions in ICWA; similarly, if the standard in ICWA is higher, then the federal law prevails. 25 U.S.C. §1921.

The New Mexico Supreme Court has adopted rules and forms over the years to ensure that ICWA procedures and standards are applied in Children's Court proceedings. Rules 10-315 and 10-318 in particular focus on ICWA requirements and will be cited in this chapter.

32.2 Specific ICWA Provisions

32.2.1 Scope

ICWA is directed toward states. It is not binding upon tribes, but states may find it difficult to comply with the statute without tribal collaboration. For example, tribes can affirm a child's eligibility for or membership in the tribe or recommend placements that comply with ICWA. Given ICWA's emphasis on applying cultural standards, maintaining cultural connections, and using active efforts to prevent the break-up of the Indian family, it may be considered a best practice for the state to build positive, respectful, and consistent working relationships with the tribes. *Cf.* State-Tribal Collaboration Act, §§11-18-1 to 11-18-5.

32.2.2 Applicability

It is important to determine whether ICWA applies as early in the case as possible to avoid harmful delays and disruptions in the child's life. The regulations and Guidelines include a number of provisions to ensure that ICWA is applied early, including a requirement that the court treat a child as an Indian child if the court has reason to know that the child is an Indian child. Additional requirements are discussed below in §32.2.2.2 (Reason to Know). As the Guidelines note, "early application of ICWA's requirements -- which are designed to keep children, when possible, with their parents, family, or Tribal community -- should benefit children regardless of whether it turns out that they are Indian children as defined by" ICWA. Guidelines B.1.

ICWA applies when (1) the child is an Indian child or there is reason to know the child is an Indian child and (2) the case is a child custody proceeding or an emergency proceeding. 25 C.F.R. §23.103. Although ICWA applies in both child custody and emergency proceedings, the requirements for each differ. The regulations provide a helpful chart that identifies which regulatory requirements apply in each type of proceeding. 25 C.F.R. §23.104.

32.2.2.1 Indian Child

An Indian child is an unmarried person under 18 who is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4). If the child is a member of or eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts is considered to be the child's tribe. 25 U.S.C. §1903(5); 25 C.F.R. §23.109 (setting forth criteria for this determination). The term "Indian tribe" is defined as a federally recognized Indian tribe. 25 U.S.C. §1903(8).

The child's tribe or tribes must be contacted to determine whether the child is eligible for membership in or is a member of that tribe. State courts do not make independent determinations about a child's eligibility for membership in a particular tribe; that is the tribe's responsibility. Tribes set their own membership criteria, which differ from tribe to tribe. The tribe's determination may be provided in writing, through testimony, or by other appropriate

methods. Using the tribe's determination of membership, state courts then decide whether the child is an Indian child for purposes of ICWA. 25 C.F.R. §23.108; Guidelines B.1 and B.7.

New Mexico Law. Whenever a child is taken into CYFD's custody, the Children's Code requires CYFD to make reasonable efforts to determine whether the child is an Indian child. §32A-4-6(C). At disposition, when a child is placed in CYFD's custody, it must investigate whether the child is eligible for enrollment as a member of an Indian tribe. If CYFD learns that a child is eligible for enrollment, CYFD must pursue enrollment on the child's behalf. §32A-4-22(I). This actually goes beyond the requirements of ICWA. 25 U.S.C. §1921.

In *State ex. rel. CYFD v. Marsalee P.*, the Court of Appeals held that the district court erred in terminating parental rights without ensuring that the department had complied with its obligation under §32A-4-22(I). The district court had an "affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child." 2013-NMCA-062, ¶25.

CYFD's duty to pursue enrollment is not unlimited. In another appeal of a termination of parental rights, *State ex rel. CYFD v. Nathan H.*, 2016-NMCA-043, the Court of Appeals looked at the sufficiency of the state's efforts. Father argued that ICWA applied to the case because the children were eligible for enrollment; however, enrollment depended on the Mother's lineage and she was not cooperating with CYFD's efforts to track this down. Also, Navajo Children and Family Services determined the children were not eligible based on its research. Finally, Father argued the children were eligible for enrollment in the Ute tribe but no evidence of this could be found. The Court concluded that CYFD's efforts complied with §32A-4-22. "[T]he statute does not require CYDF to implement all possible methods in its investigation." ¶29.

32.2.2.2 Reason to Know a Child is an Indian Child

To determine whether there is reason to know a child is an Indian child, the court must:

- ask every participant on the record, at the commencement of each proceeding (beginning at the10-day custody hearing), whether the participant knows or has reason to know that the child is an Indian child.
- make a finding about whether the child is an Indian child or there is reason to know that the child is an Indian child; and
- instruct the parties to tell the court if they subsequently receive information that provides reason to know. 25 C.F.R. §23.107; Rule 10-315.

After the initial inquiry, the court is not required to ask again in each hearing within a proceeding, but if a new proceeding (e.g., adjudication, termination of parental rights, adoption) is initiated for the same child, the court must ask again and make a finding as to whether there is reason to know that the child is an Indian child. *Id.;* Guidelines B.1; Rule 10-315; Form 10-520. The court has reason to know that a child is an Indian child when:

- any participant or officer of the court in the proceeding, Indian tribe, Indian organization, or agency, informs the court that the child is an Indian child or that it has discovered information indicating the child is an Indian child;
- the child gives the court reason to know he or she is an Indian child;
- the court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian (defined as an Indian person with legal custody of the child under tribal law or custom, state law, or parental authorization) is on a reservation or in an Alaska Native village;
- the court is informed that the child is or has been a ward of a Tribal court; or
- the court is informed that either parent or the child has an identification card indicating membership in an Indian Tribe. 25 C.F.R. §23.107.

The Guidelines encourage expansive interpretation of these factors and urge further investigation into the child's status early in the case if any of the factors are or may be present. When there is no reason to know (because none of the factors is present), CYFD should document the reasons for this conclusion in its case file. Guidelines B.1.

If there is reason to know a child is an Indian child, the court must treat the child as an Indian child (by applying ICWA) until it is determined otherwise on the record. The court must also confirm that CYFD has used due diligence to identify and work with all tribes where the child may be a member or eligible for membership in order to verify the child's status. Guidelines B.1; Rule 10-315; Form 10-520.

If the court initially finds that there is reason to know, but later determines that the child is not an Indian child, it will then proceed using the standards that apply in non-ICWA cases.

32.2.2.3 Child Custody Proceeding

A child custody proceeding is defined as any action, other than an emergency proceeding, that may result in one of the following outcomes: foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 U.S.C. §1903(1); 25 C.F.R. §23.2. Although this definition sounds straight forward, it is nuanced. First, a child custody proceeding includes both voluntary and involuntary proceedings, as well as status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including juvenile detention (which is considered a "foster care placement under the Guidelines' definition. *See* Guidelines L.18). Status offenses are "offenses that would not be considered criminal if committed by an adult, and are prohibited only because of a person's status as a minor (such as truancy or incorrigibility)." 25 C.F.R. §23.2. In New Mexico, these would include proceedings under the Families in Need of Court-Ordered Services Act, §§32A-3B-1 *et seq.*

A proceeding is voluntary when "it is not an involuntary proceeding, such as a foster-care, pre-adoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the child, or a proceeding for voluntary termination of parental rights." By contrast, a proceeding is involuntary if the child is removed or placed without the parent's or Indian custodian's consent, or when the parent or Indian custodian agrees to the removal or placement under a threat of

removal. If the child cannot be returned upon demand, then the proceeding is involuntary. "Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies." Formalities and contingencies include formal court proceedings, signing agreements, and repayment of the child's expenses. 25 C.F.R. 23.2; Guidelines L.20.

Second, "foster care placement" is a term of art with special meaning. According to the Regulations, foster care placement is "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where ... the child [cannot be] returned upon demand, but where parental rights have not been terminated." 25 C.F.R. §23.2. Although it might seem like the initial out-of-home placement at removal is the "foster care placement," it is not. In New Mexico, foster care placement occurs at adjudication. *State ex rel. CYFD v. Marlene C.,* 2011-NMSC-005, ¶ 36.

32.2.2.4 Emergency Proceedings

An emergency proceeding is "any court action that involves an emergency removal or emergency placement of an Indian child" by the state. 25 C.F.R. §23.2; Guidelines C.1. ICWA's emergency removal and placement provisions apply to all Indian children, not just those residing or domiciled on a reservation who are temporarily located off the reservation. 25 U.S.C. §1922; 25 C.F.R. §23.2; Guidelines C.1.

In New Mexico, the *ex parte* custody order and the 10-day custody hearing are "expedited emergency proceedings". *Marlene C.,* ¶32.

Emergency removal and placement of an Indian child are allowed "only if the child faces 'imminent physical damage or harm.'" 25 C.F.R. §23.113; Guidelines C.2 (quoting 25 U.S.C. §1922). The Guidelines explain that this standard for emergency proceedings, "imminent physical damage or harm," mirrors "the constitutional standard for removal of *any* child" in emergency circumstances. Emergency circumstances are "circumstances in which the child is immediately threated with harm, including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence." Guidelines C.2 (quotations and citations omitted).

The regulations outline a long list of information that should be included in the petition (and any accompanying documents) for a court order authorizing emergency removal or placement of an Indian child. In New Mexico, this information should be included in the motion for an *ex parte* custody order or the abuse or neglect petition and any attached affidavits. Because inclusion of the listed information is recommended but not required, a petition not including the information should not be denied if the child is at risk of imminent physical damage or harm. 25 C.F.R. §23.113; Guidelines C.4.

An emergency proceeding must terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child by:

- returning the child to the parent or Indian custodian,
- transferring the proceeding to the jurisdiction of the child's tribe, or
- initiating a child custody proceeding in state court (as defined in Section 23.2 of the regulations).

25 C.F.R. §23.113; Guidelines C.3.

To ensure that they are not used to evade the extensive safeguards otherwise imposed by ICWA, emergency proceedings should last no more than 30 days. An exception is made if the state court determines that terminating the proceedings is not possible because returning the child would subject the child to imminent physical damage or harm, the court has been unable to transfer the proceeding to the jurisdiction of the child's tribe, and it has not been possible to initiate a child custody proceeding. 25 C.F.R. §23.113; Guidelines C.5.

Practically speaking, in New Mexico the emergency removal or placement will likely be terminated before the 30-day outer limit described in the regulations and Guidelines because initiation of the child custody proceeding, for purposes of ICWA, formally occurs when the date is set for the adjudication and notice is sent to the parent or Indian custodian and tribe in accordance with ICWA's requirements (for timing and service). 25 C.F.R. §23.113; Guidelines C.3. This likely takes place at or soon after the custody hearing, in preparation for the adjudicatory hearing.

During the emergency removal and placement process, CYFD should work to identify Indian children by asking about tribal membership or eligibility for tribal membership. If CYFD reasonably believes that the child may be an Indian child, it should contact and coordinate with the child's tribe right away to identify possible preferred placements and services. If a preferred placement is not readily available during the emergency proceeding, CYFD should continue working to identify and secure a preferred placement as quickly as possible. 25 C.F.R. §23.113; Guidelines C.6.

32.2.2.5 Impermissible Factors

Whenever a child custody proceeding concerns an Indian child (as defined by ICWA), ICWA applies. The court does not have discretion to consider other factors like the participation (or lack thereof) of the parents or Indian child in tribal cultural, social, religious or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum. These factors are not relevant to the court's determination. 25 C.F.R. §23.103(c). "A standard that requires the evaluation of the strength of these social or cultural ties frustrates ICWA's purpose to provide more objective standards for Indian child-custody proceedings." Guidelines B.2.

32.2.2.6 ICWA Applies Even if the Child Reaches Age 18

If ICWA applied at the commencement of the proceeding and the court continues jurisdiction after the Indian child turns 18 under §32A-4-25.3, ICWA "will not cease to apply simply because the child reaches age 18." 25 C.F.R. §23.103(d).

32.2.3 Exceptions

Certain activities are not generally covered by ICWA, but may trigger ICWA at some point:

- Delinquency. Placement based upon an act which, if committed by an adult, would be deemed a crime is not considered foster care placement covered by the Act. 25 U.S.C. §1903(1). However, ICWA does apply to a proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement, including a foster care placement. 25 C.F.R. §23.103(a).

  Status Offenses, Probation Violations and ICWA. There may be a fine line between so-called status offenses and delinquent acts, especially if a status offense might be a probation violation for a particular child. If an out-of-home placement is being considered, or parents feel compelled to agree to an out-of-home placement, query whether the case comes under ICWA and requires ICWA protections.

- Custody Disputes. Custody disputes in the course of divorce proceedings are not covered by ICWA. 25 U.S.C. §1903(1). ICWA also does not address custody disputes between non-married parents, and the majority of non-New Mexico cases have held that ICWA does not apply to such disputes. There is no New Mexico case law on this provision.

- Mental Health Placement. It is not clear how ICWA affects placement for mental health treatment in an institution independent of an abuse or neglect proceeding.

- Cultural Identification. Some children may not meet ICWA's definition of "Indian child" yet may identify culturally as Indian. Although the following categories of children do not fall within ICWA's definition of "Indian," the court will want to recognize their cultural heritage and promote their cultural ties:
  - Those who have a large blood quantum from several federally-recognized tribes, but in an amount insufficient for membership in any one tribe; and
  - Those who have a sufficient blood quantum required by tribal law, but do not meet other tribal requirements for membership.

32.2.4 Jurisdiction

ICWA's jurisdictional provisions are at the heart of the law. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

> The ICWA ... seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. It

> does so by establishing a Federal policy that, where possible, an Indian child should remain in the Indian community, and by making sure that Indian child welfare determinations are not based on a white, middle-class standard which, in many cases, forecloses placement with an Indian family.

Id. at 36 (internal citations and quotations removed). The jurisdictional provisions are one way that ICWA implements this policy. They "are designed to maximize the opportunity for tribal judges, who in most cases are more knowledgeable than state court judges about Indian child-rearing traditions and customs, to determine the fate of Indian children." *The Indian Child Welfare Act Handbook, A Legal Guide to the Custody and Adoption of Indian Children*, p. 53, B.J. Jones, M. Tilden, & K. Gaines-Stoner (2008).

32.2.4.1 Exclusive Tribal Jurisdiction

A tribe has exclusive jurisdiction over an Indian child who resides or is domiciled within its reservation, even when the child is temporarily off the reservation. The tribe also has exclusive jurisdiction over an Indian child who is a ward of the tribal court, regardless of the child's residence or domicile. 25 U.S.C. §1911(a).

Tribal courts have exclusive jurisdiction over the child of unmarried parents when the child is removed from a custodial parent who is domiciled on the reservation. 25 C.F.R. §23.2 (the domicile of an Indian child whose parents are not married to each other is the domicile of his or her custodial parent); *In re Adoption of a Baby Child*, 1985-NMCA-044, 102 N.M. 735 (when a child whose mother was a tribal resident was removed from the reservation by a family member and placed for adoption, the child remained within the exclusive jurisdiction of the tribe); *see also Mississippi Band*, 490 U.S. at 36.

When a tribal court has exclusive jurisdiction, the state court must "expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding…." 25 C.F.R. §23.110. However, these mandatory dismissal provisions do not apply in emergency proceedings, which allow the state court to act when necessary to prevent imminent physical damage or harm to the child. Guidelines F.1. Nor do they apply when a tribe, in the exercise of its sovereignty, chooses to refrain from asserting jurisdiction by entering into an agreement with the state regarding jurisdiction. The Guidelines strongly encourage states and tribes to enter into cooperative agreements to provide for the orderly transfer of jurisdiction on a case-by-case basis or for concurrent jurisdiction. 25 U.S.C. §1919; 25 C.F.R. §23.110; Guidelines A.2.

When the tribal court has exclusive jurisdiction, the state court should transfer without delay, even if the parent objects. Parental wishes do not support a state court's refusal to transfer where the tribe has exclusive jurisdiction over the child. *Mississippi Band*, 490 U.S. at 53.

32.2.4.2 Concurrent Jurisdiction and Transfer

When an Indian child resides or is domiciled outside a reservation, the tribe and state have concurrent, but presumptively tribal, jurisdiction in a foster care placement or termination of parental rights case. *Mississippi Band*, 490 U.S. at 36. In these proceedings, any party may request transfer to the tribal court at any stage. ICWA requires the state court, in the absence of good cause, to transfer these proceedings to the tribal court upon petition of a parent, tribe or the Indian custodian (defined as an Indian person with legal custody of the child under tribal law or custom, state law, or parental authorization), unless the tribal court declines transfer or the tribe or either parent objects, regardless of whether the objecting parent is Indian or non-Indian. 25 U.S.C. §1911(b); *see also* §32A-1-9.

The decision to transfer is based on the circumstances and evidence of each case, but there must be good cause for the state court to decide not to transfer. The regulations and Guidelines establish procedures and criteria the state court must follow when deciding whether good cause exists to deny the transfer. If the court or a party believes that there is good cause, the reasons for that belief must be stated on the record (in writing or orally), and all parties must have an opportunity to provide the court with their view regarding whether good cause to deny transfer exists. 25 C.F.R. §23.118.

The regulations and Guidelines establish a number of factors that the state court is prohibited from considering when determining whether good cause exists, including:

- the advanced stage of the proceeding (foster care placement or termination of parental rights) *if* the parent, Indian custodian, or tribe did not receive notice of the proceeding until an advanced stage;
- that no petition to transfer was filed in a prior proceeding (for example, in a termination proceeding, the state court may not consider that transfer was not requested during the foster care placement);
- the effect on the child's placement (the state court may not presume that the Tribal court will or will not order a change of placement);
- the Indian child's cultural connections to the Tribe or reservation; and
- socioeconomic conditions within the tribe or reservation; or
- any negative perception of tribal or BIA social services or judicial systems.

25 C.F.R. §23.118; Guidelines F.5.

Some older New Mexico cases used the doctrine of *forum non conveniens* as a reason to deny transfer to the Tribal court. *In re Termination of Parental Rights of Wayne R.N.*, 1988-NMCA-048, ¶¶9-10, 107 N.M. 341; *In re Termination of Parental Rights of Laurie R.*, 1988-NMCA-055, ¶¶18-20, 107 N.M. 529; *cf. In re Guardianship of Ashley Elizabeth R,* 1993-NMCA-129, ¶¶14-15, 116 N.M. 416. According to the Guidelines, if the state court considers the tribal court's inconvenience to the parties based on distance as a factor, "it must also weigh any available accommodations that may address the potential hardships caused by the distance." Guidelines F.5.

The basis for the state court's decision not to transfer should be made orally on the record or in a written order. 25 C.F.R. §23.118.

Once a petition for transfer is granted and the tribal court has accepted transfer, the state court should "expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to the pleadings and any court record … [and] work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family." 25 C.F.R. §23.119.

Findings Required. In the case of an Indian child who is the subject of an abuse or neglect proceeding in New Mexico, it is critical that the parties present evidence early in the proceeding demonstrating the residence or domicile of the child, and that they request findings of fact on the issue. This will allow the court to determine whether it has jurisdiction over the matter and what standards should apply if there is ever a request to transfer the matter to tribal court. *State ex rel. CYFD in re Andrea Lynn M.*, 2000-NMCA-079, 129 N.M. 512.

32.2.5 Notice Requirements

ICWA requires notice to the parent, Indian custodian, and tribe in child custody proceedings, specifically foster care placement and termination of parental rights. Because the 10-day custody hearing is an emergency proceeding in New Mexico, ICWA's notice provisions do not apply. *See State ex rel. Marlene C.*, 2011-NMSC-005, ¶34. Whether notice is strictly required by ICWA before the 10-day custody hearing, CYFD should take all practical steps to inform the Indian child's tribe of the removal and hearing, such as by telephone, email, or in-person contact, and must report to the court on its efforts to contact the parents, Indian custodian, and tribe about the custody hearing. 25 C.F.R. §23.113; Guidelines C.9. (Of course, Section 32A-4-18 of the Children's Code requires CYFD to provide reasonable notice of the time and place of the custody hearing to the child's parent, guardian, or custodian, regardless of ICWA's requirements.)

In involuntary foster care placements (which occur at adjudication) and termination of parental rights proceedings, the party seeking foster care placement or TPR must notify the child's parent or Indian custodian and the tribe or BIA (if the identity or location of the parent, Indian custodian, or tribe cannot be determined) of the pending proceedings and the right to intervene. Notification must take place by registered or certified mail, with return receipt requested for either method. Copies of notices must be sent to the BIA regional director, using one of these two methods of mail delivery. 25 U.S.C. §1912(a); 25 C.F.R. §23.11; Guidelines D.1 and D.6; Rule 10-312; Form 10-521.

No foster care placement or TPR proceeding may be held until at least 10 days after notice is received by the parent or Indian custodian and the tribe or BIA. The court may grant an additional 20 days to allow the parent, Indian custodian, or tribe to prepare. 25 U.S.C. §1912(a).

ICWA Notice Form. In 2014, the New Mexico Supreme Court adopted Form 10-521 for providing notice in ICWA cases. The Form was amended in 2016 to reflect the new federal Regulations and Guidelines.

ICWA does not contain similar notice provisions for voluntary placements or for adoption proceedings. The New Mexico Children's Code requires that the Indian tribe be notified in abuse, neglect, *or adoption* proceedings, as well as in cases under the Families in Need of Court-Ordered Services Act. §32A-1-14.

32.2.6 Intervention

In any foster care placement or termination of parental rights proceeding in state court, the Indian custodian and the tribe have the right to intervene at any point, including on appeal. 25 U.S.C. §1911(c); *In re Adoption of Begay*, 1988-NMCA-081, ¶5, 107 N.M. 810. *Compare*, Children's Code §32A-4-27, Rule 10-122. Other parties may intervene as allowed by state law and rule.

The requirement that the state give notice to the tribe or Indian custodian of the right to intervene in an involuntary foster care placement of termination of parental rights proceeding attaches when there is reason to know that the child is an Indian child. If the identity of the tribe cannot be determined, notice is given to the Secretary of the Interior. 25 U.S.C. §1912(a); 25 C.F.R. 23.11. *Compare* Children's Code §§32A-1-14, 32A-4-6(C), 32A-4-29(C), 32A-4-32(D), 32A-5-16(C), 32A-5-27(D).

Proposed Changes to Rule 10-324 regarding Tribal Participation: In 2018, the NM Supreme Court published proposed changes to Rule 10-324 for public comment. The proposed changes, if adopted, would clarify that representatives of an Indian child's tribe or tribes are not members of the "general public" and therefore may not be excluded from hearings in child welfare cases in which ICWA does or may apply. The proposed Committee Commentary would further clarify that a tribal representative could, without formal intervention, monitor the proceedings and participate to the extent needed to inform the court of the tribe's concerns, but would have to intervene if the tribe were to seek affirmative relief from the state court.

32.2.7 Right to Counsel

An indigent parent or Indian custodian has the right to court-appointed counsel in any removal, placement, or termination proceeding. The court in its discretion may appoint counsel for the child upon a finding that appointment is in the best interest of the child. 25 U.S.C. §1912(b). In New Mexico, the court automatically appoints an attorney for the child. §32A-4-10(C). For children under 14 years of age, the court appoints an attorney guardian ad litem. For children 14 and older, the court appoints an attorney who represents the child in the same manner as an adult is represented by counsel; the client directs the representation. §32A-4-10(C).

32.2.8 Active Efforts

32.2.8.1 Active Efforts Required

Before a party may seek foster care placement of, or termination of parental rights to, an Indian child, the party must make "active efforts ... to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and demonstrate that these efforts were unsuccessful. 25 U.S.C. §1912(d). "The 'active efforts' requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be united with her parents, whenever possible, and helps protect against unwarranted removals by ensuring that parents who are, or who may readily become, fit parents are provided with services necessary to retain or regain custody of their child." Guidelines E.1. Active efforts should be made as early as possible, including in emergency situations. Guidelines C.8.

32.2.8.2 Active Efforts Defined

Active efforts will, necessarily, vary from case to case depending on the facts and circumstances. Generally, however, active efforts are "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. §23.2.

In *State ex rel. CYFD v. Yodell B.*, 2016-NMCA-029, ¶29, the Court of Appeals overturned the termination of a father's parental rights because CYFD did not make active efforts to prevent the breakup of the family. The Court noted that CYFD met with the father to create a treatment plan and "pointed [him] in the direction of service providers, but did little else to assist [him] in implementing the treatment plan. [The] father was not offered services aside from the one parenting class. The Department took a passive role by shouldering Father with the burden of not only independently locating and obtaining services, but also ensuring that service providers were communicating with the Department about his progress." *Id.* ¶26 (explaining that active efforts are more involved and less passive than reasonable efforts).

Although *Yodell* predates the 2016 Regulations and Guidelines, the Court's reasoning is consistent with both. Active efforts must assist the parent through the steps of a case plan and with accessing or developing the resources need to satisfy the plan. 25 C.F.R. §23.2. The Guidelines emphasize that active efforts should address the specific issues "facing the family" and be intentionally tailored to help keep the family together. Guidelines E.4.

The Regulations provide a long, but non-exhaustive, list of examples of active efforts, including things like supporting regular visits with parents in the most natural setting possible, identifying community resources and "actively assisting the Indian child's parents, or when appropriate, the child's family, in utilizing and accessing those resources," finding alternative ways to address the needs of the Indian child's parents or family if "optimum services do not exist or are not available," and "offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe." 25 C.F.R. §23.2.

To the maximum extent possible, active efforts should be consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and his or her parents, extended family, Indian custodians, and Tribe. *Id.*; Guidelines E.3. In addition to the examples provided in the regulations, Parts E.3 and E.4 of the Guidelines provide examples of culturally appropriate active efforts, including, for example, "trauma-informed therapy that incorporates best practices in addressing Native American historical and intergenerational trauma, pastoral counseling that incorporates a Native American holistic approach and focus on spirituality, and Tribal/Native faith healers or medicine/holy men or women within the Tribe who utilize prayers, ceremonies, sweat lodge and other interventions."

32.2.8.3 Burden of Proof

Active efforts must be proved by clear and convincing evidence. *Yodell B.*, ¶21. However, when a family resists the efforts or refuses to cooperate, or the evidence shows that efforts would be useless, the requirement for active efforts has been met. In *State ex rel. CYFD v. Arthur C.*, 2011-NMCA-022, 149 N.M. 472, the father challenged the termination of parental rights in part on the grounds that CYFD did not engage in active efforts. The Court of Appeals reviewed at length the evidence favorable to the decision and held that there was sufficient evidence for the district court to find beyond a reasonable doubt that CYFD engaged in active efforts to provide remedial services and rehabilitative programs. *Id*. ¶¶41-45. In that case, the record indicated that CYFD repeatedly and persistently made active efforts to provide the services and rehabilitative programs to prevent the family's break up. Father sporadically engaged in the provided services and programs, demonstrating his capability but unwillingness to participate in the remedial and rehabilitative programs and services provided by CYFD. *Id*. ¶45. (Although the Court in *Arthur C.* found that active efforts were proved beyond a reasonable doubt, the Court of Appeals subsequently clarified that the burden of proof for active efforts is clear and convincing evidence, not evidence beyond a reasonable doubt. *Yodell B.*, ¶21.)

32.2.8.4 Timing

In *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315, the New Mexico Supreme Court considered a situation in which CYFD argued that the ex parte custody order and affidavit supporting it sufficed to demonstrate active efforts. The Court did not focus on whether the efforts described were sufficient but rather concluded that the court must address the question of active efforts at adjudication, when the parent has due process protections. The children's court cannot rely on a finding in the ex parte custody order to meet the requirements of 25 U.S.C. §1912(d). *Id*. ¶¶32, 37.

32.2.9 Evidentiary Requirements

Each party to a foster care placement or termination of parental rights proceeding has the right to examine the reports and other documents on which any decision of the court is based. 25 U.S.C. §1912(c).

32.2.9.1 Burden of Proof for Foster Care Placement at Adjudication

In *Marlene C.*, 2011-NMSC-005, the Supreme Court addressed when and how a district court in an abuse and neglect proceeding must make the two factual findings required by 25 U.S.C. §1912(d) and (e):

> **Section 1912(d):** Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved successful.
>
> **Section 1912(e):** No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Court decided that the adjudicatory hearing is the best procedural stage in which to make these findings because it incorporates procedural due process protections and a stringent standard of proof that parallel those required by ICWA. *Id*. ¶36.

32.2.9.2 Burden of Proof for Termination of Parental Rights

While the standard of proof at the adjudicatory hearing is clear and convincing, the standard for termination of parental rights in an ICWA case is beyond a reasonable doubt:

> **Section 1912(f):** No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The beyond a reasonable doubt standard for cases involving Indian children is also spelled out in the Children's Code, at §32A-4-29(I). In *Arthur C.*, 2011-NMCA-022, ¶¶28-40, the Court of Appeals upheld the trial court's decision that evidence beyond a reasonable doubt supported termination in that case.

32.2.9.3 Proof of Causal Connection Required

Before the court may place an Indian child in foster care (post-adjudication) or terminate a parent's rights, the evidence must show a "causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding." 25 U.S.C. §1912(e) and (f), above; 25 C.F.R. 23.121; Guidelines G.1.

Without this causal relationship, evidence of certain conditions will not satisfy the burden of proof (clear and convincing evidence in foster care placements, beyond a reasonable doubt at TPR). These conditions include: community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, and nonconforming social behavior (e.g., behaviors that do not comply with society's norms, like dressing in a manner that seems strange to others, an unusual or disruptive speech pattern, or discomfort in or avoidance of social situations). Guidelines G.1. The Guidelines specifically recognize that children can thrive when they are kept with their parents, despite less than ideal or imperfect conditions. The conditions alone, without a causal connection, will not satisfy the evidentiary burden. *Id.*

32.2.9.4 Qualified Expert Witness

ICWA requires that the evidence for both foster care placement and termination of parental rights include testimony by qualified expert witnesses. *See* 25 U.S.C. §1912(e) and (f), above. While ICWA refers to expert witnesses in the plural, one qualified witness is sufficient. 25 C.F.R. §121. The qualified expert witness or witnesses must be able to testify about two inter-related topics: (1) whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and (2) the prevailing social and cultural standards of the Indian child's tribe. The question whether continued custody will like result in serious emotional or physical damage must be understood in the context of the cultural and social standards of the Indian child's tribe. (There may be some factual circumstances in which knowledge of the prevailing social and cultural standards of the tribe is unnecessary, as when the case involves child sexual abuse. In such a case, the qualified expert witness on sexual abuse of children would not need specific expertise or knowledge about tribal social and cultural standards.) Guidelines G.2.

Identifying an appropriate witness to serve in this capacity is not always straightforward, so the Guidelines encourage the state court, or any party, to seek help from the Indian child's tribe or the BIA in locating a qualified expert witness. The tribe may also designate a person as being qualified to testify about the tribe's prevailing social and cultural standards. *Id.* The Guidelines recommend that the qualified expert witness be someone who is familiar with the particular child. "If the expert makes contact with the parents, observes interactions between the parent(s) and the child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court." Even though the state social worker who is regularly assigned to the Indian child may have this kind of familiarity, this worker may not serve as the qualified expert witness because that would defeat the purpose of providing a culturally informed opinion from someone outside of the state agency. *Id.*

32.2.10 Voluntary Foster Care or TPR (Relinquishment)

For voluntary foster care placement or termination of parental rights, the parent or Indian custodian's consent must be:

- in writing;
- given at least 10 days after the birth of the child;
- recorded before a judge of a court of competent jurisdiction; and

- accompanied by that judge's certificate that the terms and consequences of the consent were fully explained and fully understood by the parent or Indian custodian and interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. §1913(a).

A parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time, at which point the child must be returned to the parent or custodian. 25 U.S.C. §1913(b). Consent to termination of parental rights or adoptive placement may be withdrawn prior to entry of the final decree of termination or adoption, at which point the child must be returned to the parent or custodian. 25 U.S.C. §1913(c). The parent may withdraw consent to an adoption within two years after the entry of a decree on the grounds of fraud or duress. If the court finds fraud or duress was used to obtain the consent, the decree must be vacated and the child returned to the parent. 25 U.S.C. §1913(d).

32.2.11 Full Faith and Credit

The state court is required to give full faith and credit to tribal child custody proceedings. ICWA requires that full faith and credit be given to tribal judicial proceedings involving custody of an Indian child, but only to the extent that the tribe affords full faith and credit to the state judicial proceedings. 25 U.S.C. §1911(d). Under New Mexico law, tribal judgments must be afforded full faith and credit without any requirement of reciprocity. *Jim v. CIT Financial Services Corp.*, 1975-NMCA-019, ¶3, 87 N.M. 362; *Halwood v. Cowboy Auto Sales*, 1997-NMCA-098, ¶2, 124 N.M. 77.

The New Mexico Children's Code requires that a tribal court order pertaining to an Indian child in an action under the Code be recognized and enforced by the district court for the judicial district in which the tribal court is located. A tribal court order that accesses state resources should be recognized and enforced pursuant to intergovernmental agreements entered into by the tribe and CYFD or another state agency. The tribal court, as the court of original jurisdiction, retains jurisdiction and authority over the child. §32A-1-8(E).

32.2.12 Placement Preferences

ICWA's placement preferences are a direct response to "the failure of non-Indian child welfare workers to understand the role of extended family in Indian society" and a recognition by Congress that "there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children." Guidelines H.2. The placement preferences established by ICWA express the Congress' determination that placement with the Indian child's extended family or tribal community "will serve the child's best interests in most cases." Guidelines H.4.

ICWA's enumerated placement preferences for foster care placement and adoption apply in both involuntary and voluntary placements. Guidelines I.2. While requiring compliance with the preferences for voluntary placements has been controversial because it undercuts the rights of a parent to determine who may adopt the child, the preferences are intended to protect the child's Indian identity and cultural heritage and recognize the tribe's interests in its children. The

prevailing social and cultural standards of the parent's Indian community are to be applied in meeting the preferences. 25 U.S.C. §1915(d). The record of placement must show the efforts made to comply with the preferences and must be made available to the child's tribe or the Secretary of the Interior on request. 25 U.S.C. §1915(e). *Compare,* Children's Code §§32A-4-9, 32A-5-5.

Diligent Search Required. When removing an Indian child, CYFD should conduct and document a diligent search for a placement that complies with ICWA's placement preferences, but active efforts to find such a placement are not required. Guidelines H.3; *State ex rel. CYFD v. Casey J.*, 2015-NMCA-088, ¶15 (explaining that §1912(d) of ICWA, requiring the agency to make active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family, does not apply to the placement preferences listed in §1915).

In **emergency placements,** the state "should strive to provide an initial placement that meets ICWA's (or the tribe's) placement preferences" in order to avoid later disruptions if the child becomes subject to a child custody proceeding. Guidelines C.6.

ICWA allows deviation from the preferences only when good cause is shown. 25 U.S.C. §1915(a). For more information about good cause to depart from the placement preferences, ***see*** Handbook §32.2.12.5 below.

32.2.12.1 Foster Care Preferences

ICWA requires that foster care or pre-adoptive placement be in the least restrictive setting that most approximates a family and in which any special needs of the child can be met. The child must be placed within reasonable proximity to home. Absent good cause, preference in foster care or pre-adoptive placement must be given to:

- a member of the Indian child's extended family;
- a foster home licensed, approved, or specified by the Indian child's tribe;
- an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs. 25 U.S.C. §1915(b).

Each placement should be considered in the order listed, unless the tribe has specified a different order by resolution. 25 U.S.C. §1915(c).

32.2.12.2 Adoption Preferences

Absent good cause to the contrary, preference in adoptive placement must be given to:

- a member of the child's extended family;
- other members of the child's tribe; or
- other Indian families. 25 U.S.C. §1915(a).

As with foster care placements, each adoptive placement should be considered in the order listed, unless the tribe has specified a different order by resolution. 25 U.S.C. §1915(c).

32.2.12.3 Tribal Role in Preferences

Tribes may establish a different order of preferences by resolution as long as the placement is the least restrictive setting appropriate to the needs of the child. 25 U.S.C. §1915(c). The state court should determine if the child's tribe has established different preferences and, if so, comply with them rather than with ICWA's preferences. If the tribe has adopted different preferences, the state court may deviate from them if good cause is shown. Guidelines H.4.

32.2.12.4 Parent or Child Preferences

ICWA allows the court to consider the Indian child's or parent's wishes for placement, but the court is not bound by these preferences 25 U.S.C. §1915(c). While the court may give weight to a parent's wish to remain anonymous in applying the placement preferences, how much weight a court should accord the parent's wish is unclear, especially when faced with the child's right to cultural heritage or identity and the tribe's interest in its own continued existence. The answer depends on the circumstances of the case, but the court can be guided by ICWA's primary purpose of protecting the rights of children and tribes.

32.2.12.5 Good Cause to Depart from the Placement Preferences

The placement preferences apply unless the court determines on the record or in writing that there is good cause under §23.132 of the regulations to depart from the preferences. 25 C.F.R. §23.129. Any party seeking a departure must prove good cause by clear and convincing evidence. The court's determination of good cause should be based on one or more of the following: request of the parents or child, presence of a sibling attachment that can be maintained only through a particular placement, the extraordinary physical or emotional needs of the child (such as specialized treatment services that are unavailable in the community of a preferred placement), or unavailability of a suitable placement after a diligent search was conducted to find a preferred placement. 25 C.F.R. §23.132; Guidelines H.4; Rule 10-318. The standards for determining whether a placement is unavailable after a diligent search "must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties." Rule 10-318.

A placement may not depart from the preferences for reasons:

- related to the socioeconomic status of any placement relative to another placement, or
- solely because of the ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Rule 10-318; *see also* Guidelines H.4 for a fuller description of permissible and impermissible factors that the court may consider when assessing whether good cause exists to depart from the placement preferences.

32.3 ICWA and Title IV-E

The Adoption and Safe Families Act does not change or lessen the state's responsibility to comply with ICWA. At the same time, ASFA requirements apply to Indian tribes and Indian children receiving or eligible for Title IV-E funds.

Until the Fostering Connections to Success and Increasing Adoptions Act was passed by Congress in 2008, Indian tribes could only gain access to Title IV-E funds on behalf of Title IV-E eligible children through agreements with the states and had to operate within the parameters of the state plan. Under Fostering Connections, the tribes can now apply for approval from the federal Administration for Children and Families (ACF) to operate their own Title IV-E programs directly. As of June 26, 2018, twelve tribes, including the Navajo Nation, had an approved title IV-E plan to operate a foster care, adoption assistance, and, at tribal option, guardianship assistance program. The Capacity Building Center for Tribes has compiled a helpful resource on tribal IV-E programs: https://tribalinformationexchange.org/files/products/IVE_ResourceGuide.pdf.

See Handbook Chapter 36 for more information on federal child welfare laws like ASFA and Fostering Connections.

32.4 References

The New Mexico Administrative Office of the Courts, on behalf of the Tribal-State Judicial Consortium, has developed a website with links to a number of important resources. These include the full text of the Indian Child Welfare Act, the Bureau of Indian Affairs' regulations on ICWA, and the BIA Guidelines. Also posted on the website is a judicial benchcard developed by the Consortium specifically for the use of state court judges in New Mexico: https://tribalstate.nmcourts.gov/index.php/indian-child-welfare-act.html.

The National Council of Juvenile and Family Court Judges published a judicial benchbook on ICWA in 2017 that provides a brief and useful overview of ICWA requirements by proceeding: https://www.ncjfcj.org/sites/default/files/NCJFCJ_ICWA_Judicial_Benchbook_Final_Web.pdf.

The Native American Rights Fund published *A Practical Guide to the Indian Child Welfare Act*, a detailed handbook on ICWA, in 2007. The Handbook includes the statute and its legislative history (including the full text of House Report 95-1386), but is current through September 2011 only and therefore does not incorporate the 2016 regulations or Guidelines. The handbook is available on-line without charge at http://www.narf.org/icwa/.

CHAPTER 33

RESERVED

CHAPTER 34

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES

This chapter describes:

- The Children's Mental Health and Developmental Disabilities Act as amended in 2007 and 2008.
- The Act's relationship to proceedings under the Abuse and Neglect Act.

34.1 Purpose

The Children's Mental Health and Developmental Disabilities Act (CMHDD Act), §§32A-6A-1 to 32A-6A-30, is the article of the Children's Code governing the provision of mental health care and rehabilitation services to children with developmental and mental health needs.

The purposes of the CMHDD Act are to:

- provide children with access to appropriate assessments, services and treatment;
- provide children with access to a continuum of services to address their habilitation and treatment needs;
- provide children with access to services for identification, prevention, and intervention for developmental and mental health needs;
- promote delivery of services in a culturally appropriate, responsive, and respectful manner;
- protect the substantive and procedural rights of children regardless of service setting; and
- encourage support for family as critical members of the treatment or habilitation team whenever clinically appropriate. §32A-6A-2.

The provisions of the CMHDD Act apply to children who receive mental health or rehabilitation services whether or not they are affected by abuse or neglect. §32A-6A-3. However, children who are in state custody are at increased risk for developmental disabilities and mental health problems due to the abuse or neglect that led to their involvement with the state. Treatment issues also arise in abuse and neglect cases in the context of treatment plans developed for children with such conditions.

34.2 Relationship to Abuse or Neglect Proceeding

The CMHDD Act outlines the rights of children and youth when receiving mental health or habilitation services regardless of setting. It also sets forth the procedures required for placing children with mental health problems or developmental disabilities in residential treatment facilities, as described later in this chapter. The Abuse and Neglect Act explains how some of these procedures are supposed to be handled for children involved in abuse or neglect proceedings.

34.3 Definitions

In general, habilitation refers to the services provided to children with developmental disabilities that are aimed at enabling the child to attain, maintain, or regain maximum functioning or independence. §32A-6A-4(K). Treatment refers to behavioral health services provided to enable the child to attain, maintain, or regain maximum functioning. §32A-6A-4(DD).

34.4 Rights Regardless of Setting

Children receiving treatment and habilitation services in New Mexico have certain rights regardless of setting (such as community outpatient services, treatment foster care, or residential services).

- Children have a right to individualized treatment or habilitation services based on an individualized treatment or habilitation plan. §32A-6A-7.
- Seclusion and restraint are generally prohibited, are for the most part limited to emergency use only, and in those emergencies must follow the protocol set forth in the Act. §§32A-6A-9, 32A-6A-10, and 32A-6A-11.
- Aversive interventions listed in the Act are also prohibited. §§32A-6A-4(A) and 32A-6A-8.

34.5 Consent to Treatment and Release of Records

The CMHDD Act covers matters related to consent to treatment or rehabilitation services, medication, and residential treatment.

The law provides that informed consent of the child's legal custodian is required before treatment or rehabilitation is provided to a child under 14, except that the child may initiate and consent to an initial assessment with a clinician for medically necessary early intervention services. Such services are limited to verbal therapy and limited to two calendar weeks. §32A-6A-14. This exception allows younger children to access mental health professionals for a short initial assessment of need.

For children under 14, the legal custodian may consent to disclosure of the child's mental

health or habilitation records. These records may also be disclosed to the child's court-appointed GAL, without consent of either the child or the legal custodian. §32A-6A-24(B). Consent also is not required when disclosure is necessary for treatment, when disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the child on self or another, and in certain other instances. §32A-6A-24(D).

A child aged 14 or older is presumed to have capacity to consent to treatment and habilitation services, and a child with capacity has the right to consent. §32A-6A-15. A child aged 14 or older with capacity may consent to psychotropic medication but the legal custodian must be notified. §32A-6A-15(B). A child aged 14 years or older can consent to residential treatment but the legal custodian must also consent to such treatment. §32A-6A-21(B).

Capacity Defined. The term "capacity" is defined as the ability to:

- understand and appreciate the nature and consequences of proposed health care, including significant benefits, risks, and alternatives; and
- make and communicate an informed health care decision. §32A-6A-4(C).

A process is also set forth in the CMHDD Act to allow a legal custodian to consent to services when a child aged 14 or older does not have capacity, so long as the child does not object to the decision or the custodian's assumption of that authority. However, a legal custodian cannot consent to residential treatment without the proper consent of the child. §32A-6A-16.

If the child does not agree to allow the legal custodian to consent to services and the child does not have capacity to consent, the procedures in the Act for obtaining a treatment guardian must be followed. §32A-6A-16; §32A-6A-17.

A child aged 14 or older who has capacity may refuse treatment recommended by a mental health or developmental disabilities professional. The child may not be determined to lack capacity solely on the basis that the child chooses not to accept recommended treatment. §32A-6A-16(C).

Practice Note: It is important to understand who has the right to consent to services – the child or the legal custodian. The presumption is that children aged 14 years of age or older have the right to consent to their own mental health or habilitation services. If there is concern about the child's capacity, those concerns should be addressed using the procedures set forth in the Act.

Children aged 14 years of age or older with capacity to consent have the right to consent to release of their confidential mental health or habilitation records. §32A-6A-24(C). However, there are some instances when a child's consent to release of records is not required. For example, when a clinician determines that release without consent of the child aged 14 or older will not cause substantial harm to the child, then a summary of the child's assessment, treatment plan, progress, discharge plan, and other information essential to the child's treatment may be released to the child's legal custodian. §32A-6A-24(D)(3). A

primary caregiver may also be provided with information necessary for the continuity of treatment without the child's consent. §32A-6A-24(D)(4). Finally, a court may order release of records for good cause shown if certain findings are made. §32A-6A-24(D)(7).

34.6 Out-of-Home Placement

Children in out-of-home treatment or habilitation programs have specific rights regarding their care. §32A-6A-12. Children in treatment foster care or other out-of-home placements that are not residential treatment or habilitation programs as defined in the CMHDD Act are afforded basic rights under the Act. They can also access the state's protection and advocacy system or may obtain representation from other attorneys to assist them to enforce these rights. §32A-6A-13(C). However, children are only provided with a court-appointed guardian ad litem (GAL) or attorney paid by the state when placed in the most restrictive residential treatment or habilitation program as defined under the Act or when they are subject to a petition for a treatment guardian. §32A-6A-13(A), (B). However, children in custody under the Abuse and Neglect Act have a GAL or youth attorney who should be advocating at all points of treatment or rehabilitation. See §32A-4-23(E).

34.7 Process for Placing Child in Residential Treatment or Habilitation Program

When children are placed in the most restrictive residential treatment or habilitation programs, they are afforded additional rights under the CMHDD Act. The term "residential treatment or habilitation program" is defined as the diagnosis, evaluation, care, treatment, or habilitation rendered in a mental health or developmental disabilities facility when the child resides on the premises and where one or more of the following measures is available for use:

- a mechanical device to restrain or restrict the child's movement;
- a secure seclusion area from which the child is unable to exit voluntarily;
- a facility or program designed for the purpose of restricting the child's ability to exit voluntarily; or
- the involuntary emergency administration of psychotropic medication. §32A-6A-4(AA).

The habilitation or treatment of a child must be consistent with the least restrictive means principle, which is defined in §32A-6A-4(M). This means that the treatment or habilitation and the conditions of treatment or habilitation, separately or in combination:

- are no more harsh, hazardous, or intrusive than necessary to achieve acceptable treatment objectives for the child;
- involve no restrictions on physical movement and no requirement for residential care, except as reasonably necessary for the administration of treatment or for the protection of the child or others from physical injury; and
- are conducted at the suitable available facility closest to the child's place of residence. §32A-6A-4(M).

Placement in a residential treatment or habilitation program can be either voluntary or involuntary. §§32A-6A-20, 32A-6A-21, and 32A-6A-22. In both cases, the Act requires that certain procedures be followed.

As a general rule, when involuntary placement is needed, CYFD will petition for the child's placement under the CMHDD Act and the petition will be heard by the court as part of the abuse and neglect proceeding, although it may also be heard in a separate proceeding. §32A-4-23(B), (D). All parties to the abuse or neglect case must be given notice of the hearing. §32A-4-23(D). Similarly, when a child subject to the Abuse and Neglect Act is receiving residential treatment or habilitation services, any documentation required by the CMHDD Act is filed with the court as part of the abuse or neglect case. §32A-4-23(F). The court clerk is required to maintain a separate section within the abuse or neglect file for documents pertaining to actions taken under the CMHDD Act. §32A-4-23(G).

It is important to note that children subject to the Abuse and Neglect Act who receive residential treatment enjoy all of the substantive and procedural rights set forth in the CMHDD Act. §32A-4-23(H).

34.8 Voluntary Placement

34.8.1 Children Under Age Fourteen

A child under the age of 14 can be admitted to a residential program with the informed consent of the child's legal custodian for up to 60 days. §32A-6A-20(B); Form 10-601. For children in state custody under the Abuse and Neglect Act, this means that CYFD, as legal custodian, would provide the consent.

All children under the age of 14 being admitted to residential programs have a GAL appointed by the court for them. §32A-6A-20(F). In the case of a child in an abuse or neglect case, the GAL for the child in that case serves as GAL for purposes of the CMHDD Act as well. §32A-4-23(E). The GAL has the duty to inform the child of his or her rights, which are set forth in §32A-6A-21(I) and §32A-6A-12.

The GAL must determine within seven days after admission whether the legal custodian has consented to the residential placement, whether the admission is in the child's best interest, and whether the placement is consistent with the least restrictive means principle. The GAL, representing the child's best interests, has the duty of certifying to the court whether admission to the facility is appropriate. §32A-6A-20(G) and (H); Form 10-602. The admission will be considered appropriate if the GAL certifies that:

- The child's legal custodian understands and consents to the admission;
- The admission is in the child's best interests; and
- The admission is appropriate for the child and consistent with the least restrictive means principle. §32A-6A-20(G).

Placements must be reviewed at least every 60 days, following the procedures and timelines set forth in the CMHDD Act. §32A-6A-20(K). If the child's physician or licensed psychologist determines that it is in the child's best interest to continue the admission, the residential treatment or habilitation program will notify the GAL, who will then personally meet with the child, the child's legal custodian, and the child's clinician. It is then the GAL's duty to ensure that the legal custodian understands and consents to the program and to make the same type of certification as was made at the time of the initial admission. *Id*.

If the GAL does not feel he or she can certify that the admission (or continued admission) is appropriate, the child must be released or involuntary placement procedures initiated. §32A-6-20(L). Involuntary placement is described in §34.9 below.

34.8.2 Children Age Fourteen or Older

Under the CMHDD Act, a child 14 years of age or older may voluntarily admit him or herself to a residential treatment or habilitation program, with the informed consent of the child's legal custodian. §32A-6A-21. Instead of a GAL, the law requires that the child have an attorney, who is his or her own attorney, not the attorney for the parent or other legal custodian. If the legal custodian does not obtain an attorney for the child, the court will appoint one. §32A-6A-21(D). Even if the legal custodian obtains the attorney, the attorney represents the child, not the legal custodian. It is important to note that the attorney takes direction from the child as client and advocates for the child's wishes.

In the case of a child subject to the Abuse and Neglect Act, the child's attorney in the abuse or neglect proceeding continues to serve in the CMHDD Act proceeding. However, the child may, after consultation with this attorney, elect to be represented by counsel appointed under the CMHDD Act instead. §32A-4-23(E).

Because children 14 years of age or older have the independent right to consent to residential placement, the child's attorney must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. At the meeting, the attorney must first explain to the child:

- the child's right to an attorney;
- the child's right to terminate his voluntary admission and the procedures to effect termination;
- the effect of terminating the child's voluntary admission and the options of the physician and other interested parties to the petition for involuntary admission; and
- the child's rights under the CMHDD Act, including the right to:
    - legal representation;
    - a presumption of competence;
    - receive daily visitors of the child's choice;
    - receive and send uncensored mail;
    - have access to telephones;
    - follow or abstain from the practice of religion;
    - a humane and safe environment;

- physical exercise and outdoor exercise;
- a nourishing, well-balanced, varied and appetizing diet;
- medical treatment;
- educational services;
- freedom from unnecessary or excessive medication;
- individualized treatment and habilitation; and
- participation in the development of the individualized treatment plan and access to that plan on request.

See §§32A-6A-21(I) and §32A-6A-12.

If the attorney determines that the child understands his or her rights and voluntarily and knowingly desires to remain as a patient in the residential program, the attorney will so certify on a form designated by the Supreme Court within seven days of the child's admission. §32A-6A-21(J); Form 10-603. A child voluntarily admitted has the right to immediate discharge upon his or her request, except in those situations in which involuntary placement proceedings are commenced. The child is considered to have made a request for discharge when he or she informs the director, physician, or any other member of the program staff that he desires to be discharged; this request need not be in writing. §32A-6A-21(L).

As in the case of younger children, a child 14 years of age or older who is voluntarily admitted to a treatment or habilitation program must have his or her voluntary admission reviewed every 60 days. The procedures for this review are also similar. §32A-6A-21(M).

34.9 Involuntary Placement

Any person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential services may request that a children's court attorney file a petition with the court for the child's involuntary placement. §32A-6A-22(D). When a child asks to be discharged from a voluntary program and the director, a physician, or a licensed psychologist in the program thinks that involuntary placement is needed, the request to the children's court attorney must be made the first business day after the child requests discharge. §32A-6A-21(L).

When the child is a child involved in a civil abuse, neglect, or family in need of court-ordered services case, the CYFD children's court attorney is the children's court attorney for purposes of filing the petition for involuntary placement. §32A-4-23(B). In other CMHDD Act cases, the district attorney is the children's court attorney for this purpose. §32A-1-6(E).

Upon receiving the petition, the court will appoint counsel for the child if the child does not already have an attorney or GAL. The attorney or GAL will represent the child at all stages of the proceeding. §32A-6A-13(A). In the instance of a child under 14 who has a GAL in a civil abuse or neglect or family in need of court-ordered services (FINCOS) case, that GAL will represent the child. In the case of an older child, the child's attorney in the abuse or neglect or FINCOS case will represent the child unless the child elects to be represented by

counsel appointed under the CMHDD Act. §32A-4-23(E); §32A-3B-17(E).

The involuntary placement hearing must be held within seven days of an emergency admission or within five days from a child's declaration that he or she desires to terminate his or her voluntary admission. §32A-6A-22(G); §32A-6A-21(L). Seven days in this context means seven working days. Rule 10-107 of the Children's Court Rules and Rule 1-006 of the Rules of Civil Procedure both provide that weekends and holidays do not count when the period of time required for an action is less than eleven days. (**Note**: In a case involving the adult version of the CMHDD Act, the New Mexico Supreme Court held that the seven day rule was not jurisdictional and that the hearing could be postponed for good cause shown. *NM Dept. of Health v. Compton*, 2001-NMSC-032, ¶18 n.3 and ¶24, 131 N.M. 204.)

The court may order involuntary placement only if it is shown by clear and convincing evidence:

- that as a result of mental disorder or developmental disability the child needs the treatment or habilitation services proposed;
- that as a result of mental disorder or developmental disability the child is likely to benefit from the treatment or habilitation services proposed;
- that the proposed involuntary placement is consistent with the treatment or habilitation needs of the child; and
- that the proposed involuntary placement is consistent with the least restrictive means principle. §32A-6A-22(K).

The court must include in its findings a statement of the legal custodian's opinion about whether the child should be involuntarily placed, a statement of the efforts made to ascertain that opinion, or a statement explaining why it was not in the child's best interest to have the legal custodian involved. §32A-6A-22(J).

If the court decides that the child does not meet the criteria for involuntary placement, the child must be released from the residential treatment facility, but the court may order the child to undergo nonresidential treatment as may be appropriate and necessary or it may order no treatment. §32A-6A-22(L).

Every child in involuntary placement has the right to periodic review, including a new hearing, at the end of each placement period. An involuntary placement period may not exceed 60 days. §32A-6A-22(M).

CHAPTER 35

FDERAL AND STATE EDUCATION LAWS

Education is recognized as essential to a child's well-being and outcomes. This chapter describes many of the state and federal education laws that affect children and youth in foster care, including:

- Provisions of the New Mexico Children's Code
- Supreme Court Rules on Educational Decision Makers
- Federal Every Student Succeeds Act
- Family Educational Rights and Privacy Act (FERPA)
- Individuals with Disabilities Education Act (IDEA)
- Section 504 of the Rehabilitation Act
- State Laws on Foster Youth Changing Schools
- New Mexico Family Infant Toddler Program

35.1 Purpose

Positive, stable school experiences enhance a child's well-being, help them make more successful transitions to adulthood, and increase their chances for personal fulfillment, economic self-sufficiency and their ability to contribute to society.[i] Yet, between 2010 and 2013, only 32% of youth in foster care in New Mexico graduated from high school, roughly half the statewide graduation rate.[ii] Nationally, youth in foster care have been more likely to fall below grade level and to repeat a grade than their peers. Although youth in foster care often aspire to go to college, nationally, they enroll in college at lower rates than other youth. Even when they are able to enroll, they are less likely to graduate.[iii]

Educational stability is a major predictor of school success. According to the American Bar Association and Casey Family Foundation, each change in school placement accounts for a six-month delay in academic achievement.[iv] School mobility leads to discontinuity in instruction and curricula, weakens ties with peers, and leads to lower levels of engagement with education generally. School changes are often a reflection of changes in placement. In New Mexico, 33% of youth in foster care cycle through four or more placements during their time in state care; 40% cycle through two or three homes.[v] This instability helps account for the low high school graduation rate of foster youth in New Mexico.

Recognizing how essential education is to all children, and that children in foster care are particularly vulnerable, federal laws have increasingly focused on the significance of education for children in state custody. The Foster Care Independence Act of 1999, or Chafee Act, increased funds available to states to help older foster youth transition to adulthood, including assistance with education, and for the first time extended funding to

students who age out of foster care and pursue post-secondary education or training. In 2008, Congress reinforced its commitment to the education of children in foster care in the Fostering Connections to Success and Increasing Adoptions Act, which places and emphasis on educational stability and requires state education agencies, schools and child welfare agencies to coordinate efforts to ensure educational success for children in state custody.[vi] More recently, through the passage of the Every Student Succeeds Act (ESSA) in 2015, Congress mandated that state education agencies and schools pay particular attention to the educational needs of at-risk students, including youth in foster care.

New Mexico has responded with a number of laws and policies to better support children in foster care. A 2017 law to assist foster youth who have to change schools, now NMSA §22-12-10, is one example of the laws and agency and court rules recognizing the critical importance of educational success for children in foster care. This chapter provides information about these laws and about the educational rights accorded to New Mexico's students to better assist judges and other professionals and volunteers who work with young people in the child welfare legal process.

35.2 Basic Structure of Education in New Mexico

Article XII, Section 1 of the New Mexico Constitution requires that a "uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state be established and maintained." Sections 2 and 4 of Article XII, assign state funds to provide for and assure the availability of adequate public funding for education. Section 10 of Article XII requires that students of Spanish descent shall "enjoy perfect equality with other children in all public schools and educational institutions of the state."

The structure of education in New Mexico reflects federal, state and local influence and control over the provision of education. The state Public Education Department (PED) has the responsibility to oversee school districts, prescribe courses of instruction and graduation requirements, assess and evaluate public schools to determine the adequacy of student gain, and, when necessary, take over the control of a public school or school district that has failed to meet requirements of the law or PED standards. §22-2-2. State oversight of education is also provided for by the Public Education Commission, which advises PED on policy matters and is charged with approving state chartered charter schools. §§9-24-9 and 22-8B-16.

Schools districts in New Mexico are political subdivisions of the State. § 22-1-2(R). The powers of districts are delineated in state law. *See* NMSA Chapter 22, The Public School Code. New Mexico law also provides for charter schools authorized by local school boards or the Public Education Commission. §22-8B-2. The purpose of the Charter School Act includes promoting different and innovate methods of teaching and measuring student achievement. §22-8B-3. Like the regular public schools, charter schools must comply with federal and state anti-discrimination laws and provide special education services pursuant to federal and state laws. §22-8B-4.

35.3 Educational Decisions for Children in State Custody

35.3.1 Central Role of Parents in the Education of Their Children

Parents have recognized rights related to their authority to make decisions regarding their children's education. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Supreme Court has also affirmed that Congress accords parents of children with disabilities "independent, enforceable rights concerning the education of their children." *Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007). Many federal and state education laws provide parents with specific educational rights, especially in the context of public education.

Courts have long balanced the right of parents to direct their children's education with the state interest in ensuring that children are provided access to public education. As the Supreme Court noted in *Brown v. Bd. of Ed. of Topeka*, 347 U.S., 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."

35.3.2 New Mexico Children's Code Provisions on Education

When a child comes into the custody of the state, the state has the obligation to provide the child with education. §32A-1-4(P). Under state law, CYFD must develop a case plan that addresses the child's educational needs. §32A-4-21(B)(10). Because many post-secondary education and employment opportunities require prerequisite course work, the case plan must address transition planning for children aged fourteen and older, including a statement of the child's educational and post-secondary goals. §32A-4-21(B)(12). In addition, the case plan must include "a description of the child's foster care placement and whether it is appropriate in terms of the educational setting and proximity to the school the child was enrolled in at the time of the placement, including plans for travel for the child to remain in the school in which the child was enrolled at the time of placement, if reasonable and in the child's best interest." §32A-4-21(B)(13). Court review of the implementation of the case plan, including the education components of the plan, is required at every judicial review. §32A-4-25(A).

In 2015, CYFD adopted regulations that are intended to ensure educational continuity. At the initial placement and any placement change thereafter, CYFD must develop a plan for transportation for the child to remain in the same education setting in which the child was enrolled at the time of placement, if reasonable in the child's best interest. 8.10.8.10 and 8.10.8.18 NMAC.

35.3.3 Appointment of an Educational Decision Maker

Children's Code §32A-4-35 and Supreme Court Rule 10-316 clarify who has authority to make educational decisions for children when they are in state custody. The statute and rule are intended to ensure that every child in state custody has a person authorized to make

educational decisions under state and federal law, including decisions related to early education and special education.

In *all* abuse and neglect cases, the court is required to appoint an educational decision maker at the custody hearing and to review its appointment at every stage of the proceedings. The order should specify that the person has authority to obtain and release records under the Family Educational Rights and Privacy Act (FERPA), as well as make other educational decisions. *See* Supreme Court Form 10-564.

The commentary to Rule 10-316 is instructive:

> This rule is intended to ensure that the court clearly identifies for each child in an abuse and neglect proceeding a person who is authorized to make all decisions about the child's educational rights under state and federal law, including decisions related to early intervention and special education. The rule makes clear that in most cases, the person appointed as educational decision maker should be a respondent-parent of the child. However, certain laws authorize a court to appoint a person other than a parent to protect and to make decisions related to the child's educational rights. *See, e.g.*, 20 U.S.C. §§1415(b)(2)(A)(i), 1439(5) (authorizing a judge overseeing the care of a ward of the state to appoint a surrogate to protect the rights of the child under the Individuals with Disabilities Education Act (IDEA)); 34 C.F.R. § 300.30 (providing that a person appointed by judicial decree or order to make educational decisions on behalf of a child shall be considered a "parent" under the IDEA). Because certain educational rights may attach at an early age, including the right to identification, evaluation, and educational placement in special education or early intervention services under the IDEA, the rule requires the appointment of an educational decision maker for every child, including for infants and toddlers. *See* 20 U.S.C. §1412(a)(1)(A) (providing that a child with a disability is entitled to a free appropriate public education from the ages of three (3) to twenty-one (21)); 20 U.S.C. §1432(1), (5) (providing that an infant or toddler under the age of three (3) is entitled to identification and evaluation services to determine eligibility for early intervention services).

The court must appoint an educational decision maker in *every* case, including cases involving young children. Generally, when the plan is reunification, the respondent should be appointed. *See* §32A-4-35(C). Appointing parents as educational decision makers serves a number of important purposes, including: (1) promoting parent engagement in the child's education; (2) ensuring that the parent understands the educational needs of the child even when the child is in custody; and (3) preparing the parent to advocate for the child's needs when the child returns home. It is important to have a court order even when the educational decision maker is a respondent because often schools will be confused about the role of the parent when the child is in state custody.

If the parent is not fulfilling his or her responsibility to make educational decisions for the child, the court may appoint a different educational decision maker. When appointing an educational decision maker, priority should be given to someone who knows the child and

who has a long-term relationship with the child. This should *not* be a CYFD case worker. Federal special education regulations preclude an employee of an agency that is involved in the education or care of the child from being appointed as a surrogate parent for a ward of the state. *See, e.g.*, 34 C.F.R. §300.519(d). Because children may develop a qualifying disability at any time while in state custody, taking this same approach in Children's Court ensures that children will always have a properly qualified educational decision maker.

The court will also consider whether the proposed individual has any personal or professional interests that conflict with the interests of the child. Rule 10-316. While the regulations do not explicitly address the guardian *ad litem*, these attorneys have obligations to the court and to the child's best interest. As court appointed guardians *ad litem*, their powers and duties are set forth in the Children's Code, and nothing in the Code suggests that these powers and duties extend to personally making educational decisions for a child. §32A-1-7.

35.4 Federal Education Laws that Impact Children in State Custody

Children in state custody, like all children, have a variety of substantive and procedural rights related to education. The descriptions below present federal education laws that are most relevant to children in state custody.

35.4.1 Every Student Succeeds Act (ESSA)

Passed in 2015, the Every Student Succeeds Act (ESSA), P.L. 114-95, replaced No Child Left Behind and reauthorized the Elementary and Secondary Education Act of 1965. Its aim is to ensure success for elementary and secondary students nationwide, with particular attention paid to at-risk students such as those with disabilities, English language learners, historically disadvantaged groups, and youth in foster care. Title I of the ESSA, in particular, is geared towards ensuring that state educational agencies (SEAs) and local educational agencies (LEAs) help low-achieving and disadvantaged students succeed. These services often include extended learning time, coordination with Head Start or other federal programs, targeted professional development, and parent involvement.

Title I of ESSA requires that children in foster care be kept in their school of origin unless a determination is made that the present school placement is not in the child's best interest. The Act also requires that if a student is moved to a new school, there must be immediate communication and transfer of student's documents between the two schools. Because of the importance of school stability for a child's educational, social, and emotional wellbeing, keeping a child in the school of origin is the presumption under the Act. New Mexico requires that every school district to have a point of contact person identified to provide support to children in foster care and to ensure compliance with the mandates of the ESSA. §22-13-33.

If children stay at their school of origin but move homes, they are guaranteed transportation to and from that school. LEAs, generally school districts, must work with child welfare organizations and public agencies like CYFD to create and implement a transportation plan

to ensure that a child in the foster system is able to attend her or his school of origin. In considering whether or not to change a child's school placement, judges and other educational decision makers can take into account the child's performance in school, involvement in extracurricular activities, and relationships with peers and teachers.[vii] https://www.acf.hhs.gov/sites/default/files/cb/ed_hhs_foster_care_guidance.pdf.

35.4.2 McKinney-Vento Act

The ESSA also reauthorized and amended the McKinney-Vento Act, which provides for the education of homeless youth, to remove children "awaiting foster care placement" from the definition of "homeless children and youths." P.L. 114-95, §9105. Youth living in shelters while awaiting placement, however, still receive services under the McKinney-Vento Act. The Act requires SEAs to ensure that homeless youth receive a free and appropriate public education. 42 U.S.C. §11431. Like the ESSA's provisions on youth in foster care, the McKinney-Vento Act emphasizes the importance of school stability, and specifies that homeless students should be allowed to stay in their school of origin unless a change in placement is in the student's best interest. 42 U.S.C. §11432. SEAs and LEAs must coordinate with child welfare organizations to distribute services from federally funded homeless assistance programs to students. 42 U.S.C. §11431.

35.4.3 Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act, commonly referred to as FERPA, protects educational records from disclosure. FERPA applies to all schools that receive federal funds. 20 U. S. C. §§1232g, 1232h; 34 C.F.R Part 99. For the purposes of FERPA, educational records are defined broadly and include any records, files, documents or other material maintained by the school that contain information related to a student. Personal notes or memory aids of a teacher are not educational records as long as the notes are not disclosed to anyone else. The law prohibits disclosure of educational records except in limited circumstances, including but not limited to release to other educational institutions, law enforcement agencies and monitoring agencies. Parents have the right to review and inspect all educational records and can request a copy. Reasonable fees may be charged for copying school records. As described above, the New Mexico Supreme Court form appointing an educational decision maker for children in state custody ensures that the individual appointed by the court is able to access educational records. *See* Form 10-564.

35.4.4 Section 504 and IDEA

Nationally, students in foster care are 2.5 to 3.5 times more likely than peers to be eligible for special education services.[viii] Under Part B of the Individual with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act, all students with disabilities are entitled to a free and appropriate public education (FAPE) provided in the least restrictive environment (LRE) appropriate for that student. 20 U.S.C. §1400 (IDEA); 29 U.S.C. §794 (504). Children who display signs of having a disability are entitled to an assessment of their needs. If a child is identified as having a disability, that child may be entitled to a 504 Plan or an Individualized Education Plan (IEP). Most children with disabilities are served under IDEA

but, if a child does not qualify for services under the IDEA, a plan under Section 504 should be considered.

35.4.5 IDEA

35.4.5.1 Eligibility under IDEA

A student age three through 21 is entitled to services under the IDEA and an IEP if she (1) has a disability as defined by the statute; and (2) that disability adversely affects her education. Qualifying disabilities fit into one of 13 categories, including specific learning disabilities, intellectual disabilities, emotional disturbance, speech or language impairments, and autism, among others. When considering whether a disability negatively affects education, decision makers should take into account not only academic performance, but also behavior, attention, and social skills. Many students in foster care have experienced trauma, which often has an additional adverse effect on concentration and general behavior in school.

35.4.5.2 IEP

After a student is found eligible for an IEP, the IEP team -- consisting of educational decision makers, teachers, and other school personnel, the parent or the court appointed educational decision maker, and the student, if appropriate -- meets to determine which services and accommodations are necessary to ensure a FAPE. These services can range from modified instruction in the general education classroom to a full residential placement. Each service should help the student achieve a specific educational goal, which is also set forth by the IEP team. The IEP team must convene at least once per year to reevaluate the student's progress and needs, but under IDEA parents can convene an additional meeting at any time during the year. Students are reevaluated every three years at triennial IEP meetings. The purpose of the re-evaluation is to determine the child's needs for educational or related services. 34 C.F.R. §300.303(a)(1).

35.4.5.3 Behavior Supports

Under IDEA, schools must provide positive behavioral support to students with IEPs who exhibit problematic behavior in the classroom. For students with significant behavioral concerns, schools often create behavioral intervention plans. Additionally, if a student with an IEP is suspended for more than ten days or if the school makes the decision to expel a student, the school must hold a manifestation IEP meeting. The purpose of this meeting is to determine if the behavior leading to the suspension or expulsion was a manifestation of that child's disability. A student with an IEP cannot be expelled for a manifestation of their disability. Instead, the school must develop a behavior intervention plan to support the student.

Positive behavioral supports are particularly important for children in foster care. Research demonstrates that trauma can impair a child's ability to learn. A child who is exposed to repeated complex trauma might reasonably perceive ordinary questions from teachers, alarm bells, or hallway jostling as being challenges, triggering hostility (a "fight" response) or withdrawal (a "flight" response). Students who are reliving trauma in the classroom or who

cannot self-regulate as a result of trauma, and who have not been given access to appropriate resources, may not be able to sit still or concentrate. They may act out or overreact.

Medical, mental health, and education research has confirmed that unaddressed trauma affects a student's ability to participate and succeed in school. Numerous studies have shown that children exposed to violence demonstrate significantly lower reading ability and grade-point averages, increased absences from school, and overall lower rates of high school graduation.[ix] Research reveals that children exposed to Adverse Childhood Experiences (ACEs) are subject to an escalating array of detrimental educational impacts. For example, research has shown that:

- Exposure to two or more such traumas makes a student 2.67 times more likely to repeat a grade or become disengaged with school.[x]
- Exposure to three or more traumas makes a student 4 times more likely to experience academic failure,[xi] and 5 times more likely to have serious attendance problems.[xii]
- Students who have witnessed violence, in particular, meet state academic-performance standards only half as often as peers who have not.[xiii]

In general, behavior is one way that children communicate what they need. For children receiving special education services, IDEA requires schools to provide positive behavioral supports when their behavior is impacting learning.

35.4.5.4 Transition Services

Under IDEA, by the time the child turns 16, the child's IEP must address "transition" requirements.[xiv] According to the federal Office of Special Education and Rehabilitation Services: "The IEP must include: (1) appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the student with a disability in reaching those goals)."[xv] Transition services aim to help the student learn independent living skills. Services are often provided to address self-advocacy, money management, self-care, community experiences, selecting and applying to post-secondary schools, as well as planning and support for courses of study.

35.4.5.5 Changing Schools

If a child is moved to a new school, that school must provide "services comparable to those described in the previously held IEP." 34 C.F.R. §300.323(d). If the new school district is in a different state, the district may elect to re-evaluate the student, but must continue to provide services in the previous IEP to the child while the assessment is underway. Schools must promptly exchange records to ensure that there is no lag in the provision of services to the child. 34 CFR §300.323(g). It is crucial to ensure that any new school is able to obtain a student's educational records quickly.

35.4.5.6 Parents under IDEA

IDEA aims to ensure that schools identify all children with disabilities. As a result, the law outlines with specificity who may act as a parent for the purposes of protecting student rights. Under IDEA, the first priority is the biological or adoptive parent of a child. However, foster parents, guardians and other individuals acting in the place of parent can also be recognized as parents under IDEA. 34 C.F.R. §300.30. In the event that no individual is available to act as a parent, the school has an obligation to appoint a surrogate parent. 34 C.F.R. §300.519. Because a number of individuals may be treated as parents for the purposes of IDEA, it is essential that courts appoint an educational decision maker when children are in state custody so that everyone knows who is responsible for making decisions under IDEA.

35.4.6 Section 504

Section 504 of the Rehabilitation Act "is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance." 34 C.F.R. §104.1. The law provides: "No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…." 29 U.S.C. §794(a). To demonstrate a violation of §504, a student must establish four elements: (1) he or she is an "individual with a disability" under the terms of the Rehabilitation Act; (2) he or she is "otherwise qualified" to receive the benefits or services sought, (3) he or she was denied the benefits of the program "solely by reason of her or his disability"; and (4) the program receives federal financial assistance.

35.4.6.1 Eligibility under Section 504

Disability under §504 is defined broadly to include any "physical or mental impairment that substantially limits one or more life activities," such as (but not limited to), "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. §12102(2)(A). Exposure to trauma can impact learning and, when it does, children are protected under §504.

35.4.6.2 Services under Section 504

Provision of appropriate services and supports is key to students with disabilities being able to access public education. Just as a ramp allows a student with a disability to get into the school house door, provision of necessary services and supports allows students with disabilities to participate in their classes and to learn the academic and behavioral skills they will need to progress – in short, to meaningfully access public education.

A variety of federal regulations impose specific duties and obligations on schools to ensure full compliance with §504. In the public school context, §504's nondiscrimination mandates require federal officials to ensure access to appropriate educational settings for students with disabilities; establish and conduct identification, evaluation and placement procedures for students with disabilities; and establish and implement procedural safeguards for any actions

related to the "identification, evaluation, or educational placement" of students with disabilities. 34 C.F.R. §§104.32, 104.34, 104.35, 104.36.

35.4.6.3 Least Restrictive Environment

Section 504 further requires schools to provide educational services to students with disabilities in the least restrictive environment possible and appropriate to meet the students' educational needs. This includes educating students with disabilities alongside students *without* disabilities to the maximum extent appropriate. It also includes providing education to students with disabilities in their home communities. In the rare instances when the provision of needed services at school is not sufficient to meet the needs of a student with a disability, schools must take into consideration the proximity of alternative settings to the student's home. 34 C.F.R. §104.34.

When individual students need special education and related services, or modifications or accommodations in school, an individualized 504 Plan is developed.

35.5 NM Education Laws that Impact Children in State Custody

New Mexico's Public School Code, NMSA Chapter 22, governs the provision of public education to all students in the state. Below are descriptions of New Mexico education laws that often affect children in state custody.

35.5.1 Compulsory School Attendance

Regular school attendance is key to school success, yet students in foster care experience higher rates of absence, particularly when children are placed in congregate care.[xvi] All school aged people in New Mexico are required to attend public school, home school or a state institution at least until they are eighteen, unless the individual has graduated or received a high school equivalency credential. A parent may provide written, signed permission for a student to leave school in the case of hardship, as approved by the superintendent. Parents are responsible for the attendance of their children. §22-12-2. For the purposes of the Public School Code, parents include a guardian or other person having custody and control of a school-age person; thus, the Department has a responsibility to ensure that children are attending school. §22-1-2(J).

35.5.2 Enrollment and Records

Delays in enrollment can have adverse consequences for the student. In New Mexico, a free public school must be available to any school aged resident of the state who has not received a high school diploma or its equivalent. Schools must ensure that new students are placed appropriately, taking into consideration student age and achievement. Schools shall prioritize enrollment as follows: (1) students within their attendance area; (2) students enrolled in a school rated as "F" for two of the prior four years; (3) students who previously attended the public school; and (4) all others. The only grounds for denial of enrollment or re-enrollment are a student's expulsion from any school in the preceding twelve months or

the student's behavior in any other school during the preceding twelve months that is detrimental to the welfare or safety of students or school employees. §22-1-4.

If a student has to change schools because of his or her foster care placement, the receiving school or school district must communicate with the sending school district within two days of the student's enrollment. The sending school or school district shall provide the receiving school or school district with any requested records within two days of having received the receiving school's or school district's communication. §22-12-10.

35.5.3 School Discipline

Children in foster care are subject to school discipline resulting in suspensions and expulsions at a higher rate than other students. Local school boards establish student discipline policies. The policies must set out the rules of conduct and detail specific prohibited acts and activities, as well as possible disciplinary sanctions. Corporal punishment must be prohibited in the policies. §22-5-4.3. In addition, schools must have policies that limit the use of restraint and seclusion to situations in which the student's behavior presents an imminent danger of serious physical harm to the student or others and less restrictive interventions appear insufficient to mitigate the danger. §22-5-4.12. Finally, New Mexico schools are weapon free and students are subject to exclusion for not less than a year if they knowingly bring a weapon on campus. §22-5-4.7(A). Students with disabilities may be immediately placed in an alternative school placement if they knowingly bring a weapon to school. §22-5-4.7(B).

Schools must allow students to carry and self-administer asthma medication and emergency anaphylaxis medication that has been legally prescribed to the student. §22-5-4.3.

35.5.4 Testing

Research indicates that children in state custody perform worse on standardized tests.[xvii] PED mandates assessments for a variety of purposes, including as a requirement for graduation and as part of the state's teacher evaluation system. In order to graduate with a diploma, students in New Mexico must demonstrate competence in five areas: reading, writing, math, science, and social studies. When determined appropriate by a student's IEP team, some students with disabilities are provided an alternative assessment. ELL students are provided annual assessments of their language fluency; these assessments help determine appropriate placement and services.

Standardized assessments are only one method of measuring student performance. Yet, these tests provide meaningful feedback to parents and teachers about how a student is progressing in school. Parents in New Mexico can opt their children out of required statewide standardized assessments.

35.5.5 Academic Improvement Plans and Retention

Holding students back can contribute to students dropping out of school. Children in foster care experience a higher rate of grade retention.[xviii] Elementary and middle school students who fail to attain proficiency on school assessments qualify for an Academic Improvement Plan (AIP). Parents must be notified if the student is eligible for an AIP, which is then developed by the parent, the teacher and, when appropriate, the student. This initial written AIP must include specific academic deficiencies and remediation strategies, timelines, measurements and academic expectations. At the end of grades one through seven, the student may be: (1) promoted due to academic proficiency; (2) if the student is not proficient, the student may be promoted but the student shall be required to participate in remediation; or (3) if the student is not academically proficient, upon recommendation of the teacher or the principal, and permission from the parent, the student may be retained for no more than one school year with an AIP. §22-2C-6(F). A student who is not proficient at the end of two school years shall be referred to the student assistance team. §22-2C-6. In New Mexico, all schools have student assistance teams who are charged with addressing the needs of students who are experiencing academic or behavioral difficulties that are affecting their education.

35.5.6 Special Education and Gifted Services

New Mexico law mandates compliance with federal disability laws, including IDEA and §504. §22-13-6. In addition, the state includes students who are gifted in special education and generally requires compliance with special education procedural protections, including requiring schools to develop IEPs for gifted students. 6.31.2.12 NMAC. New Mexico qualifies students for gifted services in the areas of creativity or divergent thinking, problem-solving ability or critical thinking, intelligence, and achievement. §22-13-6.1.

35.5.7 Transition

Students in state custody, like other students, require adult support to ensure that they graduate from high school and enter the work force or go to college. New Mexico requires schools to ensure that every student in grades 8-11 develop a written Next Step Plan (NSP). §22-13-1.1. The NSP identifies students' post-secondary interests and sets forth a plan of study to be on track for graduation. It must be completed within 60 days prior to the beginning of the school year and updated annually. The final NSP must be developed during a student's senior year and included in the student's cumulative file. Parents approve and sign the NSP until the student is 18, at which time parental approval is not required. For students with IEPs, the IEP must address all NSP requirements. *See* 6.31.2.11(G) NMAC.

35.5.8 School Transfers

Students who have been adjudicated abused or neglected and have to change schools during a school year now have priority placement in classes that meet state graduation requirements; and timely placement in elective classes that are comparable to those in which the student was enrolled at the student's previous school or schools as soon as the school or school district receives verification from the student's records. §22-12-10.

If the student is in high school and has had to change schools at any time during high school, §22-12-10 requires that the new school district and public school ensure:

(1) acceptance of the student's state graduation requirements for a diploma of excellence pursuant to the Public School Code;

(2) equal access to participation in sports and other extracurricular activities, career and technical programs or other special programs for which the student qualifies;

(3) timely assistance and advice from counselors to improve the student's college or career readiness; and

(4) that the student receives all special education services to which the student is entitled.

35.5.9 Extracurricular Activities

Extracurricular activities promote academic achievement and positive identity development. These activities are often sponsored by a young person's school and can provide an opportunity for students to connect with other students and teachers. Participation in extracurricular activities can be a strong motivator for students to continue in school. In 2017, the New Mexico Legislature passed a law requiring all schools to have a point of contact for foster youth. One of the responsibilities of the point of contact is to make sure that foster youth have equal opportunity to participate in sports and other extracurricular activities, career and technical programs or other special programs. §22-13-33.

35.6 Early Intervention Services

Young children grow remarkably fast, with an exponential developmental curve. Ages birth to five are crucial for the architecture of brain development. The foundations of several vital life skills are built in early childhood, including self-regulation, decision-making, delaying gratification and the ability to adapt. Healthy early development promotes positive academic achievement. The New Mexico Legislature and the Supreme Court require that an educational decision maker be appointed in **every** abuse and neglect case regardless of the child's age. §32A-4-35; Rule 10-316.

35.6.1 Family Infant Toddler Program (FIT)

Infants and young children from 0 to 3 years of age who are in state custody should be referred to early intervention services through the New Mexico Family Infant Toddler Program (FIT) if there is any concern that they may have developmental delays. FIT is a program through the Department of Health that oversees a network of private and public providers that serve children from 0 to 3 years of age who have developmental delays or are at risk of having developmental delays. Children are entitled to assessments to determine whether they have developmental delays. In addition, children and their families have rights and procedural protections under IDEA Part C. 34 C.F.R. Part 303.

35.6.2 Pre-K Education

Children who reach their fourth birthday by September 1st are eligible to attend Pre-K programs in New Mexico. This is a voluntary preschool program administered through the PED and CYFD. The goal of the program is ensure that every child has the opportunity to attend a high quality early childhood program before kindergarten. §32A-23-1 *et seq*.

35.7 Legal Protections for Diverse Students in New Mexico

Students in New Mexico reflect the rich diversity of the state. New Mexico law provides protections that target the specific needs of diverse students. For example, there are 23 Indian tribes and pueblos in New Mexico and Native American students make up over ten percent of the student population in the state. In 2003, New Mexico passed the Indian Education Act. §22-23A-1 *et seq*. The purposes of the Act include ensuring that students have access to equitable and culturally relevant learning opportunities and materials, as well as maintaining native languages. The Act also promotes partnerships between PED and tribal communities. New Mexico has also passed the Hispanic Education Act. §22-23B-1 *et seq*. The purposes of the Act include developing and implementing educational programs to close the achievement gap and increase graduation rates for Latino students.

New Mexico schools are able to provide bilingual, multicultural education programs for students who are English language learners (ELL). "English language learner" is defined as a student whose first or native language is not English and who is unable to read, write, speak or understand English at a level comparable to grade level English proficient peers and native English speakers. §22-23-2(D). Some districts provide ESL (English as a second language) programs instead of, or in addition to, bilingual multicultural educational programs.[xix]

Immigrant families constitute a large segment of families in the United States, and in New Mexico in particular. It is estimated that at least twenty percent of the children in New Mexico come from immigrant families, and, as of 2008, there were an estimated 80,000 undocumented immigrants in New Mexico.[xx] Significantly, undocumented children are entitled to attend public schools and receive special education services if necessary. *See Plyler v. Doe*, 457 U.S. 202 (1982).

35.8 Resources

A number of resources are available for anyone who wants to learn more about the educational rights of children in foster care and the educational services that should be available to them, as well as the challenges they face. These include

Legal Center for Foster Care and Education
http://www.fostercareandeducation.org/

National Working Group on Foster Care and Education
http://www.fostercareandeducation.org/OurWork/NationalWorkingGroup.aspx

National Council of Juvenile and Family Court Judges, checklist found at: http://www.ncjfcj.org/resource-library/publications/asking-right-questions-ii-judicial-checklists-meet-educational-needs

U.S. Department of Education, education and foster youth resources https://www2.ed.gov/about/inits/ed/foster-care/index.html

Wrightslaw Special Education and Advocacy http://www.wrightslaw.com/

New Mexico Public Education Department https://webnew.ped.state.nm.us/

New Mexico FIT Program https://nmhealth.org/about/ddsd/pgsv/fit/

New Mexico PreK https://www.newmexicoprek.org/

The following endnotes, which are pegged to passages in the text, may also be helpful.

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[i] *See* Factsheet on the Educational Outcomes of Children in Foster Care, available at: www.fostercareandeducation.org (last visited May 1, 2018).

[ii] Legislative Education Study Committee Bill Analysis CS/SB 206 (2014)

[iii] *See* Factsheet on the Educational Outcomes of Children in Foster Care p. 7, available at: www.fostercareandeducation.org (last visited May 1, 2018).

[iv] https://www.americanbar.org/content/dam/aba/migrated/child/education/QA_2_Credits_FINAL.authcheckdam.pdf

[v] Child Trends (2015).

[vi] https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/fosteringconnections (2014 Letter to Chief State School Officers and Welfare Directors).

[vii] U.S. Department of Education and U.S. Department of Health and Human Services, *Non-Binding Guidance: Ensuring Education Stability for Children in Foster Care*, pp. 11-14: https://www.acf.hhs.gov/sites/default/files/cb/ed_hhs_foster_care_guidance.pdf (last visited May 1, 2018).

[viii] http://cdn.fc2success.org/wp-content/uploads/2012/05/National-Fact-Sheet-on-the-Educational-Outcomes-of-Children-in-Foster-Care-Jan-2014.pdf

[ix] *E.g.*, Sheryl Kataoka et al., *Effects on School Outcomes in Low-Income Minority Youth: Preliminary Findings from a Community-Partnered Study of a School Trauma Intervention*, 21 ETHN. DIS. 7 (2011); Nadine J. Burke et al., *The Impact of Adverse Childhood Experiences*, 35 CHILD ABUSE & NEGLECT 408 (2011): Jeffrey Grogger, *Local Violence and Educational Attainment*, 32 J. HUMAN RESOURCES 659 (1997).

[x] Christina D. Bethel et al., *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33:12 HEALTH AFFAIRS 2106, 2111 (2014).

[xi] *Id.*

[xii] Christopher Blodgett, *No School Alone: How Community Risks and Assets Contribute to School and Youth Success, Report to the WA State Office of Financial Management in response to Substitute House Bill 2739* 25 (March 2015).

[xiii] Christopher C. Henrich *et al*., *The Association of Community Violence Exposure with Middle-School Achievement: A Prospective Study*, 25 J. APPL. DEV. PSYCHOL. 327 (2004).

[xiv] Under New Mexico law, transition planning begins at age 14.

[xv] https://www2.ed.gov/about/offices/list/osers/transition/products/postsecondary-transition-guide-may-2017.pdf

[xvi] "Research Highlights on Education and Foster Care" (July 2011).

[xvii] *Id.*

[xviii] *Id*.

[xix] Education Commission of the States, http://ecs.force.com/mbdata/mbstcprofexc?Rep=ELP14&st=New%20Mexico

[xx] Capps R, Fortuny K., *Immigration and Child and Family Policy*, prepared for the Urban Institute and Child Trends (January 12, 2006).

CHAPTER 36

FEDERAL CHILD WELFARE LAWS AFFECTING STATE PROCEEDINGS

Federal law has played a major role in the development of state law and policy on child abuse and neglect. This chapter describes such federal legislation as:

- Child Abuse Prevention and Treatment Act of 1974
- Adoption Assistance and Child Welfare Act of 1980
- Adoption and Safe Families Act of 1997
- Foster Care Independence Act (Chafee Act)
- Multiethnic Placement Act
- Safe and Timely Interstate Placement of Foster Children Act of 2006
- Fostering Connections to Success and Increasing Adoption Act of 2008
- Preventing Sex Trafficking and Strengthening Families Act
- Family First Prevention Services Act
- Child and Family Service Reviews.

The Indian Child Welfare Act is outlined at length in Chapter 32.

36.1 Introduction

Since 1974, federal law has played a major role in the development of state law and policy on child abuse and neglect proceedings. Some laws, such as the Indian Child Welfare Act, discussed in Chapter 39, apply directly to state court proceedings. Most of the laws in this area affect the states because they grant or deny federal funds depending on the state's compliance with certain conditions.

The federal law on child abuse and neglect is found primarily in Title IV-B and Title IV-E of the Social Security Act. Title IV-B and Title IV-E offer funds to the states and tribes for family preservation and support services, child welfare services, state administrative costs in administering child welfare programs, foster care payments, guardianship assistance and adoption subsidies. Approximately fifty percent of the funds used to support children in foster care in New Mexico is federal money which, under the legislation passed by Congress over the past 35 years, is available only if the state meets eligibility requirements. Similarly, these funds can be withdrawn if requirements are not met.

The Children, Youth and Families Department (CYFD) submits plans and reports to the federal Children's Bureau on a regular basis. These provide an excellent overview of CYFD's initiatives and services in the area of child welfare. CYFD's 2015 - 2019 Child and

Family Services Plan, for example, can be reviewed on the CYFD website, http://www.cyfd.org, under Publications.

36.2 Child Abuse Prevention and Treatment Act

Congress began to take an active role in the child welfare system with the adoption of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), P.L. 93-247, 88 Stat. 4, 42 U.S.C. §§5101–5107. The Act authorized financial assistance to public agencies and private nonprofit agencies for demonstration programs designed to prevent, identify, and treat child abuse and neglect, and provided for grants to states to assist the states in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

CAPTA has been amended over the years and contains a number of requirements that states must meet as a condition of receiving funds under the Act. States are, for example, required to provide for the reporting of abuse or neglect, immunity for persons reporting abuse or neglect, prompt investigation of reports, and methods for preserving confidentiality of records. The Act also requires that states establish citizen review panels, the requirements for which are outlined in the law, and that guardians ad litem, who have received training appropriate to the role, be appointed to represent children in abuse and neglect proceedings. In 2010, Congress added the requirement that this training include training on early childhood and child and adolescent development. Under CAPTA, fingerprinting and criminal background record checks are required for prospective foster and adoptive parents and for other adults living in the household. 42 U.S.C. §5106a(b)(2).

When CAPTA was passed, it required that state programs assisted under Title IV-B of the Social Security Act, which was adopted in 1968, meet these same conditions. This requirement remains in effect. Title IV-B, which provides funding for child welfare services and, since 1993, family preservation and family support services, continues to be subject to the conditions listed in CAPTA. 42 U.S.C. §5106a(b)(2)(E). (Title IV-B is found in 42 U.S.C. §§621-629i.)

36.3 Adoption Assistance and Child Welfare Act

While CAPTA brought some attention to the prevention and treatment of child abuse and neglect, less attention was being paid to the child's long-term need for permanency. It became apparent that children were drifting from foster home to foster home. The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500, 42 U.S.C. §§670-676 (and amending §§620-628), was the next major effort to address the needs of children who suffered from abuse or neglect. The Act was intended to protect children when they were in foster care, to shorten the time children spent in foster care, and to encourage permanency planning for children through the reunification of families when possible and termination of parental rights and adoption when not.

P.L. 96-272 established Title IV-E of the Social Security Act, which makes federal financial assistance available to states with foster care systems that meet the Act's requirements. In particular, Title IV-E provided for federal participation in foster care maintenance payments,

as well as subsidies for the adoption of children with special needs. The Act also provided for the withdrawal or reduction of financial assistance from states that did not comply with federal requirements. *See* 42 U.S.C. §§670-676.

For a state to be eligible for payments under the Act, it had to have a state plan in place. The plan had to provide that, in each case, reasonable efforts would be made (1) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (2) to make it possible for the child to return to his home. The plan also had to provide for the development of a case plan for each child receiving foster care maintenance payments, as well as for a case review system for the child. As part of the case review system, the status of the child had to be reviewed by a court at least every six months and the child had to be assured of a dispositional hearing by the court no later than 18 months after the original placement, and periodically thereafter.

Besides having a state plan in place, the state could only make foster care maintenance payments with respect to any given child if the removal from the home was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of the child. The court also had to find that reasonable efforts to maintain the child in the home or, after removal, to return the child home were made.

These Title IV-E provisions and requirements remain in place today, with a number of additions and modifications made by the Adoption and Safe Families Act in 1997, the Fostering Connections to Success and Increasing Adoptions Act in 2008, and other legislation. One of the most significant changes made by ASFA has to do with permanency. Before 1997, there was a requirement for a dispositional hearing no later than 18 months after the original placement. Now, a permanency hearing must be held within 12 months of the date the child is considered to have entered foster care and at least every 12 months thereafter. A permanency plan must be determined at this hearing. ***See*** §36.4 below.

36.4 Adoption and Safe Families Act

The Adoption and Safe Families Act (ASFA), P.L. 105-89, 111 Stat. 2115, amending 42 U.S.C. §§671-675, was passed in 1997 to improve the safety of children and to promote adoption and other permanent homes for children who need them, as well as to continue to support families. Stating that the child's health and safety were of paramount concern, the law made changes in and clarified some of the policies established under the Adoption Assistance and Child Welfare Act of 1980. It contained a wide range of provisions, from reauthorization of existing programs to providing adoption incentives for states.

ASFA regulations went into effect on March 27, 2000. This chapter will focus on the ASFA regulations that affect state judicial abuse and neglect proceedings.

A state must meet certain requirements in order to comply with foster care program provisions of the Title IV-E state plan or to be eligible to receive federal financial participation for foster care maintenance payments. While some requirements affect state

plan compliance alone, others affect the child's eligibility for Title IV-E foster care payments.

- **Reasonable Efforts Generally.** The state must make reasonable efforts to:
  - maintain the family unit and prevent the unnecessary removal of a child from his or her home, as long as the child's safety is assured;
  - effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and
  - make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. 45 C.F.R. §1356.21(b).

- **"Contrary to Welfare" Determination in First Court Ruling.** A child's removal from the home must be the result of a judicial determination that continuation in the home would be contrary to the welfare of the child, or that placement outside the home would be in the best interest of the child. This determination must be made in the first court ruling that sanctions (even temporarily) the removal of the child from the home. If this "contrary to the welfare" determination is not made in the first court ruling, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. The omission cannot be remedied. 45 C.F.R. §1356.21(c).

- **Reasonable Efforts to Prevent Removal.** When a child is removed from his or her home, a judicial determination as to whether reasonable efforts were made, or were not required, to prevent removal must be made no later than 60 days from the date the child is removed from his home. If this determination is not made, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. 45 C.F.R. §1356.21(b)(1).

- **Reasonable Efforts Not Required.** Reasonable efforts to prevent removal or to reunify the family are not required where the state agency has obtained a judicial determination that such efforts are not required because:
  - The parent has subjected the child to aggravated circumstances (as defined in state law);
  - The parent has been convicted of murder or voluntary manslaughter of another child of the parent, aiding or abetting, attempting, conspiring or soliciting to commit murder or voluntary manslaughter, or a felony assault that results in serious bodily injury to the child or to another child of the parent; or
  - Parental rights have been terminated involuntarily with respect to a sibling. 45 C.F.R. §1356.21(b)(3).

- **Foster Care Placement; Limit on Court Role**. To satisfy the requirements for a case plan for each child (***see*** §36.3 on P.L. 96-272 above), the state agency must promulgate policy materials and instructions for use by staff to determine the appropriateness and necessity for the foster care placement of the child. Federal financial participation in foster care payments is not available when a court orders a placement with a specific foster care provider. 45 C.F.R. §1356.21(g).

- **Permanency Hearing; Deadline.** Previously, the Adoption Assistance and Child Welfare Act required that states hold dispositional hearings within 18 months after placement of a child in foster care. ASFA repeals this provision and establishes a permanency planning hearing. This hearing must occur within 12 months of the date a child "is considered to have entered foster care," or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required. A child "is considered to have entered foster care" on the earlier of the date of the first judicial finding of abuse or neglect or the date that is 60 days after the child is removed from the home. 45 C.F.R. §1355.20(a).

- **Permanency Plan Set at Hearing.** The court must determine the permanency plan, or goal, for the child at the permanency hearing. 45 C.F.R. §§1355.20 and 1356.21(h). (This hearing to determine the permanency plan does not have to be the "permanency hearing" described in state law. Under ASFA, the court can hold a hearing on the permanency plan any time, which must be at least every 12 months.)

- **Permissible plans.** Permissible permanency plans, or goals, under ASFA are:
  - reunification;
  - adoption;
  - legal guardianship;
  - placement permanently with a fit and willing relative; or
  - another planned permanent living arrangement, but only if the state agency has documented to the court a compelling reason why none of the other options would be in the child's best interest. 45 C.F.R. §1355.20

- **Reasonable Efforts to Finalize Plan.** The state agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement). This determination must be made within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter while the child is in foster care. If the determination is not made, the child becomes ineligible for Title IV-E payments after the end of the 12th month following the date he or she is considered to have entered foster care, and remains ineligible until such a determination is made. 45 C.F.R. §1356.21(b)(2).

- **TPR Required; Deadline for Filing.** The state must file or join in a petition to terminate parental rights if the child has been in foster care for 15 of the most recent 22 months. The petition must be filed by the end of the child's 15th month in foster care. 45 C.F.R. §1356.21(i)(1)(i).

  This 15 month period runs from the date on which the child is considered to have entered foster care, that is, the date on which the child was adjudicated an abused or neglected child or the date 60 days after the child was removed from the home, whichever comes first. 45 C.F.R. §1355.20(a). When a child experiences multiple

exits from and entries into foster care during the 22 month period, the state must use a cumulative method of calculation and must not include trial home visits or runaway episodes in calculating the 15 months. 45 C.F.R §1356.21(i)(1)(i)(B) and (C).

- **TPR Within 60 days of Felony Determination.** If the parent has been convicted of one of the felonies listed in the regulations, the petition to terminate must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required. 45 C.F.R. §1356.21(i)(1)(iii)

- **TPR Within 60 days of Abandoned Infant Determination.** If a child is determined by the court to be an "abandoned infant" (as defined by state law), the petition to terminate must be filed within 60 days of the judicial determination that the infant is abandoned. 45 C.F.R. §1356.21(i)(1)(ii).

- **Exceptions to TPR Requirement.** The state agency may elect not to file for TPR at 15 months if:
    - at the agency's option, the child is being cared for by a relative;
    - the agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child, or
    - the agency has not provided to the family services that the state deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required. 45 C.F.R. §1356.21(i)(2).

- **Compelling Reasons.** Compelling reasons for determining that filing for TPR would not be in the best interests of the child include but are not limited to:
    - Adoption is not the appropriate permanency goal for the child; or
    - No grounds to file a petition to terminate parental rights exist; or
    - The child is an unaccompanied refugee minor as defined in certain federal regulations; or
    - There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights. 45 C.F.R. §1356.21(i)(2)(ii).

  (The New Mexico Children's Code does not use the term "compelling reasons" in its list of reasons for not filing for TPR but the list was intended to serve the same purpose. *See* §32A-4-29(G).)

- **Recruiting Adoptive Family Begins at Filing for TPR**. When the state files a petition to terminate parental rights, it must concurrently begin to recruit, identify, process and approve a qualified adoptive family on behalf of the child, regardless of age. 45 C.F.R. §1356.21(i)(3).

- **Specific Findings on "Contrary to Welfare" and "Reasonable Efforts" Required.** Judicial determinations that remaining in the home would be contrary to the welfare of the child and that reasonable efforts were made to prevent removal and to finalize the permanency plan in effect, as well as judicial determinations that reasonable efforts are not required, must be:

- explicitly documented;
- made on a case-by-case basis; and
- stated in the court order.

A transcript of the court proceeding is the only other documentation that will be accepted to verify that these determinations have been made. Affidavits, *nunc pro tunc* orders, and references to state law are not acceptable. 45 C.F.R. §1356.21(d).

36.5 Foster Care Independence Act

The Foster Care Independence Act, P.L. 106-169 (also known as the Chafee Act), was signed into law on December 14, 1999, creating the John H. Chafee Foster Care Independence Program, which is run through the states under Title IV-E. An Independent Living program that helped older foster children earn high school diplomas, participate in vocational training or education, and learn daily living skills such as budgeting, career planning, and securing housing and employment existed before the Chafee Act was passed but it focused on youth under the age of 18. The Chafee Act increased the annual appropriations to the states for the program and requires that a portion of the funds be used for assistance to young people ages 18 to 21 who exit foster care. The intent is to provide states with funding for programs that provide financial, housing, counseling, employment, education, and other support and services to former foster care recipients to complement their own efforts to achieve self-sufficiency. 42 U.S.C. §677.

The Promoting Safe and Stable Families Amendments of 2001, P.L. 107-133, 115 Stat. 2413, enacted in 2002, authorize vouchers for "education and training, including postsecondary training and education, to youths who have aged out of foster care." *See* 42 U.S.C. §677(a)(6). Among other things, the law provides that states may allow youths participating in the voucher program on the date they turn 21 to remain eligible until they turn 23, as long as they are enrolled in a postsecondary education or training program and are making satisfactory progress toward completion of the program. Vouchers may not exceed the lesser of $5,000 per year or the total cost of attendance. 42 U.S.C. §677(i). The Family First Prevention Services Act, included in P.L. 115-23 in 2018, will allow youth to participate until age 26 instead of 23, although each youth is limited to five years of participation. (The extent to which the state receives these funds depends on actual congressional appropriations from year to year, as well as on the manner in which funds are distributed or allocated to the states.)

36.6 Multiethnic Placement Act

The Howard M. Metzenbaum Multiethnic Placement Act, P.L. 103-382, 108 Stat. 4056, was adopted in 1994 and modified in 1996. The Multiethnic Placement Act (MEPA) was passed to promote the best interests of children by: (1) decreasing the length of time that children wait to be adopted; (2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and (3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs. MEPA, as amended, is found in 42 U.S.C. §§622(b)(7), 671(a)(18) and 1996b.

The Act amended the requirements for states to meet in order to receive Title IV-B funding. The state's plan for child welfare services must provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. §622(b)(7).

The state's plan for foster care and adoption assistance under Title IV-E must also comply with MEPA. The plan must provide that neither the state nor any other entity in the state that receives funds from the federal government and is involved in adoption or foster care placements may discriminate on the basis of the race, color, or national origin of the adoptive or foster parent, or of the child. 42 U.S.C. §671(a)(18).

The 1996 legislation amended the civil rights laws to prohibit persons and governments involved in adoption or foster care placements from:

- denying to any individual the opportunity to become an adoptive or foster parent on the basis of race, color, or national origin of the individual or of the child; or
- delaying or denying the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child.

However, this law is not to be construed to affect the application of the Indian Child Welfare Act. 42 U.S.C. §1996b(3).

36.7 Safe and Timely Interstate Placement of Foster Children Act of 2006

The Safe and Timely Interstate Placement of Foster Children Act was enacted July 3, 2006 to encourage the "safe and expedited placement of children into safe, permanent homes across State lines." P.L. 109-239, §2, 120 Stat. 508. The Act amends Titles IV-B and IV-E in a number of ways intended to improve the orderly and timely interstate placement of children. It also requires that the court determine at permanency hearings whether a child's out-of-state placement continues to be appropriate and in the children's best interest. 42 U.S.C. §675(5)(C).

This legislation also includes a number of provisions unrelated to interstate placement. One is that the state provide for a child's health and education records to be provided to the child at no cost when the child leaves foster care by reason of having attained the age of majority. 42 U.S.C. §675(5)(D). Another is that the state have a procedure for assuring that foster parents, pre-adoptive parents, and relative caregivers are provided notice of, and a right to be heard in the proceedings. 42 U.S.C. §675(5)(G). Federal guidelines interpret the word "proceedings" to mean permanency hearings and periodic judicial reviews. *See* Program Instruction ACYF-CB-PI-07-03, which can be found on the Children's Bureau website, http://www.acf.hhs.gov/programs/cb.

36.8 Child and Family Services Improvement Act of 2006

The Child and Family Services Improvement Act, P.L. 109-288, enacted in 2006, makes a number of changes to Titles IV-B and IV-E, including the following:

- The state's case review system must include procedural safeguards to assure that in any permanency hearing with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court consult, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child. 42 U.S.C. §675(5)(C). (Federal guidelines interpret this requirement to permit the child's views to be reported by, for example, the child's GAL or attorney. Child Welfare Policy Manual §8.3C.2c (10/17/07).)

- State plans for child welfare services must describe standards for the content and frequency of caseworker visits with children in foster care that, at a minimum, ensure that children are visited on a monthly basis and that the visits focus on issues pertinent to case planning and service delivery to ensure the children's safety, permanency, and well-being**.** 42 U.S.C. §622(b)(17).

36.9 Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections"), P.L. 110-351, 122 Stat. 3949, was enacted in September of 2008. The legislation amends Titles IV-B and IV-E of the Social Security Act to connect and support relative caregivers, improve outcomes for children in foster care, provide for tribal foster care and adoption access, improve incentives for adoption, and for other purposes. The Act primarily amends 42 U.S.C. §§671-676, or Title IV-E.

As with Title IV-E generally, the requirements in Fostering Connections are conditions for receiving federal foster care dollars. The Act:

- Requires the state agency to exercise due diligence to identify and provide notice to all adult relatives of a child within 30 days after the child is removed from the home.

- Requires the state agency to help youth develop a transition plan during the 90-day period right before a youth exits from care. The plan must address housing, insurance, education, mentoring, employment and other matters and it must be developed with the youth and parties identified by the youth. (In New Mexico, the Children's Code provides for this transition plan to be adopted at the first hearing after the youth's 17th birthday. *See* §32A-4-25.2.)

- Requires state agencies to improve educational stability for children in foster care by coordinating with schools to ensure that children remain in the school they were attending when they went into foster care. If staying in that school would not be in

the child's best interest, the state must ensure that the child is enrolled immediately in a new school with all of the child's educational records provided to the new school. The state must also ensure that children are in school or have completed high school.

- Requires states to develop, in coordination with the state Medicaid agency, pediatricians and other experts, a plan for the ongoing oversight and coordination of health care services for children in foster care.

- Requires states to make reasonable efforts to place siblings together, unless doing so would be contrary to the safety or well-being of any of the siblings. If siblings are not placed together, reasonable efforts must be made to provide frequent visitation or other interaction, unless it would be contrary to the sibling's safety or well-being. (In New Mexico, these findings must be included in the order issued by the children's court judge at disposition. *See* §32A-4-22(A)(10).)

Fostering Connections also provides for certain state and tribal options. The Act allows states and tribes that meet certain qualifications, whether they be matching requirements or changes in law or otherwise, to use Title IV-E dollars for new purposes. The Act:

- Allows tribes and tribal consortia to directly access and administer Title IV-E funds by submitting plans and meeting a number of other conditions. The Act also allows a tribe that runs its own IV-E program to apply to access Chafee funds. (The Navajo Nation received approval to administer its own Title IV-E program in 2014.)

- Expands the availability of federal Title VI-E training dollars to cover training of court personnel, attorneys, guardians ad litem, and court appointed special advocates. Availability of these funds is contingent upon state matching dollars.

- Allows states to provide care and support for youth in foster care beyond their 18th birthday if the youth is in school, employed, or incapable of doing these activities due to a medical condition. It also allows for youth to stay in foster care up to age 21 and allows states to extend adoption assistance on behalf of youth ages 19, 20, or 21. (New Mexico has not made the decision to extend foster care to age 21.)

- Gives the states the option to use federal Title IV-E funds for guardianship payments for children raised by relative caregivers. These funds would be for children for whom return home and adoption are ruled out and who likely would otherwise remain in foster care until they aged out of the system. (CYFD now has a guardianship assistance program.)

The Act also broadens the criteria for determining when Title IV-E funds may be used to subsidize the adoption of a special needs child. Among other things, the Act gradually delinks the use of Title IV-E funds for adoption assistance from the old AFDC standards. Beginning in 2010, children with special needs who were age 16 or older were eligible regardless of the income of their birth parents. By 2018, children age two and older were eligible. (In 2018, the law was amended to delay delinking adoption assistance from the AFDC standards for children under two until 2024. See 42 U.S.C. §673(e).)

36.10 Preventing Sex Trafficking and Strengthening Families Act

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, 128 Stat. 1919, enacted in 2014, has as much to do with improving outcomes for children and youth in foster care as it does with preventing sex trafficking. It amends Title IV-E of the Social Security Act, in particular 42 U.S.C. §§671, 675, and 677, to require that states receiving federal foster care dollars ensure by the end of September 2015 that their state plan:

- Includes policies and procedures for determining appropriate services for children under state responsibility whom the state believes are victims or at risk of becoming sex trafficking victims. The law also requires the state to develop protocols for locating a child who is missing from foster care, determining why the child ran away or otherwise went missing, responding to those factors in placements, and screening to determine if the child is a possible sex trafficking victim.

- In the interest of supporting normalcy for children in foster care, provides training to foster parents on a "reasonable and prudent parent standard" for the participation of the child in age or developmentally-appropriate activities.

- Limits another planned permanent living arrangement (PPLA) as a permanency goal for children under the age of 16 and includes certain case plan and case review requirements for all foster children with a permanency plan of PPLA. These include a number of requirements for permanency hearings: documenting intensive, ongoing, unsuccessful efforts for family placement, re-determining the appropriateness of the child's placement (including ensuring that the court asks the child about the desired permanency outcome for the child and makes a judicial determination that PPLA is the best permanency plan for the child), and documenting the steps the state has taken to ensure that the child has regular, ongoing opportunities to engage in age or developmentally-appropriate activities.

- For foster youth age 14 or older, requires the case plan to be developed in consultation with the child and up to two members of the case planning team who are chosen by the child, and that it include a list-of-rights document. The age for transition planning (known in New Mexico as the life skills plan) is lowered from 16 to 14.

- Ensures that foster children aging out of the system have a birth certificate, social security card, health insurance information and medical records, and a driver's license or equivalent ID. (The Family First Prevention Services Act, which was enacted in 2018 as part of P.L. 115-23, adds official documentation to prove the child was in foster care to this list.)

- Adds as an objective of the Chafee Foster Care Independence Program that children who are likely to remain in foster care until age 18 have regular, ongoing opportunities to engage in age or developmentally-appropriate activities.

- Ensures that all parents of a child's siblings who have legal custody of the siblings be identified and notified within 30 days after removal of a child from home. The term "siblings" includes individuals who would have been considered siblings if not for termination of parental rights or death of a parent.

36.11 Family First Prevention Services Act

The Family First Prevention Services Act, enacted in February 2018 as part of the Bipartisan Budget Act, P.L. 115-123, makes a number of changes to federal child welfare policy. The two biggest changes are the following:

Funding for Prevention Services. The new law offers Title IV-E funding for time-limited (one year) prevention services for mental health and substance abuse treatment and in-home parent skill-based programs to prevent the use of foster care in the first place. For states and tribes that elect to participate, this funding would be available for a child who is a "candidate for foster care", for the parents or relative caregivers for a child who is a "candidate for foster care" and for youth in foster care who are pregnant or already parents. As noted, states and tribes must elect to participate in this new program, which requires 50% state match.

Limit on Congregate Care. The second big component of the new law is that it will limit the state's ability to use congregate foster care, such as group homes. No Title IV-E funds will be permitted to be used for a child placed in congregate care beginning the third week of that placement. There will be exceptions, of course, including an exception for a "qualified residential treatment program", which will have to meet a number of requirements to qualify for the exception.

This limitation on congregate care does not take effect until October 2019, although states may apply for a two year delay beyond that. If a state requests a two year delay, that will also delay state access to Title IV-E funding for prevention services.

It will take time for all of the measures included in the Family First Prevention Services Act to be implemented, and New Mexico will need to decide if it will request a two year delay. As this 2018 Handbook goes to press, CYFD awaits more detailed guidance on implementation from HHS. *See* https://www.cwla.org/wp-content/uploads/2018/04/IM-18-02_4-12-18.pdf for a summary of the Act.

36.12 Court Improvement Program

The Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, provided for grants to state courts to assess and improve the handling of proceedings relating to foster care and adoption. These grants were intended to enable courts:

- to conduct assessments of the role, responsibilities, and effectiveness of state courts in carrying out state laws requiring proceedings that implement Title IV-B and IV-E, that determine the advisability or appropriateness of foster care placement, that

determine whether to terminate parental rights, and that determine whether to approve the adoption or other permanent placement of a child; and
- to implement changes deemed necessary as a result of the assessments.

In 2006, Congress added two new grant programs. One grant is for improved data collection to ensure that the safety, permanency, and well-being needs of children are met in a timely and complete manner. The other is for the training of judges, attorneys and other legal personnel in child welfare cases, including cross-training with the child welfare agency. 42 U.S.C. §629h.

In 2011, the Child and Family Services Improvement and Innovation Act, P.L. 112-34, for the first time allocated funds for the creation of a tribal court improvement program. The Navajo Nation was one of the first TCIP grantees.

In February of 2018, the Court Improvement Program was reauthorized and funded through 2021, as part of the Family First Prevention Services Act included in P.L. 115-23, the Bipartisan Budget Act of 2018.

The New Mexico Court Improvement Project was made possible by the Omnibus Budget Reconciliation Act of 1993. Federal grant money was first awarded to the New Mexico Administrative Office of the Courts, on behalf of the Supreme Court, in 1995. Although the funds are limited in amount, the Court Improvement Project continues to receive federal grants to help implement and evaluate its ongoing initiatives, with the guidance of the Children's Court Improvement Commission appointed by the Supreme Court.

36.13 Child and Family Service Reviews

In 1994, Congress amended the Social Security Act to authorize the U.S. Department of Health and Human Services (HHS) to review state child and family service programs to ensure conformity with the requirements of Titles IV-B and IV-E. In 2000, the HHS published a rule to establish a new approach to monitoring state programs. Under the rule, programs are assessed for substantial conformity with certain federal requirements for child protective, foster care, adoption, family preservation and family support, and independent living services. In 2001, the Children's Bureau within HHS began Child and Family Services Reviews, or CFSRs, in partnership with the states.

The federal rule was amended in 2012 to include tribal Title IV-E programs; state and tribal programs are now referred to in the regulations as Title IV-agencies.

The CFSRs look at the extent to which Title IV-agencies are achieving certain outcomes for families and children receiving services. Set forth in 45 CFR §1355.34, these are:

Safety
- Children are, first and foremost, protected from abuse and neglect.
- Children are safely maintained in their homes whenever possible and appropriate.

Permanency

- Children have permanency and stability in their living situations.
- The continuity of family relationships and connections is preserved for families.

Well-Being

- Families have enhanced capacity to provide for their children's needs.
- Children receive appropriate services to meet their educational needs.
- Children receive adequate services to meet their physical and mental health needs.

Regarding state CFSRs, each CFSR is a two-stage process consisting of a statewide assessment and an onsite review. The purpose of the CFSR is to evaluate the effectiveness of the state's child welfare practice in terms of outcomes as they relate to safety, permanency, and child and family well-being. At the end of the onsite review, states determined not to have achieved substantial conformity in all the areas assessed must develop and implement a Program Improvement Plan, or PIP, addressing the areas of nonconformity. States that do not achieve their required improvements face financial penalties. (New Mexico is now approved to conduct its own case reviews and submit the results to the Children's Bureau in lieu of the traditional one week on-site reviews overseen by the Bureau.)

The first round of CFSRs was completed nationally in 2004, the second round in 2010; the third round will be completed in 2018. New Mexico was one of the first states reviewed in the second round, and in June 2010 became the first state in the country to successfully implement and complete work under its PIP. New Mexico completed the third round of the CFSR in 2015 and has implemented a PIP. Currently CYFD is submitting ongoing reports to the Children's Bureau to evaluate progress and improvement.

The Children's Bureau continues to make assessments, plan for Round 4, and engage in other planning around the CFSRs. Information on the CFSRs can be found at https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews.

CHAPTER 37

ADOPTION

This chapter describes adoption:

- In the context of an abuse or neglect proceeding; and
- As an independent proceeding.

37.1 Introduction

The Adoption Act governs the range of adoptions that take place – the adoption of children who are in CYFD's custody, as well as adoptions handled by private child placement agencies, independent adoptions, and intercountry adoptions. However, there are certain ways in which adoptions taking place in connection with abuse or neglect proceedings are handled differently than other adoptions. This chapter discusses the range of adoptions and their accompanying procedures.

The Adoption Act authorizes CYFD to adopt regulations to implement the Act. These regulations are found in Title 8, Chapter 26 of the New Mexico Administrative Code (NMAC).

37.2 Adoption in an Abuse or Neglect Case

37.2.1 When Adoption Can Be Granted in an Abuse or Neglect Case

Adoption is one of the possible outcomes of an abuse or neglect proceeding. If the court in the abuse or neglect case is hearing a motion to terminate parental rights, the court may consider adoption in the same proceeding. This approach is most often taken in the case of "foster care conversion," where the foster parents have intervened in the abuse or neglect case and want to adopt the child. They can file a motion to adopt, and no filing fees would be required.

Absent an appeal of the TPR, the court may proceed to grant adoption of the child if the court finds that:

- parental rights should be terminated;
- the requirements for the adoption of a child have been satisfied;
- the prospective adoptive parent is a party to the action; and
- good cause exists to waive the filing of a separate adoption petition. §32A-4-28(F).

As noted, it is essential that the prospective adoptive parent be a party to the abuse or neglect proceeding if the court is to consider a motion to adopt in the same action. To determine who may intervene and become parties to the abuse or neglect action, ***see*** Handbook Chapter 27. If the prospective adoptive parent is not a party to that action, an adoption petition would have to be filed in a separate proceeding under the Adoption Act.

37.2.2 Compliance with the Adoption Act

As a general rule, adoptions heard in abuse and neglect cases must still comply with the requirements of the Adoption Act. Under §32A-4-28(F), the court may enter a decree of adoption only after finding that the party seeking to adopt the child has satisfied all of the requirements of that Act.

Section 32A-4-28(F) specifically provides that the court and the parties must comply with the time requirements in the Adoption Act, unless the termination of parental rights occurs under §32A-4-28(B)(3), which allows for TPR where the parent-child relationship has disintegrated and other conditions are met. ***See*** Handbook §24.4.4.

One situation that can arise is where the parents get the counseling required by the Adoption Act and then want to relinquish or consent on the same day. 8.26.3.25 NMAC provides that the consent or relinquishment may not be taken on the same day as the counseling session unless extraordinary circumstances exist and are documented in the counseling narrative.

Any adoption decree entered pursuant to the Abuse and Neglect Act must conform to the requirements of the Adoption Act. The court will assign an adoption case number to the decree, which will have the same force and effect as other adoption decrees. §32A-4-28(F).

37.2.3 Effective Date of Adoption

Unless otherwise stipulated by the parties, the adoption decree cannot take effect for 60 days after the termination of parental rights, which allows CYFD sufficient time to provide counseling for the child and otherwise prepare the child for adoption. §32A-4-28(F).

37.3 Proceedings under the Adoption Act

The Adoption Act is intended to be a practical guide for the legal practitioner and the judge. Many of the sections contain lists of requirements to be addressed at the various steps in the proceedings, from the initiation of a petition for adoptive placement through the obtaining of a final decree of adoption.

37.3.1 Confidentiality of Records

After the petition for adoption is filed and before the decree is entered, the records in an adoption proceeding are open to inspection only by the attorney for the petitioner, the department or the agency, the adoptee's guardian ad litem (GAL), an attorney retained by the adoptee or other persons upon order of the court for good cause shown. §32A-5-8(A). All

records, whether on file with the court, an agency, CYFD, an attorney or other provider of professional services in connection with an adoption are confidential and may be disclosed only in accordance with the Adoption Act. §32A-5-8(A) and (B). Hearings in adoption proceedings are confidential and must be held in closed court without admittance of any person other than parties or their counsel. §32A-5-8(C). Any person who intentionally and unlawfully releases any information or records that are confidential under the Adoption Act or who makes other unlawful use of these records is guilty of a petty misdemeanor. §32A-5-8(D).

Practice Note: A question that arises is whether the court appointed special advocate, or CASA, in the abuse or neglect proceeding has access to records in the adoption proceeding. The CASA is specifically listed as one of the persons who has access to records in an abuse or neglect case, §32A-4-33(B), but is not explicitly included as one who has access under the Adoption Act. §32A-5-8(A). However, the Adoption Act does allow other persons to access records in an adoption case "upon order of the court for good cause shown." §32A-5-8(A). Under appropriate circumstances, the court could enter an order allowing the CASA access.

37.3.2 Consent and Relinquishment

Under the Adoption Act, consent to adoption or relinquishment of parental rights to CYFD or an agency licensed by the state is required of:

1. The adoptee, if 14 years or older, except when the court finds that the adoptee does not have the mental capacity to give consent;
2. The adoptee's mother;
3. The adoptee's adoptive parent;
4. The adoptee's presumed father (***see*** Appendix B for the definition of "presumed father");
5. The adoptee's acknowledged father (***see*** Appendix B and *In re Adoption Petition of Bobby Antonio R. (Helen G. v. Mark J.H.),* 2008-NMSC-002, 143 N.M. 246;
6. CYFD or the agency to whom the adoptee has been relinquished that has placed the adoptee up for adoption, unless the court finds that the withholding of consent by CYFD or the agency is unreasonable; and
7. The guardian of the adoptee's parent when, pursuant to the Probate Code, that guardian has express authority to consent to adoption. §32A-5-17(A).

Terminology. Parents may "relinquish" their parental rights only to CYFD or a licensed child placement agency. In other situations, the party "consents" to the adoption.

The word "consent" is also used in other contexts. For example, a parent may relinquish their parental rights to CYFD or an agency only with the department's or agency's consent. §32A-5-23(B).

As noted above, an adoption cannot be granted unless the acknowledged father consents or relinquishes his parental rights. In *In re Adoption Petition of Bobby Antonio R.,* 2008-

NMSC-002, ¶51, 143 N.M. 246, the New Mexico Supreme Court held that the biological father in the case had not taken sufficient steps to become an acknowledged father under the Adoption Act. The Supreme Court agreed with the Court of Appeals that, when the basis of the father's status as an acknowledged father is registration with the putative father registry, the father's consent to an adoption is required only if he registers within ten days of the child's birth. *Id*. ¶14. However, the Supreme Court reversed the Court of Appeals on the basis that Mark was not an "otherwise … acknowledged father" entitled to the right to consent under §32A-5-19. *Id*. ¶6. The filing of a paternity action and petition for custody in response to the petition for adoption was insufficient to give the biological father the status of "acknowledged father" under the Adoption Act. *Id*. ¶¶24-32. The father must bring such an action before the adoption petition is filed, or have filed with the putative father registry. *Id*. ¶30. Importantly, the Court held that under the Adoption Act the "mere" biological relationship is not sufficient to give a father a veto over an adoption. *Id.* ¶¶8, 32 and 34.

Bobby Antonio R. was a case in which the Court relied on the district court's finding that the father knew or should have known that he had likely fathered a child by mother, and this finding was important to the Court's decision. The Court indicated that there may be different considerations where a father had no reason to know that he fathered a child or where a mother affirmatively rejected support and assistance from the father and the father was not otherwise aware of a possible adoption. *Id.* ¶49.

Consent or relinquishment can be implied where the parent, without justifiable cause:

- left the adoptee without provision for the child's identification for a period of 14 days; or
- left the adoptee with others, including the other parent or an agency, without provision for support and without communication for a period of three months if the adoptee was under the age of six at the commencement of the 3-month period; or six months if the adoptee was over the age of six at the commencement of the six month period. §32A-5-18(A).

Consent or relinquishment may not be implied unless notice of hearing is served on the parent in question; the court must make a decision on the implied consent before proceeding to the adjudicatory hearing on the adoption. §32A-5-18(B).

Consent or relinquishment is not required of:

- a parent whose rights have been terminated pursuant to law;
- a parent who has relinquished the child to an agency for adoption;
- a biological father of an adoptee conceived as a result of rape or incest;
- any person who has failed to respond when given notice of the adoption proceeding under §32A-5-27; or
- any alleged father who failed to register with the putative father registry within 10 days of the child's birth and who is not the acknowledged father (***see*** Appendix B for the definition of alleged father). §32A-5-19.

Before consenting to an adoption, the parent or parents must usually go through counseling. §32A-5-22. The consent itself must be in writing and must provide all of the information required by §32A-5-21, including a statement in closed adoptions that all parties understand that the court will not enforce any contact, regardless of any informal agreements made by the parties. §32A-5-21(A)(7). In addition, the consent must be signed before and approved on the record by a judge who has jurisdiction over adoptions. §32A-5-23. Prior to approval of a consent to adoption, the prospective adoptive parents must file a full and specific accounting of their costs and expenses. §32A-5-23(D). However, stepparent adoptions or adoptions pursuant to the provisions of the Abuse and Neglect Act are not subject to this requirement, unless ordered by the court. §32A-5-23(E). Licensed adoption agencies are no longer authorized to take consents to adoption.

The counseling requirements as well as the requirements for the written form of the consent or relinquishment are described in detail in Chapter 24 on termination of parental rights. ***See*** Handbook §§24.2.2 and 24.2.3.

When a parent elects to relinquish parental rights to CYFD in connection with an abuse or neglect proceeding, a motion to accept the relinquishment is heard in the abuse and neglect case. §32A-5-24; ***see*** Handbook §§24.2.1.

37.3.3 Involuntary Termination of Parental Rights

If the parents of the child do not relinquish their parental rights to free the child for adoption, the court may consider a petition to terminate parental rights (TPR). The TPR can take place in a separate action prior to the filing of the petition to adopt, simultaneously with the petition to adopt, or by motion in the adoption proceeding. The proceeding may be initiated by CYFD, by a child placement agency, or any other person having a legitimate interest in the matter, including a petitioner for adoption or the child. The petition must state, among other things, that the petition is in contemplation of adoption. §§32A-5-15, 32A-5-16.

Abuse/Neglect Cases. *See* §§32A-4-28 and 32A-4-29 for the standards and procedures for TPR in cases brought under the Abuse and Neglect Act.

The court will, upon request, appoint counsel for an indigent parent who is unable to obtain counsel, or the court may appoint counsel for an indigent parent if counsel is required in the interest of justice. §32A-5-16(E). The court must be sure to advise the parent that he or she is entitled to have counsel appointed. "[T]he fact that Section 32A-5-16(E) emphasizes the request for an attorney does not obviate the necessity of first telling the parent that such a request may be honored as a matter of right." *Chris L. v. Vanessa O.*, 2013-NMCA-107, ¶15. More recently, the Court of Appeals, emphasizing the importance of a parent's due process rights, held that a district court's failure to advise Mother of her right to court-appointed counsel if she could establish indigency was fundamental error. *See In re Adoption Petition of Darla D. v. Grace R.*, 2016-NMCA-093, ¶25.

The attorney who is appointed for the indigent parent will be paid at the rate determined by the Supreme Court for court-appointed attorneys. The payment itself is made by the petitioner. §32A-5-16(E).

A GAL will be appointed for the child in all contested cases. The district court has broad discretion in allocating GAL fees among the parties. In *Darla D.*, the Court of Appeals held that the district court abused its discretion in requiring Mother to pay one-third of the cost of the guardian ad litem (GAL), despite her low income. *Id.* ¶28.

The Children's Code and not Rule 1-053.3, which applies to contested custody disputes, governs the duties of a GAL in an adoption proceeding. *Darla D.*, ¶¶ 27-31.

If the child is 14 or older and in CYFD's custody, the child's attorney in the abuse and neglect case will represent the child in the adoption case. §32A-5-16(F).

The grounds for termination must be proven by clear and convincing evidence, except in cases involving Indian children, where the standard is beyond a reasonable doubt. §32A-5-16(H); ***see*** Handbook Chapter 32 on ICWA.

Default Judgments. Query whether a default judgment is permissible in a TPR proceeding. The parent has a constitutionally protected relationship with his or her children, a right that is so fundamental that the law requires a clear and convincing standard, not preponderance of the evidence. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982). Can parental rights be taken away based solely on a default, or with a proffer but no evidence introduced? *See State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, 127 N.M. 699, in which the Court of Appeals held that, given the fundamental nature of the rights involved in a TPR proceeding, "waiver of fundamental rights will not be presumed." *Id.* ¶27. Similarly, "[t]he children's court must enter its judgment regarding a TPR motion only with the utmost of circumspection and caution…. Entering a decision based only upon a proffer of evidence ignores this key directive." *Id.* ¶33.

The physical, mental and emotional welfare and needs of the child are the primary considerations for termination. The court may terminate parental rights under the Adoption Act for the same reasons as are outlined in the Abuse and Neglect Act: abandonment, abuse or neglect, or disintegration of the parent-child relationship (presumptive abandonment). In *Darla D.*, the Court of Appeals reviewed the three grounds for TPR under § 32A-5-15, and determined that there was insufficient evidence for any of these. ¶¶41, 52, 63-66, 71.

Even though the grounds for TPR in the two laws are the same, the Adoption Act does not contain a requirement that CYFD make reasonable efforts to work with the parents when abuse or neglect is alleged. §32A-5-15; ***see*** Handbook §24.4 on the grounds for termination under the Abuse and Neglect Act. Noting the inconsistency between the Adoption Act and Abuse and Neglect Act, the Court of Appeals has questioned whether private litigants can terminate another's parental rights on grounds of abuse and neglect without CYFD

involvement and following the other safeguards set forth in the Abuse and Neglect Act, including making reasonable efforts to reunify. *See Darla D.,* ¶¶53-60.

In *Matter of the Adoption of J.J.B.,* 1995-NMSC-026, 119 N.M. 638 , a biological father sought reversal of the trial court's decision to terminate his parental rights. Deciding that any presumption of abandonment under the predecessor to §32A-4-28(B)(3) and §32A-5-15(B)(3) was rebutted as a matter of law, the Supreme Court emphasized that proof of abandonment required a showing that parental conduct evidenced a conscious disregard of obligations owed to the child and that such conduct led to the disintegration of the parent-child relationship. The court emphasized that "evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct." Id. ¶44. *See also Darla D.,* ¶49 (Petitioners contributed to disintegration by thwarting Mother's efforts to have contact with the child), and the abuse or neglect cases cited in Handbook §24.4.4.

In *Helen G. v, Mark J.H.*, 2006-NMCA-136, 140 N.M. 618, the Court of Appeals reversed the termination of a biological father's parental rights in an adoption proceeding because the district court erroneously relied exclusively on the father's conduct prior to the child's birth to establish that the father caused the disintegration of the parent-child relationship. Explaining that the father "could not have a 'relationship' with the child in utero," the court concluded that there was no "relationship that could be subject to disintegration until the child was born." *Id*. ¶37. Because the district court "improperly focused on [the father's] pre-birth conduct," the Court of Appeals concluded that the district court's finding that the father presumptively abandoned the child was not supported by substantial evidence. *Id*. ¶40. The New Mexico Supreme Court reversed the decision of the Court of Appeals on other grounds and did not address the abandonment issue. *In re Adoption Petition of Bobby Antonio R.,* 2008-NMSC-002, ¶¶6 and 51, 143 N.M. 246. It remains to be seen whether the Court would consider steps taken or not taken during pregnancy to affect a determination of abandonment for purposes of TPR.

If the court terminates parental rights, it must appoint a custodian for the child. The court may commit the child to the custody of CYFD, the petitioner, or an agency willing to accept custody for the purpose of placing the child for adoption. In the case of an Indian child, the termination order must include specific findings that the requirements of ICWA were met §32A-5-16(I); ***see*** Handbook Chapter 32 on ICWA.

37.3.4 Placement for Adoption

Before a petition for adoption can be granted, the adoptee must be placed in the home of the petitioner. Placement is made by CYFD, by an appropriate public authority of another state, by a placement agency, or by court order. §32A-5-12(A). *See, e.g., Darla D.,* 2016-NMCA-093, ¶17 (finding that CYFD never took custody of the child or placed the child in the home so §32A-5-12(A) provided no basis for adoption). There is an exception to this placement requirement for adoptions taking place under the Abuse and Neglect Act. §32A-5-12(B). The rule also does not apply to certain independent adoptions, that is, stepparent or relative adoptions where the child has lived with the stepparent or relative for one year before the petition is filed as well as situations where the person designated to care for the child in the will of the deceased parent wants to adopt the child and the child has lived with that person

for one year. §32A-5-12(C).

When a placement order is required, the petitioner must file a request with the court to allow the placement. A hearing and the court decision on the request for placement must occur within 30 days of the filing of the request. §32A-5-13(H). Although placement may not take place until an order is obtained, §32A-5-13(A), an order allowing placement may be entered prior to service of the request for placement. §32A-5-13(G).

As a general rule, a pre-placement study, formerly known as a home study, is filed prior to the hearing on the request for placement. The requirements for a pre-placement study are described in detail in §32A-5-14. The study must be current, which means that it was prepared or updated within one year immediately prior to the date of placement. §32A-5-13(B). The court's order allowing placement must include a finding that the study complies with §32A-5-14. §32A-5-13(I).

In all adoptions, prior to any placement being made, the person making the placement must provide full disclosure. §32A-5-12(E). "Full disclosure" is defined as mandatory and continuous disclosure by the investigator, agency, department, or petitioner throughout the proceeding and after finalization of the adoption of all known, non-identifying information regarding the adoptee, including health history, psychological history, mental history, hospital history, medication history, genetic history, physical descriptions, social history, placement history, and education. §32A-5-3(N).

37.3.5 Fingerprinting and Criminal History Records Check

CYFD is required to obtain fingerprints and complete a nationwide criminal history check of all adults living in the home of a prospective foster or adoptive parent. Criminal history records obtained by CYFD are confidential and may not be released or disclosed except by court order or with the written consent of the person who is the subject of the record. Anyone who releases or discloses criminal history records or information contained in those records without a court order or written consent of the person concerned is guilty of a misdemeanor. §§32A-5-14.1, 32A-15-3.

37.3.6 Petition for Adoption

A petition for adoption must be filed within 60 days of the adoptee's placement in the proposed adoptive home if the adoptee is under the age of one, or within 120 days if the adoptee is over the age of one, at the time of placement. Extensions of time are permitted under certain conditions. §32A-5-25.

The allegations that must be included in a petition for adoption are set forth with specificity in §32A-5-26. If anonymity is being preserved, the adoptee's birth name can be filed by counsel for petitioner in a separate document. §32A-5-26(D). If the adoptee is an Indian child, any correspondence from the tribe must be attached to the petition and the efforts made to follow the placement preferences of the Indian Child Welfare Act must be stated. §32A-5-26(M); ***see*** Handbook §37.4.1 below.

CYFD must be given notice of the petition, which is accomplished by leaving a copy of the petition with the clerk of the court, who is required to mail the copy to CYFD within one working day of the petition being filed. §32A-5-7. CYFD has the authority to intervene in any action filed under the Adoption Act; intervention is effected by filing a motion for an entry of appearance and an appropriate response. §32A-5-6(C).

The Adoption Act contains a list of the persons who must be served with the petition and some additional requirements for service in the case of an Indian child. §32A-5-27(A) and (D). Notice does not have to be served on alleged fathers or on persons whose parental rights have been relinquished or terminated. §32A-5-27(B). Notice by publication is permitted if a motion is made and supported by an affidavit swearing that after investigation the identity and/or whereabouts of the parent remain unknown. §32A-5-27(F).

Any person responding to a petition for adoption must file a verified response within 20 days if the person intends to contest the adoption. However, if an agency, CYFD, or an investigator preparing the post-placement report wants to contest the adoption, they must notify the court within 20 days of completion of the post-placement report, discussed below. §§32A-5-27(E) and 32A-5-28.

The court may appoint a GAL for the adoptee at any time in an adoption proceeding upon the motion of a party or the court's own motion. A GAL must be appointed for an adoptee when the adoption is contested. The court may appoint the child's attorney appointed under the Abuse and Neglect Act if the child is 14 or older and in the custody of CYFD. §§32A-5-33.

The court is required to adopt a presumption in favor of appointing a GAL for the adoptee, or a youth attorney if the adoptee is 14 or older, when visitation between the biological family and the adoptee is included in an agreement. This presumption may be waived for good cause shown. §32A-5-35(B); ***see*** §37.4.2 below on open adoption.

Pending a final decree, custody of the adoptee lies with the petitioners pursuant to §32A-5-29. The adoptee cannot leave the county during the pendency of the proceedings for more than 15 days without court permission. §32A-5-30.

37.3.7 Post-Placement Reports

Post-placement reports are required in adoptions. The investigation may be conducted by CYFD, an agency, or a certified investigator (*see* §32A-5-13), and may be the same entity or person who conducted the pre-placement study.

The post-placement report (formerly called the investigation) must include the information specified in §32A-5-31(A), including information concerning the interaction between petitioners and the adoptee, the adjustment of the adoptee since placement, the integration and acceptance of the adoptee by the petitioner's family, the petitioner's ability to meet the physical and emotional needs of the adoptee, and full disclosure as defined by the Act. The report must also contain an evaluation of the proposed adoption with a recommendation as to

the granting of the petition. For a child under the age of one at the time of placement, the report must be filed with the court within 60 days of receipt of notice of the proceeding. For a child one year of age or older, the report must be filed within 120 days. Concurrently, the deliverer must forward a copy to the petitioner's attorney or to the petitioner, if not represented by counsel, and to CYFD, if the report is not generated by CYFD. The court may grant extensions if the report is received 30 days prior to a final hearing. §32A-5-31.

37.3.8 Hearing on Adoption Petition

The court is expected to conduct adoption proceedings in a way that protects confidentiality. The petitioner and the adoptee must attend the hearing unless the court waives a party's appearance for good cause shown (such as burdensome travel requirements). §32A-5-36. The Rules of Evidence apply to the hearing. Rule 11-1101(A)-(B).

To grant the petition under §32A-5-36, the court must find that the petitioner has proved by clear and convincing evidence that:

- the court has jurisdiction to enter a decree of adoption affecting the adoptee;
- the adoptee has been placed with the petitioner for 90 days if under the age of one at the time of placement or for 180 days if one year of age or older, unless the requirement is waived by the court for good cause shown;
- all necessary consents, relinquishments, terminations, or waivers have been obtained;
- the post-placement report has been filed;
- service of the petition has been made or dispensed with pursuant to §32A-5-27;
- at least 90 days have passed since the filing of the petition, except that the court may shorten or waive this when the child is being adopted by a stepparent, relative, or person named in the child's deceased parent's will, as described in §32A-5-12;
- the petitioner is a suitable adoptive parent and the best interests of the adoptee are served by the adoption;
- if visitation between the biological family and the adoptee is contemplated, that the visitation is in the child's best interest;
- if the adoptee is foreign born, the child is legally free for adoption and a certificate issued by the U.S. Secretary of State has been filed with the court certifying the adoption as a convention adoption (***see*** §37.4.4 below);
- the results of the criminal records checks required by the Adoption Act have been received and considered;
- when the child is an Indian child, the placement preferences of ICWA or the child's tribe have been followed or good cause for noncompliance is clearly stated and supported and provision has been made to ensure that the child's cultural ties to the tribe are protected and fostered (***see*** §37.4.1 below); and
- if the adoption involves an interstate placement, the requirements of the Interstate Compact on the Placement of Children, §32A-11-l *et seq.,* have been met. ***See*** §37.4.3 below.

Also, if a biological father who is neither a presumed father nor an acknowledged father whose consent is necessary for an adoption nevertheless contests the adoption and requests

custody of the child, the court must conduct a hearing to adjudicate the person's rights pursuant to the Adoption Act. §32A-5-36(C). In that instance the court will consider evidence presented by the parties, and make a determination as to whether the adoption is in the best interests of the child. §32A-5-36(H) and *In re Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, ¶35.

37.3.9 Adoption Decree

A decree of adoption must be entered within six months of the filing of the petition for adoption if the adoptee is under age one or within 12 months if the adoptee is age one or over, although extensions are possible for good cause shown. In any adoption of an Indian child, the court clerk must provide the Secretary of the Interior with a copy of the adoption decree and other information as required by ICWA. §32A-5-36(J)-(L); ***see*** Handbook Chapter 32 on ICWA.

After adoption, the adopted child and the adoptive parents have the same legal relation of parent and child as if the adoptee were the biological child of the adoptive parent and the adoptive parent were the biological parent of the child. The adopted child has all rights and is subject to all of the duties of that relation, including the right of inheritance from and through the adoptive parent. §32A-5-37.

If the court determines that any of the requirements for a decree of adoption have not been met or that the adoption is not in the best interest of the child, the court must deny the petition and determine, in the child's best interests, the person who shall have custody of the child. §32A-5-36(H). There may be special circumstances in which that person is someone other than the child's natural parents, even if parental rights have not been relinquished or terminated. *In re Adoption of J.J.B.,* 1995-NMSC-026, ¶¶56-66.

37.3.10 Revoking a Decree of Adoption

A decree of adoption may not be attacked more than one year after the entry of the decree, except that in the adoption of an Indian child, the parent or Indian custodian may petition to invalidate the adoption as provided in the Indian Child Welfare Act. §32A-5-36(K); ***see*** Handbook §32.2.10.

In the case of consent to adoption or relinquishment of parental rights in non-ICWA cases, the consent or relinquishment may be challenged only before the decree of adoption is entered, and only on the grounds of fraud. §32A-5-21(I). This statutory restriction was addressed in *State ex rel. HSD in re Kira M.*, 1994-NMSC-109, 118 N.M. 563, where the biological mother had sought to withdraw her consent to adoption. The Supreme Court observed that the legislature limited the grounds to fraud "in a sound expression of public policy in order to bring a high degree of certainty, finality, and stability to adoption and relinquishment proceedings." *Id.* ¶20. The Court also recognized, however, that the children's court has the power to grant the request of a natural parent to withdraw consent under exceptional circumstances, if consistent with the best interests of the child. In *Kira M.*, the facts did not provide such exceptional circumstances. *Id.* ¶21.

In *In re Adoption Petition of Drummond*, 1997-NMCA-094, 123 N.M. 727, the court considered when, if ever, an adoption decree may be reopened after the statutory one-year deadline for attacking such decrees had passed. Citing *Kira M.*, the court decided that exceptional circumstances existed in the case to justify reopening the adoption decree under Rule 60(B)(6) of the Rules of Civil Procedure. *Drummond*, ¶¶15-17.

In *Drummond*, the biological mother had been living with her child and her parents, who had adopted the child. In the course of the adoption, her parents assured her that nothing would change with the adoption and that she would still be the child's mother. In fact, she remained, for all practical purposes, the child's mother after the adoption. However, when she began dating a man her parents did not like, her parents asked her to leave the home without the child. According to the Court of Appeals, the adoption was never meant to be a real adoption or to change the mother's actual relationship with the child. The district court's decision to set aside the adoption decree was affirmed and the case remanded to determine the best interests of the child with regard to her custody and control. *Id*. ¶21.

37.4 Special Considerations

37.4.1 Adoption of Indian Children

The protections set forth in the Indian Child Welfare Act, including provisions for notice to the child's tribe, transfer to tribal court and placement preferences, apply to all proceedings involving an Indian child under the Adoption Act. §32A-5-4; ***see*** Handbook Chapter 32 on ICWA. The Adoption Act and the regulations implementing the Act also make extensive provision for the procedures to be followed in the case of the adoption of Indian children. These should be reviewed with care, together with ICWA, in any case involving an Indian child or a child who might be an Indian child.

In adoptive placements of Indian children under the state Adoption Act, preference must be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- other members of the child's Indian tribe; or
- other Indian families.

An Indian child accepted for pre-adoptive placement must be placed in the least restrictive setting that most approximates a family in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to the child's home, taking into account the child's special needs. For further details, *see* §32A-5-5.

In any pre-adoptive placement, a preference must be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- a foster home licensed, approved and specified by the child's tribe;

- an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

If these preferences are not followed or if the child is placed in an institution, a plan must be developed to ensure that the Indian child's cultural ties are protected and fostered. §32A-5-5.

The Multiethnic Placement Act does not apply to Indian children under ICWA. ***See*** Handbook §36.6.

37.4.2 Open Adoptions

Absent a finding to the contrary, an agreement reached between the adoptive parents and the biological parents concerning contact with each other or with the adoptee will be presumed in the best interests of the adoptee and included in the final decree of adoption. The agreement may also include contact between siblings and the adoptee based on a finding that it is in the best interests of the adoptee and his or her siblings and a determination that the siblings' parent, guardian or custodian has consented to the agreement. §32A-5-35(A).

The agreement is considered an open adoption although the types of contact to which the parties agree can vary greatly. For example, the "contact" may include:

- an exchange of identifying or non-identifying information; or
- visitation between the parents or the parents' relatives or the adoptee's siblings and the adoptive parents; or
- visitation between the parents or the parents' relatives or the adoptee's siblings and the adoptee. §32A-5-35(A).

As noted earlier, the court may appoint a GAL for the adoptee. If visitation between the biological family and the adoptee is included in the agreement, the court must adopt a presumption in favor of appointing a GAL, although this presumption may be waived for good cause shown. If the child is 14 or older, the court may appoint counsel for the child. §32A-5-35(B).

In determining whether an agreement is in the adoptee's best interests, the court will consider the adoptee's wishes but those wishes do not control the court's findings as to best interests. §32A-5-35(C).

The open adoption agreement is negotiated between the adoptive and biological parents. The agreement must be in writing as it is included in the final decree of adoption. §32A-5-35(A) (contrast, *Vigil v. Fogerson*, 2006-NMCA-10, 138 N.M. 822). Every agreement must contain a clause stating that the parties:

- agree to the continuing jurisdiction of the court;
- agree to the agreement; and

- understand and intend that any disagreement or litigation regarding the terms of the agreement will not affect the validity of the relinquishment of parental rights, the adoption, or the custody of the adoptee. §32A-5-35(D).

If the decree contains an agreement for contact, the court will retain jurisdiction after the decree of adoption to hear motions brought to enforce or modify the agreement. The court may not grant a request to modify unless the moving party demonstrates a change in circumstances and the agreement is no longer in the adoptee's best interests. §32A-5-35(E).

Practice Note: Open adoption should be seriously considered as an option to support the best interests of the child in an abuse or neglect proceeding. And where open adoption is an option, mediation may be a good forum in which to hammer out a post-adoption contact agreement, making it more likely that efforts toward permanency will be brought to a successful conclusion.

The Child Protection Best Practices Bulletin titled *Open Adoption and Mediated Post Adoption Contact Agreements (PACA)* provides detailed information about mediating open adoptions. To download a copy of this best practices bulletin, visit: http://childlaw.unm.edu/resources/publications/bulletins-guides-benchcards.html.

When a motion for termination is filed, the moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement and any agreement reached before TPR must be made part of the court record. §32A-4-29(D). The mediator conducts the open adoption mediation either before or after TPR, depending on the specific circumstances of the case.

37.4.3 Interstate Compact on the Placement of Children

The Interstate Compact on the Placement of Children (ICPC) is a binding reciprocal agreement among all of the states and territories of the United States. As enacted in New Mexico, the compact can be found at §32A-11-1. If an adoption involves the interstate placement of the adoptee, the requirements of the ICPC must be met. §32A-5-36(F)(13).

37.4.4 Intercountry Adoptions

In 2003, the Adoption Act was amended to implement the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption for the state of New Mexico, provide that the protections and requirements in the federal Intercountry Adoption Act apply to proceedings involving a convention adoption, and authorize CYFD to act as an accrediting entity with respect to convention adoptions. *See, e.g.*, §§32A-5-3, 32A-5-26, 32A-5-36, 32A-5-39, and 32A-5-39.1. "Convention adoption" is defined to include an adoption by a U.S. resident of a child who is a resident of a foreign country that is a party to the Hague Convention and an adoption of a child who is a U.S. resident by a resident of a foreign country that is a party to the Hague Convention. §32A-5-3(I).

A foreign decree or order of adoption will be recognized as if it were a New Mexico decree or order of adoption if it was entered by a court or other entity in another country acting pursuant to that country's law or pursuant to any convention or treaty or intercountry adoption that the United States has ratified. §32A-5-39.

37.4.5 Reproductive Alternatives

Sperm donors, artificial insemination, and other assisted reproduction methods are governed by §40-11A-701 through §40-11A-707.

Surrogate mothers are discussed in §32A-5-34. Petitioners for adoption may pay those expenses of the biological mother that are reasonably related to the adoption. §32A-5-34(A). The legislature added the reasonableness requirement in 2005 to ensure that the surrogate mother is not being paid for conceiving and carrying the child, which is prohibited by §32A-5-34(F). The biological mother may elect not to consent to the adoption or to relinquish parental rights. §32A-5-34(D).

37.5 Subsidized Adoptions

37.5.1 Adoption of Children with Special Needs

There are many situations in which an adoptive family is capable of providing the permanent family relationship needed by a difficult-to-place child in all respects except that the needs of the child are beyond the economic resources and ability of the family. In these cases, CYFD may make payments to the adoptive parents or to medical vendors on behalf of the child. §32A-5-44(A).

According to the statute, a difficult-to-place child is one who has a mental, physical, or emotional disability or who is in special circumstances by virtue of age, sibling relationship, or racial background. §32A-5-44(B).

Subsidy payments may include payments to vendors for medical or surgical expenses and payments to the adoptive parents for maintenance and other costs incidental to the adoption, care, training, and education of the child. Payments may be made until the child reaches age 18 unless the child is enrolled in the medically fragile waiver program, in which case payments may continue until the child is 21. A written agreement between the adoptive parents and CYFD outlining the terms and conditions of the subsidy plan based on the individual needs of the child should precede the decree of adoption. §32A-5-45(B) and (C).

Practice Note: Adoption assistance agreements are negotiated, taking into consideration the circumstances of the adopting parents and the needs of the child being adopted. The agreement should be negotiated and approved prior to the finalization of the adoption. Questions about adoption subsidies should be directed to CYFD's Foster Care and Adoption Bureau at CYFD (505-827-8400).

37.5.2 Sources of Funds for Subsidized Adoptions

The primary source of funds for parents adopting special needs children is Title IV-E of the federal Social Security Act. ***See*** Handbook §36.3. Title IV-E funds may be available for adoption assistance payments for a special needs child if the child, when in foster care, was eligible for Title IV-E foster care maintenance payments, if the child meets the requirements of Title XVI of the Social Security Act for the receipt of Supplemental Security Income benefits, or if the child meets the criteria of the Fostering Connections to Success and Increasing Adoptions Act, which broadens the availability of Title IV-E funds for this purpose. *See* 42 U.S.C. §673(a)(2). State funds may also be available for adoption subsidies.

37.6 Access to Records Post-Adoption

Once the decree of adoption has been entered, all court files containing records of judicial proceedings conducted pursuant to the Adoption Act and records submitted to the court in the proceedings are kept in separate locked files withheld from public inspection. The records may be open to inspection in certain situations but the identity of the former parents and of the adoptee must be kept confidential unless the former parents and the adoptee have consented to the release of identity. §32A-5-40(A). A form of Affidavit for Release of Parent Information may be available from the court.

After the entry of the decree, at any time, a former parent may file with the court or the placing agency or the department a consent or refusal to be contacted or a release of certain information. §32A-5-40(B). There is also the possibility of the use of a confidential intermediary. *See* §32A-5-40 for more details.

37.7 Useful Checklists

The Children's Court Division of the 2nd Judicial District Court has checklists that it finds helpful in adoption cases. One is a Consent and Relinquishment Checklist that may be used by judges taking a party's consent to adoption or relinquishment of parental rights. Another is a checklist used by the Trial Court Administrative Assistant for proper maintenance of the court's adoption files. Both checklists are reprinted here, beginning on the next page, as examples of useful court tools.

CONSENT and RELINQUISHMENT CHECKLIST

1. Administer oath.

2. Prescription medication?

3. Consumed alcohol or drugs in last 24 hours?

   - Anything else that would affect your ability to understand and answer my questions?

4. Counseling Narrative – Read, reviewed and signed?

   A. Counselor of your choice?
   B. Questions asked regarding whether child has Native American heritage?
   C. With the information received in counseling and with the knowledge you now have, are you voluntarily and unequivocally consenting to the adoption of your child?

5. Independent legal counsel?

   A. Attorney – did you have a choice in the selection of your independent legal counsel?
   B. Are you satisfied with representation? What was the most important thing that your attorney explained to you?
   C. Did you have an opportunity to privately disclose any reservations you may have or to report any coercive influences?
   D. Attorney Fees paid by agency or adoptive parents – issue?

6. Form of Consent/Relinquishment

   A. Reviewed form with your attorney?
   B. Questions regarding the meaning of any of the terms or provisions of the form?

7. What rights does any parent have to her/his child?

   A. Control activities; make decisions about child; custody
   B. Right to withhold consent to adoption
   C. Notice of legal action involving child that may affect your rights –waiver of notice

8. By signing Consent/Relinquishment you are giving up your rights to your child.

9. Once given, you may not withdraw your consent/relinquishment.

10. Once you sign consent/relinquishment, the document is legally binding, final and irrevocable. Please tell me in your own words what that means.

11. Has anyone promised you anything of value in exchange for your consent/relinquishment?

12. Has anyone threatened you or forced you to give consent/relinquishment against your will?

13. Conditional consent: conditions??

14. No informal agreements for pictures, information or visits will be enforced by the court. Only written open adoption agreements approved by the court will be enforced.

15. Option for Open Adoption: discuss.

16. If your open adoption agreement is not approved by the Court, are you still willing to give consent/relinquishment? [Present a hypothetical that addresses whether a court-approved open adoption agreement is an expectation that motivates his/her consent/relinquishment.]

17. Failure to abide by the terms of open adoption agreement does not affect the validity of the relinquishment, adoption or custody of the child.

18. Explain other parent's due process rights and importance of giving notice to him/her. [Explain in context of ensuring permanency of placement and avoiding disruption for the child. If facts warrant, probe for information as to identity and whereabouts of other birth parent.]

19. Have you been offered a copy of the consent/relinquishment?

20. Questions of attorney, court or counselor?

FINDINGS
OBTAIN SIGNATURE

TRIAL COURT ADMINISTRATIVE ASSISTANT ADOPTION FILE CHECKLIST

1. Birthparent Narrative (including counselor's certification)

    - Birthmother
    - Birthfather

2. Birthparent Consent, relinquishment, or waiver

    - Birthmother
    - Birthfather
    - Signed by judge?
    - Attorney for birthmother? (not required, but preferred)
    - Attorney for birthfather? (not required, but preferred)

3. Affidavit for Release of Information

4. Full disclosure documentation

5. Adoptee counseling narrative if 10 or over (should include counselor's certification)

6. Adoptee consent if 14 or over

7. Placement agency/CYFD consent

8. Subject to ICWA?

    - If yes, then was proper notice sent to tribe?
    - Tribal intervention or concurrence?

9. Background records checks (+ detailed report if results are positive)

    - FBI – not older than 2 years
    - State – not older than 1 year

10. Request for Order of Placement (if not an agency or CYFD adoption)

11. Order allowing placement (if not an agency or CYFD adoption)

12. Adoption Petition w/Petitioner verification (or Motion if CYFD adoption)

13. Notice of Adoption Petition (if not by relinquishment/consent) – must reflect TPR if no response

    - Birthfather
    - Birthmother
    - Death certificate of any deceased birthparent
    - Surviving parents of a deceased birthparent

14. Putative father registry check response

15. Motion for Service by Publication with affidavit (if not by relinquishment/consent or direct notice)

16. Order for Service by Publication

17. Certificate of Mailing

    - CYFD Central Adoptions
    - Agency

18. Pre-placement study (less than 1 year old) & updates, as appropriate (with counselor certification)

19. If open-adoption, then open-adoption agreement (OAA)

20. Motion/order for GAL if not waived in cases where OAA provides for contact

21. GAL report when GAL appointed

22. Motion for order to leave county of residence (if leaving county for more than 15 days)

23. Order of residence (if leaving county for more than 15 days)

24. Original birth certificate

25. Affidavit of publication

26. Certificate of service (if by mail, proof of certified delivery/return receipt)

27. Certificate as to the State of the Record

28. Motion for default judgment

29. Default judgment

30. Post-placement report with counselor certification

31. Statement of accounting

32. Request and order for hearing

33. Final decree

CHAPTER 38

KINSHIP GUARDIANSHIP

This chapter summarizes the Kinship Guardianship Act, enacted in 2001. It covers:

- Eligibility for appointment by the court as a kinship guardian.
- Procedures for appointment of kinship guardian.
- Provisional adoption of kinship guardianship forms.
- The Caregiver's Authorization Affidavit.

38.1 Purpose of Kinship Guardianship Act

The Kinship Guardianship Act (KGA), §§40-10B-1 to 40-10B-15, was enacted in 2001 and amended in 2015 and 2017. As stated in the Act, its purposes are to:

- create procedures for establishing a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and
- provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally, and emotionally to the maximum extent possible when the child's parents are not willing or able to do so. §40-10B-2.

Kinship guardianship is not the same thing as "permanent guardianship" under the Abuse and Neglect Act. For someone to be able to petition the court for appointment under the Kinship Guardianship Act, the person must be an adult with whom the child resides, although not necessarily a blood relative. Kinship guardianship does not authorize the court or law enforcement to remove the child from the parents' home. For further comparison with permanent guardianship under the Abuse and Neglect Act, as well as guardianship under the Probate Code, ***see*** Handbook §25.13.

In *In re Guardianship of Victoria R.,* the Court of Appeals for the first time reviewed a judgment awarding guardianship under the KGA. 2009-NMCA-007, 145 N.M. 500. The court in this case was comparing KGA proceedings with termination of parental rights. The court noted four important differences:

- nothing in the KGA indicates that it can be invoked to terminate a parent's rights;
- unlike termination of parental rights, a KGA guardianship is revocable;
- under the KGA the court may order that the parent retain rights and duties; and

- the court retains continuing jurisdiction over a KGA guardianship.

2009-NMCA-007, ¶8. The court noted that the "Legislature did not intend a KGA guardianship to completely and irrevocably sever the relationship between a parent and the child, nor did it intend for a KGA guardianship to be a one-size-fits-all remedy." *Id.* Furthermore, "KGA guardianship cases do not represent a 'bipolar' contest between parents and the party invoking the authority of the state to override the decision of the child's parents: '[t]here is at a minimum a third individual, whose interests are implicated in every case to which the statute applies--the child.'" *Id.* ¶11 (citation omitted).

According to the concurring opinion in *Victoria R.*, the KGA "represents a significant change in the area of children's rights … [and] recognizes the emergence of a new body of children's rights." 2009-NMCA-007, ¶21, 145 N.M. 500 (Pickard, J., specially concurring).

38.2 Proceeding to Appoint Guardian

38.2.1 Petition

Under the Kinship Guardianship Act, a caregiver with whom a child resides and who provides the child with the care, maintenance and supervision consistent with what a parent provides may petition the district court for guardianship. The court must set a date for the hearing on the petition which is no less than 30 and no more than 90 days from the date of filing. §§40-10B-3 to 40-10B-6.

The caregivers who may petition for appointment are:

- a kinship caregiver (kinship meaning the relationship that exists between a child and a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond);
- a caregiver age 21 or older with whom no kinship exists but whom a child age 14 or older nominates; or
- a caregiver clearly designated by a parent in writing. §§40-10B-5.

If an abuse or neglect proceeding is pending, the petition and notice of hearing must be served on CYFD. The petition and notice must also be served on the child if 14 years of age or older, the parents, any person with custody or visitation rights and, in the case of an Indian child, the tribe. §40-10B-6. Failure to give notice may violate due process, *see In re Guardianship of Kaitlynn Alexis Ware*, 2010-NMCA-083, ¶19, 148 N.M. 616, and, in the case of an Indian child, the Indian Child Welfare Act.

The court may appoint a guardian ad litem for the child upon a party's motion or solely in the court's discretion. If a parent is participating in the proceeding and objects to the appointment of a guardian, then the court must appoint a guardian ad litem. Likewise, in a proceeding to revoke a guardianship previously established, the court must appoint a guardian ad litem if the guardian objects to revocation. §40-10B-9.

38.2.2 Appointment

Under §40-10B-8(B), the court may appoint a guardian after hearing if:

- the parent consents in writing; or
- the parent's rights have been terminated or suspended by prior court order; or
- the child has been residing with the petitioner and without a parent for 90 days or more and the parent with legal custody is currently unwilling or unable to care for the child or there are extraordinary circumstances; and
- no guardian is currently appointed under the Probate Code (***see*** Handbook §25.13).

If an award of guardianship is based on parental consent, the consent of both parents is not required provided that each parent meets at least one of conditions in §40-10B-8(B). The Supreme Court has reasoned that if the consent of both parents were required to meet the parental consent prong, then a parent demonstrated to be unfit or absent would have the power to veto a guardianship. Instead, §40-10B-8(B) requires each parent to meet one of its conditions but does not require both parents to satisfy the same condition. *Freedom C. v. Brian D., In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶¶17-18. Moreover, the fact that one parent lives in the same house as the kinship guardian does not necessarily preclude application of the KGA. *Id*. ¶¶32-34.

The "extraordinary circumstances" standard was addressed in *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶16, 145 N.M. 500. In that case, the Court of Appeals affirmed the trial court's award of guardianship to the third party petitioner over the objection of one of the biological parents, holding that extraordinary circumstances were established. These included a showing that the child was primarily bonded to petitioners, considered them her parents, and would suffer significant depression if her relationship with petitioners was abruptly terminated. *Id.* ¶26. *See also* the discussion of extraordinary circumstances in the concurring opinion. *Id*. ¶¶27-30 (Pickard, J., specially concurring).

In contrast, the Court of Appeals in *Stanley J. v. Cliff J., In re the Kinship Guardianship of Adam L.*, 2014-NMCA-029, reversed the district court's award of guardianship, concluding that the petitioners had not proven extraordinary circumstances by clear and convincing evidence. In that case, Mother had died after a lengthy illness and the teenage children wanted to stay in Grady and finish school there. However, their Father, who lived in Texas, was a fit parent and wanted custody. The court held that, while moving to Texas would result in a life-changing experience for the children and undoubtedly result in emotional stress or apprehension, whether they should be moved to Texas was a parenting decision for Father, not the courts, to make. *Id*. ¶21. This was a 2-1 decision; the Supreme Court denied certiorari in early 2014.

The court must find in all cases that the best interests of the child will be served by the requested appointment. §40-10B-8(A).

The burden of proof is clear and convincing evidence. §40-10B-8(C).

If the child is 14 years old or older, the court must appoint the person nominated by the child unless the court finds the nomination contrary to the child's best interest. The court may not appoint a person against whom the child has filed a written objection. §40-10B-11.

The court may order a parent to pay the costs of support and maintenance to the extent the parent is financially able to pay. The court may also order visitation between a parent and the child to maintain or rebuild a parent-child relationship if visitation is in the best interests of the child. §40-10B-8(D) and (E).

38.2.3 Rights and Duties

A guardian appointed under the Kinship Guardianship Act has the legal rights and duties of a parent except the right to consent to adoption. The guardian also does not have the parental rights and duties that the court orders be retained by a parent. Unless the court otherwise orders, the guardian may make all decisions regarding visitation between a parent and the child. §40-10B-13.

38.2.4. Revocation

The guardianship may be revoked by order of the court. Any person, including a child who has reached his or her 14th birthday, may bring a motion to revoke a kinship guardianship under the KGA. §40-10B-12; *Vescio v. Wolf*, 2009-NMCA-129, ¶13, 147 N.M. 374. The person moving for revocation must attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or new guardian. §40-10B-12. The court may grant the motion if it finds that a preponderance of the evidence proves a change of circumstances and revocation is in the child's best interest. *Id*. The Rules of Evidence apply at the hearing. *State ex rel. CYFD v. Djamila B*, 2015-NMSC-003, ¶23.

A kinship guardian, as a guardian, can be accused of abuse or neglect and summoned to participate in an abuse or neglect proceeding. If the permanency plan is adoption and it becomes necessary to move to terminate the parental rights of the parent, it will also be necessary to revoke the kinship guardianship of the guardian. *Djamila B.*, ¶¶6, 29, 30. The revocation may occur in the abuse and neglect proceeding because the Children's Court has jurisdiction over the kinship guardian and the ability to make decisions in the best interests of the child. *Id*. ¶¶2, 35.

38.2.5 Forms Approved by the Supreme Court

Rule 1-120 of the Domestic Relations Rules requires that self-represented litigants use Court approved forms in cases under the KGA. The following forms, which were recompiled and amended or newly adopted in 2016, are available in the Civil Domestic Relations Forms:

4A-501	Petition to appoint kinship guardians
4A-502	Motion for service by publication
4A-503	Notice of pendency of action
4A-504	Order for service of process by publication in a newspaper

4A-505	Parental consent to appointment of kinship guardian and waiver of service of process
4A-506	Nomination of kinship guardian(s)
4A-507	Ex parte motion to appoint temporary kinship guardian(s)
4A-508	Ex parte order appointing temporary kinship guardian(s)
4A-509	Motion to appoint temporary kinship guardian(s)
4A-510	Order appointing temporary kinship guardian(s)
4A-511	Order appointing kinship guardian(s)
4A-512	Motion to revoke kinship guardianship
4A-513	Order revoking kinship guardianship

38.3 Caregiver's Authorization Affidavit

38.3.1 Purpose and Effect

Judges, advocates, social workers, and parents should be aware of a temporary option available to parents and caregivers under the Kinship Guardianship Act. If the child lives with a caregiver, defined in the Act as a an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child,, the caregiver may execute a caregiver's authorization affidavit. The affidavit is valid for up to a year after the date on which it is executed. §§40-10B-15, 40-10B-3.

Before the law was changed in 2017, §40-10B-15(A) provided that a caregiver who executes a caregiver's authorization affidavit by competing Items 1 through 4 of the form and having the form notarized was authorized to enroll the child in school and consent to school-related medical care. §40-10B-15(B) provided that a caregiver who is a relative of the child and who completes Items 1 through 7 of the form, has the same authority to authorize medical, dental, and mental health care for the child as a guardian appointed under the KGA. The authority in subsection B was broader than the authority in subsection A.

In 2017, Subsection A was amended to authorize the caregiver who completes Items 1 through 4 of the form to:

1. enroll the child in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school;
2. consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and
3. be the authorized contact person for school-related purposes. §40-10B-15(A), as amended.

Now that the authority to consent to medical care has broadened beyond school-related care, it is not clear how it differs from the authority of a caregiver who completes the whole form.

Anyone who acts in good faith reliance on a caregiver's authorization affidavit to provide

medical, dental, or mental health care to a child without actual knowledge of facts contrary to those stated in the affidavit is protected from criminal culpability, civil liability, or professional disciplinary action. This protection applies even though a parent having parental rights or a person having legal custody has contrary wishes as long as the provider of services has no actual knowledge of those wishes. §40-10B-15(E).

It is important that the affidavit contain the warning statement set out in the form in not less than ten-point boldface type, or a reasonable equivalent, enclosed in a box with three-point rule lines. 40-10B-15(H).

38.3.2 Form of Affidavit

Section 40-10B-15(J), which was amended heavily in 2017, requires that the caregiver's authorization affidavit be in substantially the following form:

"Caregiver's Authorization Affidavit"

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize the caregiver to:

(1) enroll a minor in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school ("school");

(2) consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and

(3) be the authorized contact person for school-related purposes.

B. Completion of Items 5-7 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____
2. Minor's birth date: _____
3. My name (adult giving authorization) _____
4. My home address: _____

5. Check one or both (for example, if one parent was advised and the other cannot be located):

( ) I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

( ) I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

6. My date of birth: _____

7. My NM driver's license or other identification card number: _____.

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both. [**Handbook Note**: This should be put in a box pursuant to §40-10B-15(H).]

I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.

Signed: _____

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____, 20_____, by _____.

My commission expires: _____

Notary Public

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. If the minor stops living with you, you are required to notify any school, early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental health care

provider, mental health care provider, health insurer or other person to whom you have given this affidavit.

2. If you do not have the information requested in Item 7, provide another form of identification such as your social security number or medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

CHAPTER 39

FAMILIES IN NEED OF COURT-ORDERED SERVICES

This chapter addresses:

- The purpose of the Families in Need of Court-Ordered Services (FINCOS) process.
- Initiation of a FINCOS case.
- Protective custody, including:
  - Grounds for taking a child into protective custody without a court order.
  - Hearing requirement.
- Adjudication and disposition.
- Periodic judicial review.

39.1 Purpose

Families in Need of Court-Ordered Services (FINCOS) is a statutorily created process established in 1993. Its purposes, as stated in §32A-3B-1, are:

- through court intervention, to provide services for a family in need of services when voluntary services have been exhausted; and
- to recognize that many instances of truancy and running away by a child are symptomatic of a family in need of services and that in some family situations the child and parent are unable to share a residence.

The phrase "family in need of court-ordered services" is defined in §32A-3B-2 to mean that:

- The child or family has refused family services; or
- CYFD has exhausted appropriate and available family services; and
- Court intervention is necessary to provide family services to the child or family; and
- One of the following circumstances exists:
  - The child is subject to compulsory school attendance and is absent from school without an authorized excuse more than ten days during a school year.
  - The child is absent from the child's place of residence for a time period of 12 hours or more without consent of the child's parent, guardian, or custodian. (This section of the statute was amended in 2007 to shorten the time period

from 24 to 12 hours. ***See*** box in §39.3.1 below.)
- The child refuses to return home and there is good cause to believe that the child will run away from home if forced to return to his parent, guardian, or custodian.
- The child's parent, guardian, or custodian refuses to allow the child to return home and a petition alleging neglect of the child is not in the child's best interests.

39.2 Initiation of Proceedings

The procedure to provide court-ordered services to the child or family is very similar to abuse and neglect proceedings. The case commences with CYFD filing a petition alleging the family is in need of court-ordered services. A petition may not be filed unless the children's court attorney, after consultation with CYFD, determines and endorses upon the petition that filing is in the best interests of the child and family. §32A-3B-10.

The petition must include the following allegations, as required by §32A-3B-11(A):

- The child or the family is in need of court-ordered family services;
- The child and the family participated in or refused to participate in a plan for family services and CYFD has exhausted appropriate and available services; and
- Court intervention is necessary to assist CYFD in providing necessary services to the child and the family.

Section 32A-3B-11(B) requires that a petition alleging a child's chronic absence from school be accompanied by an affidavit filed by a school official in accordance with §32A-3A-3, but the provision in §32A-3A-3 for affidavits by school officials was repealed in 2005.

The Children's Court Rules apply to FINCOS proceedings. Unless otherwise provided, the rules and forms governing abuse and neglect proceedings apply to these proceedings. Rule 10-101(A)(1) and (6).

39.3 Protective Custody

39.3.1 Obtaining Custody of the Child

Section 32A-3B-3 provides that a law enforcement officer may take a child into protective custody without a court order when the officer has reasonable grounds to believe that the child:

- has run away from the child's parent, guardian, or custodian;
- is without parental supervision and is suffering from illness or injury;
- has been abandoned; or
- is endangered by his surroundings and removal from those surroundings is necessary to ensure the child's safety.

Runaway Child: In 2007, a section was added to the Children's Code entitled "Runaway child; law enforcement; permitted acts." This section provides that, whenever a law enforcement agency receives a report from a parent, guardian, or custodian that a child over whom the parent, guardian, or custodian has custody has left home without permission and is believed to have run away, a law enforcement agent may help the parent, guardian, or custodian locate the child and:

- return the child to the parent, guardian, or custodian unless safety concerns are present;
- hold the child for up to six hours if the parent, guardian, or custodian cannot be located, so long as the child is not placed in a secured setting; or
- after the six hours has expired, follow the procedures in §32A-3B-3. §32A-1-21

A child taken into protective custody may not be held involuntarily for more than two days, unless a petition to extend the protective custody is filed under the FINCOS Act or the Abuse and Neglect Act. When a petition is filed, the children's court or district court may issue an *ex parte* custody order based on a sworn written statement of facts establishing probable cause that protective custody is necessary. §32A-3B-4(D) and (E).

When a child is taken into protective custody and is not released to the parent, guardian, or custodian, CYFD must provide prompt written notice to the parent, guardian, or custodian of the reasons for placing the child in protective custody. This notice must be provided within 24 hours of the child being taken into protective custody. §32A-3B-5(A).

In addition, when a child is taken into protective custody, CYFD must make a reasonable effort to determine if the child is an Indian child. §32A-3B-3(C). If the child is an Indian child and is not being released, CYFD must also provide notice to the child's tribe. §32A-3B-5(D).

ICWA Note. If there is reason to know the child is an Indian child, the Indian Child Welfare Act will apply to protective custody under FINCOS since FINCOS is a court action that involves an emergency removal or placement of an Indian child. 25 C.F.R. §23.2. If protective custody is being considered, the court and the parties should pay attention to the standards for emergency proceedings, which allow emergency placement of an Indian child only if it is necessary to prevent imminent physical damage or harm to the child. This standard will also apply at the protective custody hearing since it is comparable to the custody hearing in the abuse and neglect case, governed by Rule 10-315. ***See*** Handbook §15.7.3 and Chapter 32 on ICWA.

39.3.2 Place of Custody; Indian Placement Preferences

According to §32A-3B-6, a child placed in protective custody may be placed in the following community-based shelter-care facilities:

- a licensed foster-care home or any home authorized under the law for the provision of

foster care, group care, or use as a protective residence;
- a facility operated by a licensed child welfare services agency;
- a facility provided for in the Children's Shelter Care Act, §§32A-9-1 - 32A-9-7; or
- in a home of a relative of the child, when the relative provides the court with a sworn statement that the relative will not return the child to the dangerous surroundings that prompted protective custody for the child.

A child in protective custody may not be held in a jail or other facility intended or used for the detention of delinquent children unless the child is also alleged or adjudicated delinquent. §32A-3B-6.

An Indian child taken into protective custody must be placed in the least restrictive setting that most closely approximates a family in which the child's special needs, if any, may be met. The Indian child must also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference will be given to placement with:

- a member of the Indian child's extended family;
- a foster care home licensed, approved and specified by the Indian child's tribe;
- an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the Indian child's tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

When these placement preferences are not followed or if the Indian child is placed in an institution, a plan must be developed to ensure that the Indian child's cultural ties are protected and fostered. §32A-3B-6.1.

39.3.3 Protective Custody Hearing

A hearing must be held within 10 days from the date the petition for protective custody is filed to determine if the child should remain with the family or be placed in CYFD's custody pending adjudication on the petition for court-ordered services. §32A-3B-7(A). The Rules of Evidence do not apply to protective custody hearings. §32A-3B-7(F).

When the protective custody hearing is conducted, the court is required by §32A-3B-7(C) to release the child to the parent, guardian, or custodian unless probable cause exists to believe one of the following:

- The child is in immediate danger from his surroundings and the child's removal from those surroundings is necessary for the child's safety or well-being;
- The child will be subject to injury by others if not placed in CYFD's protective custody; or
- A parent, guardian, or custodian of the child or any other person is unable or unwilling to provide adequate supervision and care for the child.

See also the standards laid out in the rule on custody hearings in abuse and neglect cases, specifically Rule 10-315(F) for Indian children.

At the conclusion of the hearing, if the court determines that protective custody pending adjudication is appropriate, the court may:

- Award custody of the child to CYFD; or
- Return the child to the child's parent, guardian, or custodian, subject to conditions that will reasonably assure the safety and well-being of the child. §32A-3B-7(D).

The court may also order the child and family to participate in an assessment and referral process. §32A-3B-7(E).

39.3.4 Appointment of GAL or Youth Attorney

As in an abuse or neglect proceeding, the court in a FINCOS case will appoint a guardian ad litem for a child under the age of 14 and an attorney for a child age 14 or older. (The GAL is also an attorney but the attorney for the older child is client-directed while the GAL represents the child's best interest.) §32A-3B-8(C). Whenever it is reasonable and appropriate, the court will appoint a GAL or attorney who is knowledgeable about the child's cultural background. §32A-3B-8(E).

39.3.5 Change in Placement

When CYFD changes the placement of a child in protective custody, it must provide written notice of the proposed change to the parties and the child's tribe (if the child is an Indian child) ten days before the change occurs, except in the case of emergency. §32A-3B-9(A).

If the child's GAL or attorney requests a hearing to contest the proposed change in placement, CYFD may not change the placement before the result of the hearing, unless an emergency requires changing the placement before the hearing. §32A-3B-9(B).

When a child's placement is changed because of an emergency and prior notice is not given, CYFD must send written notice of the change within three days of the change to the parties and to the child's tribe if the child is an Indian child. §32A-3B-9(C).

39.4 Adjudication and Disposition

39.4.1 Timing of the Adjudicatory Hearing

An adjudicatory hearing must be commenced within 60 days after the date the petition is served on the respondent. When the adjudicatory hearing does not begin within the time limit or within any extension of the time limit, the petition must be dismissed with prejudice. §32A-3B-12.

39.4.2 Conduct of the Hearing; Confidentiality

Adjudicatory hearings are conducted in the same manner as adjudicatory hearings in abuse or neglect cases. The adjudicatory hearing is closed to the general public, but the parties, their counsel and witnesses may be present. §32A-3B-13(B). The court may exclude a child under 14 if it determines that exclusion is in the child's best interests. The court may also exclude a child who is 14 or older, but only after the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding. §32A-3B-13(C).

In addition to the parties, counsel and witnesses, the court may admit any other person having a proper interest in the case or the work of the court to a closed hearing on the condition that they do not disclose any information that would identify the child or family involved in the proceedings. §32A-3B-13(B).

Anyone admitted to a closed hearing who intentionally divulges information concerning the hearing is guilty of a petty misdemeanor. §32A-3B-13(D).

39.4.3 Evidence; Findings Required

The court must find, on the basis of a valid admission of the allegations in the petition or on the basis of clear and convincing evidence that is competent, material and relevant, that the child is a child of a family in need of court-ordered services. §32A-3B-14(B).

If the court finds that the child is a child of a family in need of court-ordered services, the court may proceed immediately or at a postponed hearing to disposition of the case. If the court does not find that the child is a child of a family in need of court-ordered services, the court must dismiss the petition. §32A-3B-14(B).

In an adjudicatory proceeding that may culminate in an Indian child being placed outside the home, the court will need to consider whether *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian. The court must find that such efforts have been made and that they have been unsuccessful. In addition, no foster care placement may be ordered upon adjudication unless there is a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that continued custody with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. ***See*** Handbook §17.11.2 and Chapter 32 on ICWA.

39.4.4 Dispositional Hearing

Prior to the dispositional hearing, the court must direct CYFD to prepare a written family services plan to correct the problems that caused the child to be adjudicated a child of a family in need of court-ordered services. §32A-3B-15.

At the conclusion of the dispositional hearing, the court is required to make findings in the dispositional judgment on the 13 factors listed in §32A-3B-16(A):

- The ability of the parent and child to share a residence;
- The interaction and interrelationship of the child with the parent, siblings, and any other person who may significantly affect the child's best interest;
- The child's adjustment to home, school, and community;
- Whether the child's educational needs are being met;
- The mental and physical health of all individuals involved;
- The wishes of the child as to who should be the custodian;
- The wishes of the child's parent, guardian, or custodian as to the child's custody;
- Whether there exists a relative of the child or any other individual who, after study by CYFD, is found to be qualified to receive and care for the child;
- The availability of services recommended in the treatment plan;
- CYFD's efforts to work with the parent and child in the home and a description of the in-home treatment programs that CYFD has considered and rejected;
- When the child is an Indian child, whether the placement preferences set forth in the Indian Child Welfare Act (ICWA) or the placement preferences of the child's tribe have been incorporated into the plan. When placement preferences have not been incorporated, an explanation must be clearly stated and supported;
- When the child is an Indian child, whether the plan provides for maintaining the Indian child's cultural ties; and
- When the child is an undocumented immigrant, whether the family services plan included referral to nongovernmental agencies that may be able to assist the child, and family when appropriate, in addressing immigration status.

Under §32A-3B-16(B), when there is an adjudication regarding a family in need of court-ordered services, the court will enter judgment and make any of the following dispositions:

- Permit the child to remain with the child's parent, guardian, or custodian, subject to conditions and limitations the court may prescribe.
- Place the child under the protective supervision of CYFD.
- Transfer legal custody of the child to:
    - CYFD;
    - An agency responsible for the care of neglected or abused children; or
    - The child's non-custodial parent, if that is in the child's best interests.
- If the evidence indicates that the child's educational needs are not being met, the local education agency may be joined as a party and directed to:
    - Assess the child's needs within 45 days;
    - Attempt to meet the child's educational needs; and
    - Document its efforts to meet the child's educational needs.

When the child is an Indian child, the court must consider the child's cultural needs during disposition. When reasonable, the child must be provided access to cultural practices and traditional treatment. §32A-3B-16(D).

The statute also contains specific provisions on the disposition of a child who has or may have a developmental disability or mental disorder. §32A-3B-17. The court may order CYFD to secure an assessment of the child and prepare appropriate referrals for services. If necessary, CYFD may also initiate proceedings for involuntary placement for residential mental health or developmental disability services under the Children's Mental Health and Developmental Disabilities (CMHDD) Act, §§32A-6A-1 to 32A-6A-30. The hearing may be held as part of the FINCOS proceeding or in a separate proceeding. In either case, a younger child will be represented by the same GAL as in the FINCOS case, while a youth who is 14 or older may choose to be represented in the mental health proceedings by his or her attorney in the FINCOS case, or by an attorney appointed under the CMHDD Act. §32A-3B-17. ***See*** Handbook Chapter 34.

39.4.5 Time Limits on Dispositional Judgments

The duration of a dispositional judgment varies depending on the person or entity granted legal custody. §32A-3B-18. For example, a judgment vesting legal custody of a child in an agency remains in force for an indeterminate period not exceeding two years from the date entered. However, the court may extend this judgment for additional periods of one year if, before it expires, the court finds that the extension is necessary to safeguard the welfare of the child or the public interest. §32A-3B-18(A) and (E).

A judgment giving legal custody of a child to an individual other than the parent remains in force for two years, unless terminated sooner by court order. §32A-3B-18(B).

A judgment vesting legal custody of a child in the child's parent or a permanent guardian remains in force for an indeterminate period from the date entered until terminated by court order or until the child is emancipated or reaches the age of majority. §32A-3B-18(C).

On the motion of a party, including the child, a dispositional judgment may be modified, revoked or extended at any time before it expires. §32A-3B-18(D).

When a child reaches 18 years of age, all FINCOS orders affecting the child terminate automatically. The termination of these orders does not disqualify a child from eligibility for transitional services. §32A-3B-18(F).

39.5 Periodic Judicial Review

Dispositional judgments must be periodically reviewed using basically the same procedures used for abuse or neglect proceedings under the Children's Code. §32A-3B-19. If at any judicial review the court finds that the child's parent, guardian, or custodian has not complied with the treatment plan, the court may order the child's parent, guardian, or custodian to show cause why he or she should not be held in contempt of court and subject to sanctions. The court may also direct CYFD to show cause why an abuse or neglect action has not been filed or if the local education agency has been made a party, direct the local education agency to show cause why it has not met the child's educational needs. Dispositional orders entered after a judicial review remain in force for a period of six months. §32A-3B-19(H).

39.6 Confidentiality

All records or information concerning a family in need of court-ordered services, including social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts, and audio recordings of a child's statement of abuse or medical reports, obtained as a result of a FINCOS investigation or proceeding are confidential and closed to the public. §32A-3B-22(A).

Under §32A-3B-22(B), these records and information may be disclosed only to:

- the parties;
- court personnel;
- CASAs;
- the child's GAL or attorney;
- the attorney representing the child in an abuse or neglect action, a delinquency action, or any other action, including a public defender;
- CYFD personnel;
- any local SCRB or substitute care advisory council staff;
- law enforcement officials;
- district attorneys;
- a state or tribal government social services agency of any state;
- those persons or entities of an Indian tribe specifically authorized to inspect the records pursuant to ICWA or its regulations;
- tribal juvenile justice system and social service representatives;
- a foster parent, under certain circumstances;
- school personnel involved with the child, if the records concern the child's school or educational needs;
- health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardian, or custodian or other family members;
- protection and advocacy representatives; and
- any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court.

Anyone who intentionally and unlawfully releases any information or records that are closed to the public is guilty of a petty misdemeanor. §32A-3B-22(C).

CHAPTER 40

JUVENILE DELINQUENCY

This chapter describes:

- The Delinquency Act generally, and
- The Act in relation to the Abuse and Neglect Act.

40.1 Purpose of the Delinquency Act

An act committed by a child that would be designated a crime if committed by an adult is considered a "delinquent act" and addressed under the Delinquency Act, §§32A-2-1 through 32A-2-33. Part of the Children's Code, the Delinquency Act is intended to remove from children the adult consequences of criminal behavior while at the same time holding them accountable for their actions to the extent of the child's age, education, mental and physical condition, background, and other relevant factors.

The Act is intended also to provide these children a program of supervision, care, and rehabilitation, and to provide effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives. An additional purpose of the Delinquency Act is to strengthen families and to successfully reintegrate children into homes and communities. §32A-2-2.

In 2007, the Legislature amended §32A-2-2 and added eight additional statutory objectives. One of the explicit purposes of the Act is to eliminate or reduce disparities based upon race or gender. This was reiterated in 2009, when the general purpose section of the Children's Code, §32A-1-3, was amended to specify that the Code is to be construed to effectuate the legislative purpose of reducing overrepresentation of minority children and families in the juvenile justice system through early intervention, linkages to community support services, and the elimination of discrimination.

40.2 Relationship between Delinquency and Abuse or Neglect

Children who are in CYFD's custody because of abuse or neglect are sometimes involved in the juvenile justice system as well, and they are often referred to as crossover youth. As a matter of reality, many young people in the juvenile justice system are youth who suffered abuse or neglect as they were growing up.

Delinquency proceedings focus on the acts of the child. In contrast, abuse or neglect proceedings focus on the acts of the parents. The abuse and neglect case is brought if it is in

the best interests of the child while the delinquency case is brought if it is in the best interest of the child and the public. *Compare* §32A-4-15 *and* 32A-2-8.

A child who is involved in both an abuse or neglect proceeding and a delinquency proceeding will be represented by a guardian ad litem or "youth attorney" in the abuse and neglect case and defense counsel in the delinquency case. The term "youth attorney" is used simply to describe the attorney who represents a youth age 14 or older in the child welfare case. Both this attorney and the attorney in the delinquency case represent the young person under the traditional client-directed model of representation.

Although the guardian ad litem (GAL) for children under age 14 in the abuse or neglect case is an attorney, he or she performs a different role than the youth attorney and defense counsel, both of whom are client-directed. ***See*** Chapter 7 on the GAL's role. The Children's Code provides explicitly that "[a] guardian ad litem shall not serve concurrently as both the child's delinquency attorney and guardian ad litem." §32A-1-7(I).

Indian Children -- Note 1. When an Indian child is involved in both an abuse or neglect case and a delinquency case, the court needs to ensure that the protections specifically enacted for these children are provided, and the parties in both cases need to advocate zealously for them.

Separate and apart from the Indian Child Welfare Act (**see** Chapter 32 on ICWA), the New Mexico Children's Code provides independent protections for an Indian child caught up in the delinquency system. The Code requires that:

- the JPO identify whether a child is an Indian child, §32A-2-5(B)(8);
- the JPO consult and exchange information with the child's tribe concerning disposition and placement, and report to the court the name of the person contacted and the results of the contact, §32A-2-5(B)(9);
- the District Attorney notify the court and parties of an Indian child in the petition; §32A-1-11(F); and
- the court consider "the Indian child's cultural needs" in the dispositional judgment and provide "reasonable access to cultural practices and traditional treatment." §32A-2-19(C).

40.3 Delinquent Children

A "delinquent child" is a child who has committed a delinquent act. §32A-2-3(B). A "delinquent act" is defined as an act committed by a child that would be designated as a crime under the law if committed by an adult. §32A-2-3(A). Examples of delinquent acts include, but are not limited to, driving while intoxicated, reckless driving, illegal use of glue, aerosol spray or other chemical substance, violating the Criminal Code provisions on unauthorized graffiti, and violating an order of protection under the Family Violence Protection Act. *Id.*

In *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 1999-NMSC-044, ¶19, 128 N.M. 315, the Supreme Court held that the Children's Code preempts local government from enacting a teen curfew ordinance which subjects minors to criminal sanctions of incarceration and fines for activity which is not unlawful when committed by adults. As previously noted, under §32A-2-3(A), a delinquent act is an act that would be a crime if committed by an adult. In the *ACLU* case, the Court reasoned that, because an adult could not be charged with violating the curfew law, it could not be a delinquent act, and held that imposing criminal sanctions on children outside the context of the Children's Code was an invalid exercise of power by the city. *Id.* ¶¶10-19.

Children against whom formal court proceedings are brought are in one of three categories:

Delinquent Offender: This designation refers to a child who has committed a delinquent act, who is subject to juvenile sanctions only, and who is not a youthful offender or a serious youthful offender. §32A-2-3(C).

Youthful Offender: This designation refers to a delinquent child who is subject to juvenile or adult sanctions because he or she:

- was 14 to 18 years of age at the time of the offense and is adjudicated for second degree murder, assault with intent to commit a violent felony, kidnapping, aggravated battery, aggravated battery against a household member or upon a peace officer, shooting at a dwelling or occupied building or shooting at or from a motor vehicle, dangerous use of explosives, criminal sexual penetration, robbery, aggravated burglary, aggravated arson, or abuse of a child that results in great bodily harm or death to that child;
- was 14 to 18 years of age at the time of the offense and is adjudicated for any felony offense after having three prior, separate felony adjudications within a three-year period immediately preceding the present offense; or
- was 14 years old and adjudicated for first degree murder. §32A-2-3(J).

An alleged youthful offender is tried in children's court and may only be considered for an adult sanction after an amenability hearing, described further in §40.5.7 below.

Serious Youthful Offender: This designation refers to an individual 15 to 18 years of age who is charged with and indicted or bound over for trial for first degree murder. A serious youthful offender is **not** considered a delinquent child, being the only juvenile who can be tried as an adult in New Mexico. §32A-2-3(H). For that reason, and because of the differences in the way the cases are handled, serious youthful offenders will not be discussed further in this chapter.

Note that a child 14 years of age or older who is charged with first degree murder but found to have committed a youthful offender offense (the offenses enumerated in §32A-2-3(J)) is subject to juvenile or adult sanctions under §32A-2-20. If the child is found to have committed a delinquent act that is neither first degree murder nor a youthful offender offense, the child is subject only to disposition as a delinquent offender. §32A-2-20(H); §32A-2-19.

Indian Children – Note 2. When an Indian child (as defined in ICWA) is involved in a delinquency case, ICWA protections apply if a status offense is alleged. 25 C.F.R. §23.103(b)(2). As "involuntary proceedings," these cases require at least notice to the tribe, a judicial determination of whether the child would suffer "serious emotional or physical harm" if the child remained with the parent, and placement according to the placement preferences if the court finds out of home placement is necessary, in addition to the other ICWA requirements. ***See*** Chapter 32 on ICWA.

What happens if the child is alleged to have violated his or her probation with a status offense, with a possibility of an out-of-home placement? Consider whether this is an ICWA proceeding subject to ICWA protections.

40.4 Preliminary Inquiry; Informal Action by Juvenile Probation Officer

A child becomes involved in the juvenile justice system by referral to CYFD's juvenile probation services. Upon receiving the referral, the juvenile probation officer (JPO) will conduct a preliminary inquiry to determine the best interests of the child and the public regarding what action should be taken. §32A-2-7(A).

At the outset of a preliminary inquiry, the JPO must advise the parties of their basic rights and inform the child of the right to remain silent. Additionally, no party may be compelled to appear at any conference, produce any papers, or visit any place. §32A-2-7(B).

If the child is not in detention, a preliminary inquiry must be conducted within 30 days of the JPO's receipt of the referral from law enforcement. This period may be extended if necessary to complete a thorough inquiry and if the extension is not prejudicial to the best interests of the child. §32A-2-7(C).

If the child is in detention, probation services must give the child's parent, guardian or custodian, or attorney, reasonable notice of the preliminary inquiry and an opportunity to be present. §32A-2-7(C). When a child is detained, probation services must complete its preliminary inquiry and the children's court attorney must file a delinquency petition within two days from the date of detention, excluding Saturdays, Sundays, and legal holidays, or the child must be released. Rules 10-211(C) and 10-107; §32A-2-13(A). The time limit for filing a petition in Rule 10-211(C) differs from the time limit in §32A-2-13, which specifies 24 hours, also excluding weekends and holidays. According to the committee commentary to Rule 10-211, the difference between two days and 24 hours is intentional and the rule applies because the time limit is procedural.

If, as a result of the preliminary inquiry, the JPO determines that a delinquency petition is unnecessary, ~~it~~ he or she has the authority, among other things, to make referrals for services that are appropriate or desirable and to informally dispose of up to three misdemeanor charges brought against a child within two years. §32A-2-5(B).

Examples of informal dispositions by the JPO include:

- counseling and releasing the child without further action;
- requiring the child to perform community service;
- requiring the child to make victim restitution;
- requiring the child complete an assessment for treatment and follow the recommendations of that assessment;
- referring the child to a particular program; or
- some form of informal supervision.

Some of the programs that may be available include first offender diversion programs**,** parent-child mediation, victim-offender mediation, family counseling, or alcohol and drug education. Even letters of apology or essays are used.

If the report alleges a felony or the child has been referred for three or more prior misdemeanors within two years of the current offense, probation services must refer the case to the district attorney's children's court attorney (not to be confused with CYFD's children's court attorney, who handles abuse and neglect cases). §32A-2-7(E)-(F).

40.5 Formal Actions

40.5.1 Commencement of Case

A formal delinquency proceeding is begun by the filing of a petition in children's court. The petition alleging delinquency is filed by the children's court attorney who, after consulting with probation services, has determined and endorsed on the petition that the filing of the petition is in the best interest of the public and the child. §32A-2-8.

The parents of the child may be joined as parties to the delinquency action and, if the child is adjudicated a delinquent, may be ordered to submit to counseling or participate in any probation or other treatment program ordered by the court. §32A-2-28. If not joined as parties, parents must be given notice of the filing of the petition. Rule 10-211(D).

Practice Note: It would be helpful to coordinate, to the extent possible, any treatment programs required of the child or the parents as a result of a delinquency proceeding and the treatment plan adopted in the abuse or neglect case. Efforts should be made to avoid situations in which the parents or the child or both are being subjected to different, duplicative, or possibly conflicting requirements or programs.

A child involved in a formal delinquency proceeding is entitled to counsel and will have a public defender appointed if the child's parent, guardian, or custodian is unable or unwilling to pay for an attorney. Rule 10-223. As noted above, a guardian ad litem appointed for a child in an abuse or neglect proceeding may not simultaneously serve as the child's legal counsel in delinquency proceedings. §32A-1-7(I). No similar rule prevents a youth attorney appointed in an abuse or neglect case from representing the same child in a delinquency

proceeding. Nevertheless, a youth attorney should be alert to potential conflicts that may arise when representing a child in both kinds of cases.

In addition to counsel, the court may appoint a guardian ad litem for the child if the child does not have a parent, guardian, or custodian appearing on behalf of the child or if their interests conflict. The court will appoint a guardian, as distinct from a guardian ad litem, if the child does not have a parent or legal guardian in a position to exercise effective guardianship. §32A-2-14(J), (K).

If the petition alleges one or more youthful offender offenses, the children's court attorney may file a notice of intent to invoke an adult sentence. Any such notice must be filed within 10 working days of the filing of the petition, although the court may extend the time for good cause shown prior to the adjudicatory hearing. §32A-2-20(A). Section 32A-2-20 and Rule 10-213 outline the procedures required. Either the court will conduct a preliminary hearing or the case will be presented to a grand jury, depending on the judicial district. Only if the indictment or bind over order includes a youthful offender offense will the case proceed as a youthful offender case for which adult sanctions are possible.

When Grand Jury Returns a No-Bill. The Court of Appeals has held that the remedy when the grand jury finds no probable cause is dismissal without prejudice. This applies to any delinquent offender offenses presented to the grand jury, as well as the youthful offender offenses. *State v. Oscar Castro H.*, 2012-NMCA-047, ¶¶5, 15.

Until late 2014, the Children's Court Rules applied in delinquency cases while the Rules of Criminal Procedure applied to youthful offender cases in which adult sanctions were being sought, unless a specific Children's Court Rule stated otherwise. The Supreme Court amended the Children's Court Rules in 2014 to make them applicable to youthful offender cases. Rule 10-101(A), as amended in 2014.

40.5.2 Detention Hearing

The Children's Court Rules provide that, if a child is taken into custody for a delinquent act, the petition alleging delinquency must be filed within two working days or the child must be released. Rules 10-211(C) and 10-107... Not all children charged with delinquent acts may be held in detention. Children under the age of 11 may not be held in detention, but may be detained and transported for emergency mental health evaluation and care if the child "poses a substantial risk of harm to the child's self or others." §32A-2-10(C).

For children 11 and older who are detained, the court must hold a detention hearing within one working day of the following events, whichever is applicable:

- the filing the petition if the child is in detention at the time the petition is filed;
- placement of the child in detention if the respondent is placed in detention after the petition is filed;
- placement of the child in detention without a warrant for failure to comply with the conditions of release; or

- a motion of the child for release after being placed in detention pursuant to a warrant for failure to comply with conditions of release. Rule 10-225(A).

The court, upon request of any party, may permit the detention hearing to be conducted by appropriate means of electronic communication provided that all electronic hearings are recorded and preserved as part of the record, the child has legal representation present with the child, and no pleas are taken. In addition, the court must find that:

- undue hardship will result from conducting the hearing with all parties, including the child, present in the courtroom, and
- the hardship substantially outweighs any prejudice or harm to the child that is likely to result from the hearing being conducted by electronic means. §32A-2-13(A)(3).

At the detention hearing, the court must decide whether continued detention is justified. *Id.* Unless ordered by the court under other provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act may not be placed in detention unless a detention risk assessment instrument is completed and a determination is made that the child:

- poses a substantial risk of harm to himself;
- poses a substantial risk of harm to others; or
- has demonstrated that he may leave the jurisdiction of the court. §32A-2-11(A).

If none of these criteria exist, the court will order the child released. As a condition of release, the court may order one or more of the following conditions to meet the individual needs of the child:

- place the child in the custody of a parent, guardian, or custodian or under the supervision of an agency agreeing to supervise the child;
- place restrictions on the child's travel, association, or place of abode during the period of release; or
- impose any other condition deemed reasonably necessary to assure the child's required appearance, including a condition that the child return to custody as required. Rule 10-225(C); *see also* §32A-2-13(F).

If it is determined that a child must be detained pending a court hearing, the child may be placed or detained in any of the following places:

- a licensed foster home or a home authorized to provide foster or group care;
- a facility operated by a licensed child welfare services agency;
- a shelter-care facility provided for in the Children's Shelter Care Act, §§32A-9-1 to 32A-9-7, that is in compliance with all standards, conditions, and regulatory requirements and that will be considered a temporary placement subject to judicial review within 30 days of placement;
- a detention facility certified by CYFD for children alleged to be delinquent children;
- any other suitable facility designated by the court that meets the standards for detention facilities under state and federal law, other than a facility for the long-term

care and rehabilitation of delinquent children to which children adjudicated as delinquent may be confined; or

- the child's home or place of residence, under conditions and restrictions approved by the court. §32A-2-12(A).

A child arrested and detained for a delinquent act may not be held in an adult jail or lock up unless the child is placed in a setting that is physically segregated by sight and sound from adult offenders. The child may only be held in the adult jail or lock up for up to six hours, after which the child must be placed or detained pursuant to §32A-2-12. §32A-2-4.1.

There are special provisions for a child alleged to be a youthful offender or a serious youthful offender. *See* §32A-2-12(B) (youthful offenders); §§32A-2-12(E) and 31-18-15.3 (serious youthful offenders). In the event a child is detained in a jail, the director of the jail must take measures to provide protection to the child, who is presumed to be vulnerable to victimization by adult inmates. §32A-2-12(E).

A child who was previously incarcerated as an adult or a person over age 18 may be detained in the county jail and may not be detained in a juvenile detention facility. §32A-2-12(C). However, a child may not be transferred from a juvenile facility to a county jail solely on the basis of turning 18. §32A-2-12(D). Many jurisdictions will allow a child who has turned 18 while in a juvenile detention facility to remain in that facility as long as the child maintains appropriate behavior.

40.5.3 Competency

A child's competency to stand trial or participate in his or her own defense may be raised by any party at any time during a proceeding. §32A-2-21(G). However, if the child was previously found to be competent to stand trial in the proceeding, the competency issue may be redetermined only if the judge finds that there is evidence not previously submitted which raises a reasonable doubt as to the child's competency to participate. Rule 10-242(C). Upon motion and good cause shown the judge will order a mental examination of the child before making a competency determination. Rule 10-242(B). Form 10-741 is a form of order for a competency evaluation.

If the court finds the child incompetent and the child has been accused of an offense that would be a misdemeanor if the child were an adult, the court must dismiss the delinquency petition with prejudice. The judge may also recommend that the children's court attorney initiate proceedings under the Children's Mental Health and Developmental Disabilities (CMHDD) Act, §32A-2-21(G); Rule 10-242(D).

In all other cases, the court must stay the proceedings until the child is competent to stand trial, but in no case may the proceedings be stayed more than one year. If the court stays the proceedings, it may order treatment to enable the child to attain competency to stand trial and may amend the conditions of release. During the stay, the child's competency must be reviewed every 90 days. In many jurisdictions, an updated competency evaluation may be ordered towards the end of the one year stay to determine if the child has become competent.

The court must dismiss the petition without prejudice if, at any time during the stay, the court finds that the child cannot be treated to competency. For this reason, many attorneys request that the competency evaluators state in their reports whether it is the evaluator's belief that the child can obtain competency in the one year time period. The case must also be dismissed without prejudice if, after one year, the child remains incompetent to stand trial and unable to participate in his or her own defense. Upon dismissal, the court may recommend proceedings under the CMHDD Act. §32A-2-21(G); Rule 10-242(D).

40.5.4 Adjudicatory Hearing

The adjudicatory hearing is the equivalent of a criminal trial in an adult case in district court. Except as otherwise provided, the hearing is conducted in the same manner as trials are conducted under the Rules of Criminal Procedure. Rule 10-244(A); Rule 10-245.1(C).

In delinquency proceedings, if the child is in detention, the adjudicatory hearing must begin within 30 days of the petition being filed or the child being placed in detention, whichever occurs latest. Rule 10-243(A). If the child is not in detention or is released before this time limit, the adjudicatory hearing must be commenced within 120 days of the petition being served on the child. Rule 10-243(B). (The 30 and 120 days could also run from a number of other events that occur less frequently.) The children's court may grant an extension of time but the maximum period of time for all extensions is 90 days, except upon a showing of exceptional circumstances. Rule 10-243(D).

In youthful offender proceedings, the adjudicatory hearing must begin within 6 months of the arraignment or waiver of the arraignment. Rule 10-243.1(A). (As with the 30 and 120 deadlines above, the 6 months could also run from a number of the events that occur less frequently.) The court may grant up to two 6-month extensions. The aggregate may not exceed one year except in exceptional circumstances. Rule 10-243.1(B).

In both delinquency and youthful offender cases, if the hearing does not take place within the required time period or within any extension of time granted under the rules, the case must be dismissed with prejudice. Rule 10-243(F); Rule 10-243.1(D).

The child is entitled to a jury trial if the act is one for which an adult would have a right to a jury trial. Rules 10-245(A) and 10-245.1(A) provide that the trial "shall be by jury" unless the child "knowingly and voluntarily waives the right to a jury trial." *See State v. Eric M.*, 1996-NMSC-056, ¶6, 122 N.M. 436. A child facing a juvenile disposition is entitled to a six-person jury. If adult sanctions are possible, the child is entitled to a 12-person jury. §32A-2-16(A); Rule 10-245.1(B). The state does not have a right to insist on a jury trial in a delinquency case. *In re Christopher K.*, 1999-NMCA-157, ¶12, 128 N.M. 406.

The Rules of Evidence apply during the adjudication. *See* Rules 10-141 (formerly Rule 10-115) and 11-1101.

Before any statement or confession by a respondent age 13 or over may be introduced into evidence, the state must prove that the statement or confession was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights. §32A-2-14(D). Courts apply the factors set forth in §32A-2-14(E) to determine whether a child validly waived his or her rights. *See, e.g., State v. Rivas*, 2017-NMSC-022 , ¶¶34-35 (finding that a 15 year old who was subject to pre-petition questioning validly waived his rights, based on his age, form of advisement, explicit written waiver, appropriate responses to questions, no evidence of physical or mental impairment and absence of countervailing factors); *State v. Wyatt B.*, 2015-NMCA-110, (finding that such factors as the 16 year old's impaired physical and mental condition due to intoxication and the police officer's denial of child's request to have his parents present did not override other evidence showing a valid waiver of rights under the totality of circumstances analysis set forth in §32A-2-14(E)).

No confessions, statements or admissions may be introduced against a child under the age of 13 at all, whether made to a person in authority or simply to a friend or neighbor. §32A-2-14(F); *State v. Jade G.*, 2007-NMSC-010, ¶16, 141 N.M. 284.

There is a rebuttable presumption that any confession, statement or admission made by a child age 13 or 14 to a person in a position of authority is inadmissible. §32A-2-14(F). Section 32A-2-14(F) requires the prosecution to prove by clear and convincing evidence that, at the time statement to a person in a position of authority, the child was warned of his constitutional and statutory rights, and knowingly, intelligently, and voluntarily waived each right. *State v. DeAngelo M.*, 2015-NMSC-033, ¶3. To show a valid waiver of rights by a 13 or 14 year old, the recording of the child's interrogation must clearly and convincingly show that "the child's answer to open-ended questions demonstrated that the … child has the maturity to understand each of his or her constitutional and statutory rights and the force of will to insist on exercising those rights." *Id.* ¶¶ 3, 19, 30. Expert testimony is not required but may assist the factfinder in determining whether the presumption has been overcome. *See id.* ¶3.

Once the Sixth Amendment right to counsel has attached, a child cannot waive his or her rights outside an attorney's presence. The court need not engage in the statutory waiver inquiry. *See Rivas*, ¶¶26, 50.

Unlike abuse and neglect proceedings, delinquency hearings are generally open to the public. However, with a finding of exceptional circumstances, the court can decide that a closed hearing is appropriate. §32A-2-16(B).

Police Questioning and Consent to Search. The Delinquency Act provides children with broader rights in the area of police questioning than adults. *Miranda* protections are triggered when a child is subject to investigatory detention, not just custodial interrogation. §32A-2-14(C); *State v. Filemon V.*, 2018-NMSC-011, ¶35; *State v. Rivas*, 2017-NMSC-022, ¶27; *State v. Javier M.*, 2001-NMSC-030, ¶1. *See also J.D.B. v. North Carolina*, 564 U.S. 261 (2011), in which the U.S. Supreme Court decided, by plurality decision, that the federal Constitution requires that law enforcement consider age when determining whether a child is "in custody" and entitled to *Miranda* warnings before interrogation (for instance, query whether a 13 year old would feel free to leave).

The New Mexico Supreme Court has held that a police officer's "mere presence" while the school principal questioned a 15 year old student in the principal's office about delinquent behavior (drinking alcohol) subjected the student to investigatory detention. The police officer was therefore required to advise the child of his right to remain silent and that, if the right was waived, anything he said could be used against him in criminal delinquency proceedings. *State v. Antonio T.*, 2015-NMSC-019, ¶11. The Court was careful to note that its holding only applies to delinquency proceedings and in no way affects school disciplinary proceedings. *Id.* ¶24. More recently, the Supreme Court held that unwarned statements made by a child to a probation officer in a situation the Court determined to be investigatory detention were inadmissible. *Filemon V.*, ¶35. The Court distinguished *State v. Taylor E.*, 2016-NMCA-100, in which the Court of Appeals had held that statements made by a child to his probation officer were admissible in a probation revocation proceeding. The Court noted that the statements in question in *Taylor E.* were admissible because they were elicited in a routine meeting and not used to prosecute a new offense, unlike the *Filemon V.* situation. 2018-NMSC-011, ¶34.

The Court of Appeals has characterized §32A-2-14 "as a very narrowly drawn statutory protection" and interpreted *Javier M.* as only protecting a child's *statements* under §32A-2-14. *State v. Candace S.*, 2012-NMCA-030, ¶27. A child's physical conduct in a field sobriety test (FST) is not a statement, and accordingly, §32A-2-14 does not require that a police officer advise a child of the right to decline to perform an FST. *Id.* ¶26. *See also State v. Randy J.*, 2011-NMCA-105, ¶20, 150 N.M. 683. Similarly, no legal authority requires a police officer to advise a child of the right to deny consent to a search. *State v. Carlos A.*, 2012-NMCA-069, ¶20.

The Court of Appeals has also ruled that a child's consent to a blood test under the Implied Consent Act, §66-8-107(A), and blood test results are not statements subject to suppression under §32A-2-14(D). *Randy J.*, ¶¶ 23, 24, 26.

40.5.5 Time Waivers

The child, through counsel, and the children's court attorney may agree to defer adjudication of the charges on the condition that the child comply with certain restrictions on his or her behavior. The petition is dismissed (with prejudice) if the child completes the conditions and no new charges are filed against the child during that time. §32A-2-7(G). This agreement is

called a "time waiver," because the parties agree to waive the strict time limits for adjudication and disposition. Court approval is not required.

40.5.6 Consent Decrees

A consent decree is an order that suspends delinquency proceedings and continues a child under the supervision of probation services without a judgment. §32A-2-22(A).

Any time before the court enters judgment in a delinquency case, either party may move the court to suspend the proceedings and continue the child under supervision with certain agreed-upon terms and conditions. §32A-2-22(A); Rule 10-228. This motion may be filed even after adjudication. Rule 10-228.

If the child objects to a consent decree, the court will proceed to findings, adjudication, and disposition of the case. If the child does not object but the children's court attorney does, the court may, in its discretion after considering the objections, enter the consent decree. §32A-2-22(B).

The court may not require an admission as a condition of a consent decree. §32A-2-22(A); 10-226(A) (providing that the child may stand mute in response to the petition). However, the court must inform the respondent child about the legal consequences and make certain inquiries before granting a motion for consent decree, including determining that the motion is voluntary and ensuring that a factual basis exists for the allegations in the petition. Rule 10-226(I) and (J).

A consent decree remains in force for six months unless the child is discharged earlier by probation services or the court extends the consent decree for an additional six months, by motion of the children's court attorney filed before the original decree expires. Rule 10-228(B). No hearing is required on juvenile probation's application to extend probation unless the child objects, in which case the court will determine after hearing if the extension is in the best interests of the child and the public. §32A-2-22(C); Rule 10-228.

If the children's court attorney believes that the child is not fulfilling the terms of the consent decree, the attorney may file a petition to revoke it. The petition must be filed prior to discharge by probation services or expiration of the consent decree, whichever occurs earlier. Rule 10-228(D); §32A-2-22(D). Proceedings on the petition to revoke a consent decree are conducted in the same manner as proceedings on petitions to revoke probation. If the court finds that the child violated the consent decree, the court may extend the period of the consent decree or make any other disposition that would have been appropriate in the original proceeding, including reinstatement of the original delinquency petition. §32A-2-22(D).

The court retains jurisdiction to hear a timely filed petition to revoke a child's consent decree after the probation period has expired. *State v. Katrina G.*, 2007-NMCA-048, 141 N.M. 501. Section 32A-2-22(E) does not impose a time limit on the children's court. Rather, Rule 10-243 (formerly Rule 10-226) governs the time limits within which the court must hear a petition to revoke a child's probation. *Id.* ¶¶12, 19.

A judge who elicits or examines information or material about a child during consent decree proceedings that would be inadmissible in a hearing on the delinquency petition may not participate in any subsequent delinquency proceedings if the child objects. This could happen if (1) the consent decree is denied and the allegations in the petition remain to be decided in a hearing where the child denies the allegations; or (2) a consent decree is granted but the delinquency petition is subsequently reinstated. §32A-2-22(F).

40.5.7 Dispositional Hearing

If the child is in detention, the dispositional hearing must begin within 30 days from the date the court concludes the adjudicatory hearing in a delinquency proceeding or trial in a youthful offender proceeding or accepts from the child an admission of the factual allegations of the petition. Rule 10-246(B). If the hearing is not begun within 30 days, unless the child has agreed to or been responsible for the delay, the child must be released from detention until the dispositional hearing can be commenced. Rule 10-246(B) permits the court to set appropriate conditions on such release.

Copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court must be provided to the parties at least five days before the actual disposition or sentencing. §32A-2-17(A); Rule 10-246(A) and (B).

In the case of youthful and serious youthful offenders, pre-disposition reports are mandatory under §32A-2-17(A), as made clear by the Supreme Court and Court of Appeals. *See State v. Gutierrez*, 2011-NMSC-024, ¶¶62-66, 150 N.M. 232, and *State v. Jose S.*, 2007-NMCA-146, ¶16, 142 N.M. 829.

The court may order that a child adjudicated as a delinquent child be administered a predisposition evaluation by a professional designated by the department for purposes of diagnosis, with direction that the court be given a report indicating what disposition is most suitable when the interests of the child and the public are considered. The preference is now for performing the evaluation in the child's community. §32A-2-17(D).

The evaluation must be completed within 15 days of the court's order. However, for good cause shown, a child may be detained for more than 15 days within a 365 day period for the evaluation. § 32A-2-17(D) and (E).

Evaluation Forms. In 2016, the Supreme Court recompiled and amended the forms for delinquency and youthful offender proceedings. The forms for an order for evaluation of competency to stand trial, an *ex parte* order for forensic evaluation, an order for the predispositional diagnostic evaluation, and an order for evaluation of amenability to treatment are Forms 10-741 through 10-745 respectively.

As in an abuse or neglect case, the dispositional hearing is not subject to the Rules of Evidence. All relevant and material evidence may be received, even if it would not be competent if it were offered during the adjudicatory hearing. §32A-2-16(G); Rule 11-1101.

The court may consider such factors as the child's brain development, maturity, trauma history, and disability when making dispositional findings related to the child's mental health. *See* §32A-2-19(A)(3).

The court may make any number of dispositions for a child found to be delinquent, depending on the delinquent act committed by the child and the child's circumstances. However, the court is limited to options authorized by statute. *State ex rel. CYFD v. Paul G.*, 2006-NMCA-038, ¶¶20, 21, 24, 139 N.M. 258. Options under §32A-2-19, depending on the act committed, include:

- a fine;
- transfer of legal custody to CYFD. CYFD would then determine the appropriate placement, supervision and rehabilitation program for the child, considering the judge's recommendations for placement, if any. Types of commitment include:
    - a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children, of which a maximum of nine months may be served in a facility and at least 90 days must be served on supervised release;
    - a long-term commitment of no more than two years, of which no more than 21 months may be served at the facility and at least 90 days must be served on supervised release;
    - if youthful offender felonies were committed, a commitment to age 21, unless discharged sooner, regardless of the age of the offender (*State v. Indie C.*, 2006-NMCA-014, ¶8, 139 N.M. 80);
- probation under conditions and limitations set by the court (if the child was found delinquent because of alcohol, glue or drugs, a condition of probation under §32A-4-19(B)(4) could be transferring custody of the child to CYFD for up to six months for treatment);
- placing the child in a local detention facility certified in accordance with §32A-2-4 for a period not to exceed fifteen days (within a 365 day time period); this is commonly referred to as the "fifteen day kick-out" option;
- restitution;
- community service; or
- denial or revocation of driving privileges.

Another option is to simply release the child from the court's jurisdiction, which the court can do if the child is no longer in need of care, supervision or rehabilitation. §32A-2-23(G).

With regard to commitments, §32A-2-19(B) does not authorize the court to impose a disposition that includes commitment *less than* to age twenty-one, unless it is a short-term commitment of one year or a long-term commitment of no more than two years. *Paul G.*, ¶¶1, 20 (holding that the Delinquency Act does not authorize the children's court, pursuant to a plea agreement, to commit a child for an indeterminate period up to the age of 18).

The court may refer the child and family to CYFD for an abuse or neglect investigation and, if warranted, abuse or neglect proceedings. §32A-2-19(G).

Before a short-term commitment of one year expires, the court may extend the judgment for one six-month period if the court finds that the extension is necessary to safeguard the welfare of the child or the public safety. Notice and hearing are required for any such extension to take place. If a short-term commitment is extended, the mandatory 90-day supervised release must be included in the extension. §32A-2-23(D).

Before a long-term commitment of two years expires, the court may extend the judgment for additional periods of one year until the child turns 21 if necessary to safeguard the welfare of the child or the public interest. Notice and hearing are required for any such extension to take place. If a long-term commitment is extended, the mandatory 90-day supervised release must be included in the extension. §32A-2-23(E).

The court may also extend a judgment of probation for an additional period of one year until the child reaches 21, if necessary to protect the community or safeguard the child's welfare. §32A-2-23(F).

When the child is an Indian child, the Indian child's cultural needs must be considered in the dispositional judgment and reasonable access to cultural practices and traditional treatment must be provided. §32A-2-19(C).

The court may not impose consecutive commitments. *State v. Adam M.*, 2000-NMCA-049, ¶14, 129 N.M. 146. However, it may impose two separate concurrent commitments arising out of different facts at the same hearing, as long as each commitment is statutorily authorized. *State v. Jose S.*, 2005-NMCA-094, ¶11, 138 N.M. 44.

While most delinquent acts subject the child only to juvenile sanctions, the children's court may order the imposition of adult sanctions in the case of youthful offenders. §32A-2-20(A). An adult sentence is only permitted if the court finds that:

- the child is not amenable to treatment or rehabilitation as a child in available facilities; and
- the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. ***See*** Chapter 34 on the Children's Mental Health and Developmental Disabilities Act. §32A-2-20(B).

Section 32A-2-20(C) lists several factors that must be considered when making these findings. These include:

1. the seriousness of the offence;
2. whether the offense was committed in an aggressive, violent, premediated or willful manner;
3. whether a firearm was used;
4. whether the offense was against persons or against property;

5. the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;
6. the record and previous history of the child;
7. the prospects for adequate protection of the pubic and the likelihood of reasonable rehabilitation of the child; and
8. any other relevant factor, provided that factor is stated on the record.

In *State v. Nehemiah G.*, 2018-NMCA-034, the Court of Appeals reversed the lower court's finding that the State failed to prove by clear and convincing evidence that the child was not amenable to treatment or rehabilitation as a child in available facilities. The Court decided that the district court abused its discretion by, among other things, insufficiently considering and failing to make proper findings regarding each of the seven statutory factors listed in §32A-2-20(C). *Id*. ¶¶1, 55. *See also State v. Gonzales*, 2001-NMCA-025, 130 N.M. 341.

Amenability Hearings. In *State v. Jones*, the Supreme Court held that the children's court cannot approve a plea agreement in which the defendant agreed to be sentenced as an adult without first conducting an amenability hearing and making the necessary findings. A child's right to an amenability hearing cannot be waived. 2010-NMSC-012, ¶¶48-50, 148 N.M. 1. In *State v. Rudy B.*, the Court ruled that the Sixth Amendment right to jury trial does not apply to amenability determinations in youthful offender proceedings. 2010-NMSC-045, ¶59, 149 N.M. 22.

Rule 10-247, adopted in 2014, establishes procedures and other requirements for amenability hearings in youthful offender proceedings and makes it clear that the Rules of Evidence apply. Uniform Jury Instruction 14-9005 requires the jury to make special findings to assist the court when deciding amenability.

A youthful offender given an adult sentence is then treated as an adult offender and transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. §32A-2-20(E). While a judgment resulting in a juvenile disposition is not considered a conviction of crime, an adult sentence is. §32A-2-18(C).

Children over 14 who are charged with first degree murder but found guilty only of delinquent acts are subject only to the dispositions permitted for those offenses. §32A-2-20(G), (H). If found to have committed a youthful offender offense, for example, the child must be given an amenability hearing before an adult sentence may be considered. A child found to have committed a delinquent offense is subject only to juvenile sanctions. These statutory changes effectively overrule *State v. Muniz*, 2003-NMSC-021, ¶15, 134 N.M. 152.

40.5.8 Revocation of Probation

Proceedings to revoke probation are governed "by the procedures, rights and duties applicable to proceedings on a delinquency petition," except that the hearing is held before the judge without a jury. The Court of Appeals has interpreted this language as applicable to "the manner in which trials and hearings are conducted in court and not to events taking

place before the commencement of a court proceeding." *State v. Taylor E.*, 2016-NMCA-100, ¶49. Consequently, statements inadmissible in a delinquency proceeding may still be admissible in a probation revocation proceeding. *See, e.g., Taylor E.*, ¶¶42, 57 (reversing the district court's suppression of a juvenile's incriminating statements to his JPO after being suspended from school for behavior that jeopardized juvenile's probationary status); *see also* §40.5.4 above.

To establish a violation of probation in a probation revocation proceeding, the State must prove the violation beyond a reasonable doubt and must prove willful conduct on the part of the probationer. *In re Bruno R.*, 2003-NMCA-057, ¶11, 133 N.M. 566; *see also* §32A-2-24.

In *In re Aaron L.*, 2000-NMCA-024, 128 N.M. 641, the Court of Appeals held that Rule 10-224 (now Rule 10-226) applies to probation revocations as well as delinquency proceedings by virtue of §32A-2-24. "[T]he trial court had an affirmative duty under Rule 10-224(C) to ascertain whether Child's admission was supported by an adequate factual basis and whether Child's admission was knowing, intelligent, and voluntary." *Id*. ¶16. Extrajudicial admissions and confessions are not sufficient to prove beyond a reasonable doubt that a child committed delinquent acts, including violations of probation, absent other corroborating evidence. §32A-2-14(G); *Bruno R.*, 2003-NMCA-057, ¶17.

In *State v. Erickson K.*, 2002-NMCA-058, ¶18, 132 N.M. 258, the court held that the Rules of Evidence apply to the adjudicatory portion of a juvenile probation revocation hearing. As a result, "the children's court must take pains to maintain some separation between disputed adjudicatory issues and the dispositional matters that arise as a consequence of that adjudication." *Id*. ¶17. The Rules of Evidence do not apply to the dispositional phase. *Id.* ¶15.

40.5.9 Appeals

A child has a right to appeal a judgment under the Delinquency Act. Rule 10-253 sets forth requirements governing appeals, including the advisement of the right to appeal, in delinquency and youthful offender proceedings. The Rules of Appellate Procedure govern appeals from delinquency judgments and dispositions and appeals from youthful offender judgments and sentences. §32A-1-17(A); Rule 10-253.

40.6 Motor Vehicle Cases

Jurisdiction over children who commit Motor Vehicle Code violations is split between children's court and the courts of limited jurisdiction (municipal, magistrate and metropolitan). The children's court has jurisdiction over the traffic offenses that are specifically listed in §32A-2-3(A)(1), such as driving while under the influence and reckless driving. If the children's court acquires jurisdiction over a child for delinquent offenses, it also acquires exclusive jurisdiction over traffic offenses alleged to have been committed by the child arising out of the same occurrence. Other traffic violations are heard by municipal, magistrate, or metropolitan court. §32A-2-29(A) and (B).

If the children's court acquires jurisdiction over traffic violations by virtue of its jurisdiction over delinquent acts arising out of the same occurrence, the court may, in its discretion, dispose of the traffic violations under the Motor Vehicle Code or municipal traffic code to the extent that the disposition neither conflicts with nor is inconsistent with the dispositional provisions of the Children's Code. §32A-2-29(D).

Only the children's court may incarcerate a child who has been found guilty of traffic offenses. §32A-2-29(F).

40.7 Confidentiality of Juvenile Records

Section 32A-2-32 provides that all records pertaining to the child, including the records listed below, are confidential and may not be disclosed directly or indirectly to the public. The records that are confidential include:

- social records;
- behavioral health screenings;
- diagnostic evaluations;
- psychiatric reports;
- medical reports;
- social studies reports;
- records from local detention facilities;
- client-identifying records from facilities for the care and rehabilitation of delinquent children; and
- pre-parole or supervised release reports and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in the possession of CYFD. §32A-2-32(A).

Except for mental health and developmental disabilities records, these records may be disclosed to the individuals entities listed in §32A-2-32(C). However, the agency, person, or institution receiving the information may not re-release the information without proper consent or as otherwise provided by law. §32A-2-32(A). Mental health and developmental disability records may only be disclosed pursuant to the Children's Mental Health and Developmental Disabilities Act. §32A-2-32(B). ***See*** Handbook, Chapter 34.

If disclosure of otherwise confidential records is made to the child or any other person or entity pursuant to a valid release of information signed by the child, all victim or witness identifying information must be redacted or otherwise deleted. §32A-2-32(D).

Rule Changes Pending. In January 2018, the Supreme Court issued amendments to Rule 10-166(C)(6) to clarify §32A-2-32, especially the phrase "all records pertaining to the child" found in the first sentence of the statute, due to different interpretations across the state. The result was that all court records in a proceeding under the Delinquency Act were sequestered, except that this did not apply to: (a) persons and entities enumerated in §32A-2-32(C); (b) a facility, organization, or person providing care, treatment, or shelter

to the child, including a detention facility; and (c) disclosure by CYFD as governed by §32A-2-32. Almost immediately upon adoption, objections were raised that resulted in the Supreme Court suspending the rule and republishing it for comment. Possible revisions are being considered as this Handbook goes to press in July 2018.

40.8 Sealing of Records under §32A-2-26

Section 32A-2-26 allows for a motion to seal the records and files of a person who has been the subject of a delinquency proceeding and provides for automatic sealing in certain circumstances. Rule 10-262 governs the sealing of records and files as authorized by §32A-2-26.

On motion of or on behalf of an individual who has been the subject of a delinquency proceeding or on the court's own motion, the court must vacate its findings, orders and judgments on the petition and order the legal and social files and records of the court, probation services and any other agency in the case sealed as long as certain conditions are met. The movant may also request that law enforcement files and records be sealed. §32A-2-26(A); Rule 10-262(C). The conditions are that (1) two years have elapsed since the release of the person from legal custody and supervision or since entry of judgment not involving legal custody and supervision and (2) in those two years, the person has not been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent and no such proceeding is pending. If the person is not yet 18, the court must find good cause to seal the records. *Id*.

Regardless of whether a motion is filed, once a child turns 18, CYFD must prohibit public access to the child's files and records in its possession once the child (now an adult) has been released from court-ordered supervision or custody of CYFD and is not subject to a pending delinquency proceeding or any other order not involving legal custody or supervision. Once it seals its files and records, CYFD must set in motion a process by which the courts and other agencies will also seal their files and records on the child. Rule 10-262(E) and (F).

When a delinquency petition does not result in an adjudication of delinquency, the children's court attorney at the conclusion of the case must present the court with a proposed sealing order in the form prescribed by the Supreme Court (Form 10-718). This order will direct CYFD and all other agencies to seal all files and records related to the delinquency proceeding. Rule 10-262(D) and (E). *See also* §32A-2-26(J).

Following the entry of a sealing order, the proceedings must be treated as if they never occurred and all index references to the matter deleted. As explained in the rule, the sealing order has the effect of vacating the findings, orders, and judgments in the case. If an inquiry about the case is made, "the court, law enforcement officers and departments and agencies shall reply, and the person may reply, to an inquiry that no record exists with respect to the person." §32A-2-26(C); Rule 10-262(G).

After the entry of a sealing order, the court may permit inspection of the files and records or release of information in the records included in the sealing order only upon motion of the

person who is the subject of the records and only to persons named in the motion. The court may also, in its discretion, permit inspection by a clinic, hospital, or agency that has the person under care or treatment or by other persons engaged in fact finding or research. §32A-2-26(D). After sealing, CYFD may store and use a person's records for research and reporting purposes, subject to the confidentiality provisions of §32A-2-32 and other applicable federal and state laws. §32A-2-26(K).

A finding of delinquency or conviction of a crime following the sealing of records may, in the court's discretion, be used by the court as a basis for setting aside the order. §32A-2-26(E). A court may also unseal and consider CYFD youthful offender records and the juvenile disposition of a youthful offender and any evidence given at a hearing for a youthful offender when, during a later case in which the person is charged with a felony, the court is considering the setting of bail or other conditions of release. §§32A-2-26(F) and (I). However, the juvenile disposition and evidence may only be considered if the person is 30 years of age or younger, and must be kept confidential and reviewed in camera. §31-3-1.1. All evidence, motions and other documents pertaining to the juvenile disposition that are confidential must be sealed. *Id*.

CHAPTER 41

CRIMINAL ABUSE AND NEGLECT PROCEEDINGS

This chapter reviews:

- Reporting requirement for suspected child abuse and neglect.
- Statute of limitations for initiation of a criminal prosecution.
- Elements of child abuse and neglect crimes and other crimes against children.
- Evidentiary considerations.

This chapter will discuss allegations of abuse and neglect of a child which result in a criminal prosecution against the alleged perpetrator. The chapter will lay out the various criminal offenses and their elements as well as discuss applicable case law and other matters related to criminal prosecutions where the alleged victim is a child.

41.1 Reporting Requirement

Every person, including a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is abused or neglected is required to report the matter immediately to local law enforcement or CYFD. For an Indian child residing in Indian country, the report must be made to tribal law enforcement or a social service agency. §32A-4-3(A). Failure to report is a misdemeanor. §32A-4-3(F). Cross-reporting is required between law enforcement and CYFD. §32A-4-3(B).

For reporting purposes, the terms "abused" and "neglected" are defined as set forth in the Abuse and Neglect Act, §§32A-4-1 to 32A-4-34. These are the definitions that apply in civil abuse and neglect proceedings rather than in criminal cases. ***See*** Handbook §17.5.3. The definitions applicable to criminal prosecutions alleging abuse or neglect are discussed later in this chapter.

In *State v. Strauch*, 2015-NMSC-009, the Supreme Court made it clear that *every person* is a mandatory reporter under the child abuse reporting statute, § 32A-4-3(A). Addressing the facts of the case, the Court found that both privately and publicly employed social workers are mandatory reporters. In reaching the conclusion that the reporting statute must be read broadly, the Court reviewed at length the history of the mandatory reporting requirement. The Court wrote: "There is absolutely no indication in the legislative history that by complying with its own technical drafting manual, the Legislature intended to make an unannounced policy change from the universal reporting requirement that had existed for

thirty years to a sharply limited requirement." *Id*. ¶37.

Obstruction of the reporting or investigation of alleged child abuse or neglect is a misdemeanor offense. §30-6-4. "Obstruction" is defined as knowingly inhibiting, preventing, obstructing, or intimidating another from reporting child abuse or neglect (including sexual abuse), or knowingly obstructing, delaying, interfering with, or denying access to a law enforcement officer or child protective services social worker in the investigation of a report of child abuse or sexual abuse. §30-6-4(A) and (B).

Parental permission is not required for a child to be interviewed by law enforcement, employees of the district attorney's office, employees of CYFD, or investigative interviewers from a children's safehouse. §32A-4-5(C). However, before interviewing a child, CYFD must notify the child's parent or guardian, unless it determines that notification would adversely affect the safety of the child about whom the report has been made or compromise the investigation. §32A-4-5(F).

41.2 Statutes of Limitations

The standard statute of limitations, §30-1-8, sets forth the general time requirements for initiating a criminal prosecution. A special statute tolling the statute of limitations for some offenses against children, §30-1-9.1, provides that, for any crime of child abuse or abandonment, criminal sexual penetration (CSP) or criminal sexual contact of a minor (CSCM), the time period for commencing prosecution does not begin to run until the victim turns 18 or "the violation" is reported to law enforcement, whichever occurs first.

In *State v. Whittington*, the Court of Appeals found that the trial court erred in dismissing a criminal prosecution for criminal sexual contact with a minor under §30-1-9.1. 2008-NMCA-063, ¶1, 144 N.M. 85. Defendant argued that an earlier CYFD investigation into allegations that defendant may have sexually abused the victim triggered the statute of limitations and that the state was time barred from prosecuting the case. At that time, the victim in the instant case denied any sexual abuse. She did not disclose sexual abuse until some eleven years later, at which time the police initiated criminal charges against the defendant. Applying the rules of statutory construction, the court concluded that, under §30-1-9.1, the statute of limitations to commence a prosecution for a violation of §30-6-1 (child abuse or abandonment), §30-9-11 (CSP) or §30-9-13 (CSCM) did not commence until the facts that form the basis for the violation were reported to a law enforcement agency. *Id.* ¶12.

For crimes which are designated as capital felonies or first degree violent felonies, the legislature removed the statute of limitations for those crimes, effective July 1, 1997. §30-1-8(G). *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, established that this statute of limitations provision can be applied to first degree violent felony and capital crimes occurring on or after July 1, 1982, that is, that were within the statute of limitations at the time of the change to eliminating the statute of limitations. Thus, any first-degree violent felony or capital felony offenses occurring on or after July 1, 1982, are within the statute of limitations.

Where there is DNA evidence available in any CSP case, adult or child, and the alleged perpetrator has not been identified, the statute of limitations is tolled, and does not begin until a DNA profile is matched with a suspect. §30-1-9.2, effective July 1, 2003, and includes any CSP for which the statute of limitations has not expired as of July 1, 2003.

41.3 Child Abuse

41.3.1 Statutory Elements

Under §30-6-1(D), "abuse of a child" consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

- placed in a situation that may endanger the child's life or health;
- tortured, cruelly confined, or cruelly punished; or
- exposed to the inclemency of the weather.

Under the law, a defendant can be charged and convicted of child abuse based on acts on his or her part, as well as failing to act or acting without regard to the consequences.

Jury Instructions on Criminal Child Abuse. In 2015, the Supreme Court adopted separate jury instructions for intentional child abuse resulting in death of a child under 12 years (UJI 14-623) and for child abuse with reckless disregard resulting in death of a child (UJI 14-622). In addition, there are separate jury instructions for child abuse resulting in death of a child 12 years of age up to 18 years of age (UJI 14-621) and child abuse resulting in great bodily harm (UJI-615), which require a showing that defendant acted with reckless disregard. Unlike a conviction for intentional child abuse resulting in death of a child under the age of 12, which carries a sentence of life imprisonment, the penalty for child abuse resulting in great bodily harm or death of a child 12 years of age or older is the same whether defendant acted intentionally or recklessly. *See State v. Consaul*, 2014-NMSC-030, ¶23. As stated in Use Note number 6 to UJI 14-615, evidence that a defendant acted knowingly or intentionally will usually meet the reckless disregard standard, so separate instructions for intentional conduct are not provided. This is also true for child abuse which does not involve great bodily harm or death. UJI 14-612.

The Court adopted UJI 14-625, a step-down instruction for child abuse resulting in death of a child under twelve, which must be given when the jury is also to consider reckless child abuse resulting in death. *See* UJI 14-623 Committee Commentary. The Supreme Court's amendments to the instructions on child abuse have also replaced the word "negligence' with "recklessness" since, as discussed in *Consaul*, ¶37, "reckless disregard" is the minimum level of culpability required to sustain a conviction for child abuse.

Finally, as noted in *State v. Cabezuela,* (*Cabezuela II)*, 2015-NMSC-016, the revised instructions omit a definition of "intentional" and instead provide that UJI 14-141 be given to juries to aid their understanding of the legal concept of intent. UJI 14-141 states in relevant part that "[w]hether the defendant acted intentionally may be inferred from all of

the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him]." ¶42 (alterations in original). Note that the Supreme Court has removed the language on "failure to act" in order to clarify the instructions, but a failure to act may still be considered among other factors such as conduct and statements surrounding the act forming the basis of intentional child abuse in proving that defendant acted purposefully. ¶¶41-43.

State v. Consaul presented a situation in which two separate instructions for reckless and intentional child abuse resulting in great bodily harm were needed because the state advanced two different and inconsistent theories of child abuse. For negligent child abuse, the State claimed that defendant put baby to bed carelessly by tightly swaddling him and putting him face down on his pillow, causing his injuries. For intentional child abuse, the state suggested that the defendant actually suffocated the baby with a pillow. The jury instruction did not require the jury to specify and unanimously agree upon which conduct caused the baby's injuries. The Court noted that "[w]hen two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred, then the jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished." ¶23.

The Legislature has added a specific form of child abuse relating to the exposure of a child to items relating to the manufacture of controlled substances. Evidence demonstrating that the defendant has knowingly, intentionally, or negligently allowed a child to enter or remain in a motor vehicle, building, or other premises containing chemicals and equipment used or intended for use in the manufacture of a controlled substance is deemed prima facie evidence of child abuse. §30-6-1(I). Similarly, evidence that demonstrates that a child has been knowingly and intentionally exposed to the use of methamphetamine is deemed prima facie evidence of abuse. §30-6-1(J).

If abuse of a child, whether intentional or negligent, results in death or great bodily harm to the child, the crime is a first-degree felony, although whoever commits intentional abuse of a child less than twelve years of age that results in death is guilty of a *first-degree felony resulting in the death of a child.* The basic sentence of imprisonment for a first-degree felony is 18 years, which may not be suspended or deferred. §31-18-15(A)(3); §31-20-3. But the sentence for a first-degree felony resulting in the death of a child is life imprisonment. §30-6-1(H); §31-18-15(A)(1). A person serving a life sentence under this provision is not eligible for parole until 30 years of the sentence has been served. However, because the crime is not a "capital felony", the court may mitigate the term. "Unlike a mandatory sentence of life imprisonment, a basic sentence of life imprisonment is subject to alteration, in accordance with the principles set forth in this opinion, if the trial court finds 'any mitigating circumstances surrounding the offense or concerning the offender.'" *State v. Juan*, 2010-NMSC-041, ¶42, 148 N.M. 747.

If the abuse did not result in death or great bodily harm, a first offense is a third-degree felony, §30-6-1(E), with a basic sentence of three years. A second or subsequent offense of child abuse not resulting in death or great bodily harm is a second-degree felony, §30-6-1(E),

with a basic sentence of nine years. §31-18-15(A). And again, those convictions are considered optional serious violent offenses.

41.3.2 Definitions Relating to Child Abuse

Important definitions in criminal child abuse prosecutions include:

- Great bodily harm: Great bodily harm is defined as "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body." §30-1-12(A). *See State v. Bell*, 1977-NMSC-013, ¶15, 90 N.M. 134 (great bodily harm does not have to be proven by medical experts exclusively); *State v. Ortega*, 1966-NMSC-186, ¶¶8-11, 77 N.M. 312 (great bodily harm is a question of fact for the jury; tattooing a victim can be great bodily harm). *See also* UJI 14-131. Note that child abuse actually requires that great bodily harm result. §30-6-1(B), (E). Whereas, for a conviction for aggravated battery, great bodily harm does not have to result. "Whoever commits aggravated battery inflicting great bodily harm…or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony." §30-3-5(C).

- Intentional: In *State v. Cabezuela (Cabezuela I)*, 2011-NMSC-041, 150 N.M. 654, the Supreme Court reversed the defendant mother's conviction for intentional child abuse resulting in the death of her 8-month old daughter. The Court concluded that the Legislature did not intend to include within intentional child abuse other forms of abuse committed with a lesser degree of intent, specifically failure to act to prevent another from abusing the victim child. "[F]ailure to act to protect a child from abuse aligns with a negligent theory of child abuse…. This is in contrast to the defendant causing the abuse, which aligns with an active, intentional theory of child abuse." *Id*. ¶33. A failure to act may nonetheless be considered among other factors such as conduct and statements surrounding the act forming the basis of intentional child abuse in proving that defendant acted purposefully. *Cabezuela II,* ¶¶ 41-43.

  In *State v. Lucero*, 2016-NMSC-008, Father was convicted of intentional child abuse under §30-6-1(D) and (H), after his infant girl died as a result of "devastating brain injuries" caused by blunt force trauma. Father appealed his conviction, contending that the jury instructions should have required the jury to find, not only that he acted intentionally, but also *with a further intent to abuse or harm a child.* ¶28. The Supreme Court concluded that the instructions given were not incomplete or inconsistent with the law, nor where they confusing or misleading. ¶¶32, 39. The Court pointed out that the State's case was always based on the theory that Defendant intentionally, physically abused Baby, resulting in her death. ¶¶34, 37. Defendant also conceded at oral argument that the evidence was sufficient to support a conviction of abuse by torture, cruel confinement, or cruel punishment. While upholding the conviction, the Court noted that instructing on abuse by endangerment created an unnecessary appellate issue when the state had such a strong case of abuse by torture, cruel confinement, or cruel punishment. ¶39.

- Negligence: The Supreme Court has noted that over the years it has struggled to distinguish between civil and criminal negligence in the context of the criminal child abuse statute. *State v. Consaul*, 2014-NMSC-030, ¶28.

  In *Santillanes v. State*, 1993-NMSC-012, ¶29, 115 N.M. 215, the "Court provided its first meaningful interpretation of the use of the term 'negligently' in the child abuse statute" and changed the standard of negligence to one of "criminal negligence." *Consaul*, ¶30. To find that negligent child abuse occurred, the fact finder must find that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.

  In *State v. Magby*, 1998-NMSC-042, 126 N.M. 361, overruled on other grounds in *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, the Court further clarified the criminal negligence standard and concluded that the trial court's refusal to give an instruction defining "reckless disregard" was improper. In *State v. Consaul*, the Supreme Court further clarified the culpability required for negligent child abuse in the statute. Finding that the Legislature only intended to "punish acts done with a reckless state of mind consistent with its objective of punishing morally culpable acts and not mere inadvertence," the Supreme Court stated that recklessness, not ordinary civil negligence, is required for a negligent child abuse conviction. 2014-NMSC-030, ¶¶ 37-38. The Court explained that, as pointed out in prior case law, use of the term "knew or should have known" creates confusion by suggesting a civil negligence standard. The Court directed that what has long been called "criminally negligent child abuse" should be called "reckless child abuse" in the jury instructions, without any reference to negligence. ¶37. The Court expressly modified all prior cases holding that negligence, not recklessness, was the culpability required for the crime of negligent child abuse. ¶38.

  Since *Consaul*, the Court has amended the child abuse jury instructions to remove the "knew or should have known" language and incorporate a reckless disregard standard. *See* UJIs 14-612 through 14-625.

41.3.3 Case Law on Child Abuse

As the following cases illustrate, the New Mexico appellate courts have decided that certain actions fall within the ambit of child abuse, while other actions do not.

Causing or Permitting Child Abuse:

- *State v. Galindo*, 2018-NMSC-021. In a horrific case in which a twenty-eight day old infant was sexually assaulted and violently abused, resulting in her death, the defendant father was also charged with child abuse based on endangering an older child, who encountered her father in the kitchen with the baby's "purple, bluish" body. The state's theory of endangerment was that the defendant caused emotional injury to the older child. The Supreme Court dismissed defendant's argument that

emotional harm is not covered by the statute, citing another recent case, *State v. Ramirez,* 2018-NMSC-003, ¶50. As for the sufficiency of the evidence, defendant kept calling for the older child to get her help to revive the already dead baby. The older child attempted to get outside help but defendant refused to allow it; the child testified that she was "shocked" and "scared" upon seeing the defendant and the baby. In fact, the older child witnessed defendant's continued abuse to the baby's lifeless body. The Court acknowledged the horrors that the child experienced, and affirmed the defendant's conviction. *Galindo*, ¶¶13-20.

- *State v. Nichols*, 2016-NMSC-001. While causing and permitting child abuse are in most cases distinct theories that can be charged in the alternative, in the specific context of endangerment by medical neglect "causing" and "permitting" child abuse loses their distinction because medical neglect can only be charged when someone fails to seek or provide necessary medical care. In this case, the jury acquitted the defendant of causing endangerment by medical neglect but convicted him of permitting such endangerment, which the Supreme Court noted are conflicting verdicts. ¶36. However, the Court ultimately reversed the conviction based on the state's failure to prove that defendant's alleged endangerment by medical neglect actually caused the child's death, or that he acted "with reckless disregard." ¶37.

- In *State v. Montoya*, 2015-NMSC-010, defendant was convicted of intentional child abuse resulting in the death of a child under 12. Defendant claimed that the jury instruction erroneously combined the elements of intentional and reckless child abuse, misstating the law and confusing the jury. The Court found that the verdict forms were clear in asking the jury to specify whether it was finding intentional or reckless. The Court found that the only distinction between the two crimes is the level of *mens rea* required: either intentional or reckless. The Court held that reckless child abuse resulting in death of a child under 12 is a lesser included offense of intentional child abuse resulting in death of a child under 12. The Court put defendants on notice that they will have to defend against both intentional and reckless child abuse when a defendant is charged with intentional child abuse. ¶43.

- *State v. Ramirez*, 2016-NMCA-072. The Court of Appeals affirmed the convictions of a defendant who invaded a home in which a 15-year old child was alone, put a gun to the child's head, and forced the child to go with him room-by-room as he looked for someone who wasn't there. Among other things, the defendant argued that his conviction for aggravated assault was subsumed into the child endangerment conviction. ¶18. The Court disagreed. Although the act of pointing a gun at the victim is a shared element of both offenses as charged, it does not follow that one offense is subsumed within the other. ¶23. "We conclude that there is little overlap between the social policies addressed by the child abuse and assault statutes…. [W]here a defendant acts in a manner that infringes on both of those social interests, multiple punishments for aggravated assault and child endangerment do not violate the right to be free from double jeopardy." ¶29.

- *State v. Leal*, 1986-NMCA-75, 104 N.M. 506. The child abuse statute prohibits two

separate acts: causing or permitting child abuse. Since abuse will frequently occur in the privacy of the home, charging a defendant with "causing or permitting" may enable the state to prosecute where it is not clear who actually inflicted the abuse, but where the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur. *See also State v. Crislip*, 1990-NMCA-054, 110 N.M. 412, and *State v. Adams*, 1976-NMCA-107, 89 N.M. 737.

- *State v. Granillo*, 2016-NMCA-094. This case addresses the *mens rea* required for intentional child abuse by endangerment under § 30-6-1(D)(1). Police arrested mother after witnesses observed her driving on the wrong side of the road and otherwise driving "poorly," and finding her in an intoxicated state unable to stand for a field sobriety test. ¶¶2-6. The Court of Appeals rejected the State's argument that it only had to prove that Defendant intended to drive her car while intoxicated, with a child in the car. ¶14. The Court held that "the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result -- endanger a child." ¶¶17, 21. In this case, the child was strapped to a car seat and Mother did not seem to be purposely courting danger while driving. The Court found no evidence that it was Mother's conscious objective to endanger the child, and reversed Defendant's conviction. ¶24.

- *State v. Arrendondo*, 2012-NMSC-013. Defendant shot and killed another man and, in the course of the events, fired into a house in which children were present. He appealed convictions for negligent child abuse. The Supreme Court held that the State was required to prove beyond a reasonable doubt that Defendant knew or should have known that the child victims were present in the zone of danger that he created. *Id*. ¶25, ¶¶27-28.

- *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434. The Supreme Court held that the evidence was insufficient to support convictions for child abuse by endangerment solely based on filthy living conditions. The Supreme Court directed lower courts to discontinue use of "the reasonable probability or possibility" standard, which it considered too imprecise when applied. *Id*. ¶21. Courts should follow the language of the UJI and determine whether the evidence establishes that the defendant's conduct created "a substantial and foreseeable risk" of harm. *Id.* ¶22. Despite the shift in emphasis, the Court stated that the likelihood that the harm will actually occur "remains an important consideration[.]" *Id*. ¶26.

- *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462. Defendant was convicted of negligently permitting child abuse by endangerment under §30-6-1(D). She was arrested in a house where chemicals and equipment involved with methamphetamine production were found and the evidence suggested that her child lived there with her. In addition to the jury instruction for negligently permitting child abuse, the following instruction, based on what is now §30-6-1(I), was given:

> Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor

> vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child.

Defendant appealed her conviction arguing that this instruction undermined the jury's responsibility to find all of the essential elements of her charge and that there was insufficient evidence to support her conviction. The Supreme Court agreed, holding that: (1) the permissible-inference jury instruction failed to properly instruct jury that it was required to find the essential element of endangerment beyond a reasonable doubt; (2) an evidentiary presumption does not change the state's burden to establish the essential elements of the crime without reference to the presumption itself; (3) the evidence was insufficient to establish the child's presence in the home; and (4) the evidence was insufficient to establish risk of harm to child. *Id*. ¶¶13, 18, 22, 23. *But see, State v. Schaaf*, 2013-NMCA-082, where the Court of Appeals upheld the finding of child endangerment based on the presence of methamphetamines and guns in the house.

- *State v. Jensen*, 2006-NMSC-045, 140 N.M. 416. Defendant was convicted of endangering a 15-year old child who frequently visited the defendant in the defendant's home, where conditions were notably unhealthy: dog vomit and feces, rotten food, and rat droppings were present throughout the house, including on the stove top, where defendant prepared food for the child. In addition, the defendant provided the child with alcohol on a daily basis for approximately two weeks, allowing the child to become so intoxicated that he vomited on at least one occasion. Finally, the defendant provided the child with access to online pornography. The Court of Appeals overturned defendant's conviction, concluding that the 15-year old child was old enough to simply avoid the defendant and thereby protect himself from harm. The Supreme Court disagreed, emphasizing that the "child's failure to avoid Defendant does not exonerate Defendant as a matter of law" and concluding that the combination of facts—filth, provision of alcohol, and access to pornography—were sufficient to prove child endangerment. *Id.* ¶15.

- *State v. Graham*, 2005-NMSC-004, 137 N.M. 197. The presence of marijuana in the house of a drug dealer was sufficient to support a conviction of child abuse when a marijuana roach was found on the living room floor, a marijuana bud was found in a child's crib, a plastic sandwich bag with a small amount of marijuana was found on a table, and when the children were present in the immediate vicinity of the marijuana and the marijuana was accessible to them. The Supreme Court held that the evidence was sufficient to find that the defendant had placed the children "in a situation that may have endangered their life or health and did so with a reckless disregard." *Id.* ¶¶8, 14.

- *State v. McGruder*, 1997-NMSC-023. 123 N.M. 302. Defendant went to victim's home, shot the live-in boyfriend of the victim's mother in the head, and then held a gun to the mother's head, threatening to kill her. The child victim was behind the mother during the incident, crying. The child was physically uninjured but the

appeals court affirmed the child abuse conviction because "[t]he jury was entitled to view such conduct as endangering either the life or health of the child." *Id.* ¶38.

- *State v. Orquiz*, 2012-NMCA-080. Defendant was driving his vehicle with his nine-year old in it when he crashed into a ditch. His child was injured in the collision. Defendant was convicted not only of DWI but also of child abuse by endangerment based on the presence of the child in the moving vehicle. Defendant appealed the child abuse conviction, arguing that the mere fact that he was driving while intoxicated, standing alone, was insufficient as a matter of law to support a conviction for child abuse by endangerment. The Court of Appeals disagreed, finding that defendant's actions placed his child inescapably within a moving zone of danger. ¶11. *Cf. State v. Etsitty*, 2012-NMCA-012, wherein clearly drunk Defendant was sitting in his pickup truck with his wife and four-year old child, and *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, in which the defendant was sitting in the vehicle with his girlfriend and four children, keys in his hands and the car not running. "'[T]he possibility that [the d]efendant might drive is a theoretical danger – the exact type of danger our Legislature did not intend to bring within the ambit of Section 30-6-1.'" *Cotton*, ¶21. The court in *Etsitty* concluded "without evidence of actual driving, Defendant had not yet put the child in real peril." *Etsitty*, ¶11. The evidence was insufficient to support a conviction for child abuse by endangerment.

- *State v. Gonzales*, 2011-NMCA-081, *aff'd on other grounds*, 2013-NMSC-016. Defendant drove on the interstate while severely drunk, sideswiping one car and ploughing into the rear of another. Two children were in the back seat of the car that defendant struck; one of the children died and the other received minor injuries. Defendant was convicted of negligent child abuse by endangerment. The Court of Appeals held that there must be a discernible risk of danger to a particular child and the defendant must be aware of danger to the identifiable child when engaging in the conduct that creates the risk of harm. *Cf. State v. Melendrez*, 2014-NMCA-062, (distinguishing *Gonzales* because there was evidence that Defendant, who drove into a group of children trick or treating, was actually or constructively aware of the presence of children).

- *State v. Watchman*, 2005-NMCA-125, 138 N.M. 488. Defendant's conviction for negligent child abuse was supported by sufficient evidence that the defendant acted with reckless disregard for the safety of her 21 month- old child when she left the child unattended in an unlocked pickup truck for at least 30 minutes, the child had easy access to numerous bottles of hard liquor left in the truck, the truck was parked at a crowded bar on a Saturday night, and defendant drove to the bar in an intoxicated condition with the child in the truck. *See also State v. Castaneda*, 2001-NMCA-052, ¶¶21, 22, (upholding a conviction of criminally negligent child abuse when the defendant drove in an intoxicated condition with her children in the car).

- *State v. Trujillo*, 2002-NMCA-100, 132 N.M. 649. Defendant's eight-year old daughter saw him hitting her mother but was ordered back to her room: "Get your little f---ing ass back to bed because I don't want to have you see me kill your

mother." The Court of Appeals reversed defendant's conviction for child abuse, determining that there was insufficient evidence of a reasonable probability or possibility that the daughter's emotional or physical health was endangered. *Id.* ¶20. The court distinguished *Ungarten* and *McGruder* as being cases in which the children were situated directly in the line of physical danger from a lethal weapon, which was pointed in their direction during a heated exchange. *Trujillo,* ¶16.

- *State v. Ungarten*, 1993-NMCA-73, ¶11, 115 N.M. 607. Defendant, a neighbor of the child victim, waved a knife in a threatening manner towards the child. The child was not physically harmed. A child does not have to suffer a physical injury for the defendant to be convicted of child abuse. The court opined that the Legislature's intent was to require "a reasonable probability or possibility" that the child would be endangered.

- *State v. Roybal*, 1992-NMCA-114, ¶32, 115 N.M. 27. Child abuse was not proven where defendant was involved in a drug transaction approximately 10 to 15 feet away from a vehicle where the defendant's daughter was sitting.

Who May Commit Child Abuse:

- *State v. Reed*, 2005-NMSC-031, 138 N.M. 365. Defendant, who was 18 years old, shot and killed his 14-year old friend. The Supreme Court held that the Legislature has not indicated that the statute for negligent child abuse resulting in death is restricted to persons having a special relationship with the child, such as a parent or guardian. *Id.* ¶50. Therefore, it rejected defendant's argument that as a friend and contemporary of the deceased he could not be convicted of negligent child abuse resulting in death.

- *State v. Lujan*, 1985-NMCA-111. ¶¶13-15, 103 N.M. 667. Defendant and his companions harassed victim's parents outside a store and then followed them in their vehicle. During the pursuit, someone from defendant's vehicle threw beer bottles and cans into the victim's pickup, one of which struck a seven-month old infant in the head. Defendant then hit the victim's car, forcing it to stop. The passengers in defendant's vehicle attacked the child's parents. For the defendant to be convicted of child abuse, he does not have to be a parent of the child. *See also State v. Fulton*, 1983-NMCA-011, 99 N.M. 348 (stepfather guilty of child abuse towards stepchildren).

Conduct That Is Not Criminal:

- *State v. Mondragon*, 2008-NMCA-157, ¶¶12-13, 145 N.M. 574. The state alleged that the defendant inflicted injuries on the mother, which resulted in injuries to the fetus. The child was born alive but died two days later and defendant was charged with child abuse resulting in death under §30-6-1(E). Relying on its decision in *State v. Martinez*, 2006-NMCA-068, ¶¶7-8,139 N.M. 741, the Court of Appeals held that the statute requires that the child abuse be inflicted on a child and that a fetus is not a

child. *Martinez* involved a case in which the state prosecuted a mother for child abuse when the mother used cocaine during her pregnancy. The Court of Appeals held that the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute.

- *State v. Lefevre,* 2005-NMCA-101, 138 N.M. 174. Defendant was prosecuted for battery for using physical force to discipline his child. The Court of Appeals held that a parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. Discipline involves controlling behavior and correcting misbehavior for the betterment and welfare of the child. *Id.* ¶16. An isolated instance of such force that results in nothing more than transient pain or temporary marks or bruises is protected under this parental discipline privilege. *Id.* ¶19.

41.4 Child Abandonment

Under §30-6-1(B), the statutory elements of "abandonment of a child" are:

- a parent, guardian, or custodian of the child
- intentionally leaving or abandoning the child
- under circumstances whereby the child may or does suffer neglect.

"Abandoning" a child includes intentionally leaving a child with the intent not to return, whereby the child may or does suffer neglect, and "leaving" a child includes intentionally departing from a child, leaving the child under circumstances where the child may or does suffer neglect. *See State v. Stephenson,* 2017-NMSC- 002 ¶16 (Nakamura and Maes concurring in part and dissenting in part).

"Neglect" means that a child is without proper parental care and control of subsistence, education, medical, or other care or control necessary for the child's well-being because of:

- the faults or habits of the child's parents, guardian, or custodian; or
- their neglect or refusal to provide these when able to do so. §30-6-1(A)(2).

If child abandonment results in the death of a child, the crime is a second-degree felony resulting in the death of a human being, punishable by fifteen years imprisonment. §31-18-15(A)(4). If the abandonment results in great bodily harm to the child, the crime is a second-degree felony, punishable by nine years imprisonment. §31-18-15(A)(7). If it does not result in death or great bodily harm, the crime is a misdemeanor. §30-6-1(B).

A parent, guardian, or custodian leaving an infant less than 90 days old in compliance with the Safe Haven for Infants Act may not be prosecuted for abandonment of a child under §30-6-1. §24-22-3(A). However, the parent, guardian, or custodian may be subject to an abuse or neglect case in Children's Court since that is the means by which the Children, Youth and Families Department can find permanency for the infant. (The Safe Haven Act allows infants to be left at hospitals, fire stations and law enforcement agencies that have staff on-

site at the time an infant is left. *See* §§24-22-2 and 23-22-3.)

If it is discovered that the child suffered abuse prior to being left at a safe haven site, the perpetrator may be prosecuted for that abuse. §30-6-1(K).

41.5 Sexual Abuse

41.5.1 Criminal Sexual Penetration

Under §30-9-11(A), the statutory elements of criminal sexual penetration are:

- unlawfully and intentionally causing a person
- to engage in sexual intercourse, cunnilingus, fellatio, or anal intercourse, or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

Criminal sexual penetration in the first degree is a first-degree felony that consists of all criminal sexual penetration perpetrated on a child under 13 years of age or by the use of force or coercion that results in great bodily harm or great mental anguish to the victim. §30-9-11(D). The basic sentence of imprisonment is 18 years, which may not be suspended or deferred. §31-18-15(A)(3), §31-20-3.

Aggravated criminal sexual penetration is all criminal sexual penetration perpetrated on a child under 13 years of age with an intent to kill or with a depraved mind regardless of human life. §30-9-11(C). The offense carries a sentence of life imprisonment. §31-18-15(A)(2).

Second degree criminal sexual penetration includes criminal sexual penetration by the use of force or coercion on a child age 13 to 18. §30-9-11(E)(1). This is a second degree felony, a sexual offense against a child, for which the basic sentence is 15 years. §31-18-15(A)(5). However, the defendant must be sentenced to a minimum term of three years, which may not be suspended or deferred. §30-9-11(E). In other second degree criminal sexual penetration cases under §30-9-11(E), where the victim's age is not an essential element of the offense, the victim's age is an essential sentencing fact that must be determined by the jury beyond a reasonable doubt in accordance with UJI 14-6019A, special verdict, sexual offense against a child. Should it not be found by a jury that the victim was a child, the defendant would only be subject to a basic sentence of nine years for a second degree felony.

Jury Instructions on Unlawfulness in CSP II Felony Cases. In *State v. Stevens*, 2014-NMSC-011, a woman was convicted of, among other things, two counts of CSP II-felony under §30-9-11(E) for directing her 13- year old daughter to perform oral sex on her adult boyfriend after injecting methamphetamine with her. The woman appealed on the ground that the jury was not instructed that the state had to prove that the sexual activity occurring during the commission of a felony was itself unlawful. ¶12. Although it affirmed her convictions, the Supreme Court found the jury instructions to be inadequate. ¶¶21, 40, 58. The Court clarified the law, holding "that when a CSP II charge is based on the

commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent." *Id*. ¶39. The Supreme Court asked the Criminal UJI Committee to recommend changes to the jury instructions to clarify the elements of criminal sexual penetration during the commission of a felony. *Id*. ¶40. As a result of *Stevens*, the jury instructions were amended to clarify the elements of second degree criminal sexual penetration. *See* UJI 14-6019A, UJI 14-954.

Third degree criminal sexual penetration consists of all criminal sexual penetration perpetrated through the use of force or coercion which is not otherwise specified in §30-9-11. §30-9-11(F). If the victim is a child 13 up to 18 years, the defendant is guilty of a third-degree felony for a sexual offense against a child and will be subject to a six-year basic sentence. §31-18-15(A)(9) versus a three-year basic sentence for other third degree felonies.

Fourth degree criminal sexual penetration consists of:

- all criminal sexual penetration either not previously defined under §30-9-11 and
- perpetrated on a child 13 up to 16 years of age when the perpetrator is at least 18 years of age and is at least four years older than the child and not the child's spouse;

or

- perpetrated on a child 13 up to 18 years of age, when the perpetrator is either a licensed or unlicensed school employee; a school contract employee; a school health service provider; or a school volunteer; and
- who is at least 18 years of age and at least four years older than the child; and
- not the child's spouse; and
- learns while performing services in or for the school that the child is a student. §30-9-11(F)(1)-(2).

In all cases, the state must prove that the penetration was unlawful. *See State v. Stevens*, 2014-NMSC-011, ¶23. Depending on the perpetrator's age, the child's age, and other statutory factors, such as whether the perpetrator is associated with a school, a lack of consent may be a part of the unlawfulness element of CSP. *See State v. Samora*, 2016-NMSC-031, ¶26 (finding that whether the sixteen-year old victim consented to sex with Defendant was legally relevant to the CSP-felony charge because the child could have legally consented to sex with defendant, and the omission of "without consent" from the jury instructions resulted in fundamental error).

Criminal sexual penetration does not include medically indicated procedures, §30-9-11(B), or reasonable parental care. *See State v. Osborne*, 1991-NMSC- 032, ¶14, 111 N.M. 654, and the discussion of unlawfulness in §41.5.2 below. In prosecutions for criminal sexual penetration, the testimony of the victim need not be corroborated and the lack of corroboration has no bearing on the weight that the fact finder gives to the testimony. *State v. Nichols*, 2006-NMCA-017, ¶10, 139 N.M. 72.

Note that the definition of "sexual intercourse," as used in the jury instructions for criminal sexual penetration, includes penetration of the vulva. UJI 14-982, 14-981; *see State v. Tafoya*, 2010-NMCA-010, ¶¶47, 51-52, 147 N.M. 602 (rejecting defendant's contention that penetration of the vulva amounts only to criminal sexual contact of a minor, not criminal sexual penetration). Fellatio only requires that the mouth or tongue touch the penis; it is not required that the penis enter the mouth of the other person. Furthermore, cunnilingus does not require that the tongue go inside or penetrate the vagina, only that the female sex organ be touched on the edge or inside with the lips or tongue. UJI 14-982.

41.5.2 Criminal Sexual Contact of a Minor

Under §30-9-13(A), the statutory elements of criminal sexual contact of a minor (CSCM) are:

- the unlawful and intentional touching of or applying force to the intimate parts of a minor, or
- the unlawful and intentional causing of a minor to touch one's intimate parts.

"Intimate parts" means the primary genital area, groin, buttocks, anus or breast. *Id*. The definitions of the parts of the primary genital area are defined in Criminal UJI 14-981. Common usage definitions should be used for the terms "breast" or "buttocks". *See* UJI 14-981, Committee Commentary (stating that if requested, a dictionary definition should be given to the jury for the terms "breast" and "buttocks"); *State v. Pitner*, 2016-NMCA-102 (absent a definition in the jury instructions, applying the common meaning of the "groin" from case law - "the fold or depression marking the line between the lower part of the abdomen and the thigh, as well as the region of that line." (citing *State v. Benny E.*, 1990-NMCA-052, ¶18, 110 N.M. 237)).

Second degree criminal sexual contact of a minor consists of all criminal sexual contact of the unclothed intimate parts of a minor perpetrated:

- on a child under 13 years of age, or
- on a child 13 up to 18 years of age when:
    - the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit; or
    - the perpetrator uses force or coercion that results in personal injury to the child; or
    - the perpetrator uses force or coercion and is aided or abetted by one or more persons; or
    - the perpetrator is armed with a deadly weapon. §30-9-13(B).

Anyone convicted of second degree criminal sexual contact against a child must be sentenced to a minimum term of imprisonment of three years, which may not be suspended or deferred, up to fifteen years, for a sexual offense against a child. §30-9-13(B), §31-18-15(A)(5).

Third degree criminal sexual contact of a minor consists of all criminal sexual contact of a

minor when either:

- The minor is under age 13; or
- The minor is age 13 up to 18 and the perpetrator:
    - is in a position of authority over the minor and uses this authority to coerce the minor to submit. *See State v. Orosco*, 1992-NMSC-006, ¶24, 113 N.M. 780; *State v. Gardner*, 2003-NMCA-107, ¶22, 134 N.M. 294; *State v. Trevino*, 1991-NMSC-085, ¶¶4-5, 113 N.M. 804;
    - uses force or coercion that results in personal injury to the child;
    - uses force or coercion and is aided or abetted by one or more persons; or
    - is armed with a deadly weapon. §30-9-13(C).

A person is in a "position of authority" if that person "is a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child." §30-9-10(E). If a perpetrator falls within the designated relationships—parent, relative, household, teacher, or employer—then no additional proof is required to show that a person is able to exercise undue influence over a child. *State v. Erwin*, 2016-NMCA-032, ¶9. In *State v. Haskins*, the Court of Appeals held that a massage therapist may be found to be in a position of authority for purposes of satisfying the elements of CSCM. 2008-NMCA-086, ¶9, 144 N.M. 287.

"Force or coercion" is defined in §30-9-10(A) to mean:

- the use of physical force or physical violence;
- the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
- the use of threats, including threats of physical punishment, kidnapping, extortion, or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
- the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep, or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
- the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is *not* an element of force or coercion. §30-9-10(A). However, there is no jury instruction that defines force or coercion.

Criminal sexual contact in the third degree is a third-degree felony for a sexual offense against a child, for which the basic sentence of imprisonment is six years. §30-9-13(C); §31-18-15(A)(9).

Criminal sexual contact of a minor in the fourth degree includes all criminal sexual contact

that is not defined above. It occurs when:

- the child is age 13 to 18; and
- the criminal sexual contact is perpetrated with force or coercion. §30-9-13(D). Force or coercion is defined in §30-9-10(A) (***see*** above) and does not require as an element of the crime that the victim physically or verbally resisted.

Criminal sexual contact of a minor in the fourth degree also occurs when:

- the perpetrator is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider, or a school volunteer; and
- the perpetrator is at least 18 years of age and is at least four years older than the child, and not the spouse of the child; and
- the perpetrator learns that the child is a student in a school while performing services in or for a school. §30-9-13(D)(2).

The basic sentence for fourth degree criminal sexual contact of a minor is 18 months imprisonment. §31-18-15(A) (13).

The state is required to prove unlawfulness as an element of the offense of criminal sexual contact of a minor. *State v. Osborne*, 1991-NMSC-032. For the touching to have been unlawful, it must have been done with the intent to arouse or gratify sexual desire or otherwise to intrude upon the bodily integrity or personal safety of the victim. If the touching was for purposes of reasonable medical care or non-abusive parental or custodial care, it is not unlawful. *Osborne*, ¶32. The court in *State v. Gardner*, 2003-NMCA-107, ¶24, reiterated that the desire to obtain sexual gratification was not necessary; the defendant may have intended otherwise to intrude on the victim's bodily integrity.

No law enforcement officer, prosecuting attorney, or other government official may ask or require an adult, youth, or child victim of a sexual offense set forth in §§30-9-11 through 30-9-13 to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense. Also, the victim's refusal to submit to such an examination may not prevent the investigation, charging, or prosecution. §30-9-17.1.

41.5.3 Aggravated Indecent Exposure

Under §30-9-14.3(A), the elements of aggravated indecent exposure on a minor are:

- knowingly and intentionally exposing
- the primary genital area
- to public view
- in a lewd and lascivious manner
- with the intent to threaten or intimidate another person
- while committing one or more enumerated acts or criminal offenses, including exposure to a child under age 18, criminal sexual penetration, or child abuse.

"Primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva, or vagina. §30-9-14.3(B).

Aggravated indecent exposure is a fourth-degree felony, §30-9-14.3(C), punishable by a basic sentence of 18 months imprisonment. §31-18-15(A). In addition to that sentence, the court must order the offender to participate in and complete a program of professional counseling at his or her own expense. §30-9-14.3(D).

41.5.4 Incest

Under §30-10-3, the elements of incest are:

- knowingly intermarrying or having sexual intercourse
- with persons with the following degrees of consanguinity: parents, children, grandparents, and grandchildren of every degree, whole and half brothers and sisters, uncles, aunts, nieces, or nephews.

Incest is a third-degree felony. §30-10-3. Note that the statute only criminalizes sexual intercourse, not other sexual penetrations or contacts, and with blood parents, not stepparents. A conviction for incest does not carry the same penalties as other sex offenses, that is, it only carries a three-year term. It also does not carry any other consequences such as registration as a sex offender. There is no age component to the offense, either for the victim or offender.

41.5.5 Sexual Exploitation of Children

Under the Sexual Exploitation of Children Act, several different types of activity can constitute sexual exploitation of children:

- Possession of Medium. The elements of this fourth-degree felony for sexual exploitation of a child are:
    - intentionally possessing
    - any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act
    - knowing or having reason to know that the medium depicts a prohibited sexual act or simulation of a sexual act, and
    - knowing or having reason to know that one or more of the participants in the act is under age 18. §30-6A-3(A).

  The penalty for this specially designated crime is ten years. §31-18-15(A) (12). If the child depicted is under the age of thirteen, the basic sentence must be increased by one year, and may not be suspended or deferred. The one-year sentence increase is optional for youthful offenders. In *State v. Santos*, 2017-NMCA-75, the Court of Appeals clarified the meaning of "intentionally possessing" in the face of Defendant's claim that there was insufficient evidence to show that he intentionally possessed child pornography because he deleted the computer files after watching them and it is

not illegal to watch child pornography. ¶12. The court upheld his conviction. "By downloading, viewing, and deleting videos on his computer, Defendant possessed those videos," and there was plenty of evidence that Defendant knew child pornography was on his computer. ¶¶14, 20.

- Distribution of Medium. The elements of this third-degree felony are:
  - intentionally distributing
  - any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act
  - knowing or having reason to know that the medium depicts a prohibited sexual act or simulation, and
  - knowing or having reason to know that one or more of the participants in the act is under age 18. §30-6A-3(C).

This crime is designated a third-degree felony for sexual exploitation of a child, and if found guilty, a defendant is subject to a term of eleven years. §31-18-15(A) (10).

- Causing/Permitting Minor to Engage in Act. The elements of this felony are:
  - intentionally causing or permitting
  - a child under eighteen
  - to engage in any prohibited sexual act or simulation of such an act
  - knowing, having reason to know, or intending that
  - the act may be recorded in any obscene visual or print medium, or performed publicly.

This crime is a third-degree felony unless it is perpetrated on a child under age 13, in which event it is a second-degree felony. §30-6A-3(D). Both crimes are designated as felonies for sexual exploitation of a child, with the second-degree felony carrying a basic penalty of twelve years of imprisonment (§31-18-15(A) (6)), and eleven years for a third degree (§31-18-15(A) (10)).

- Manufacture of Medium. The elements of this second-degree felony are:
  - intentionally manufacturing
  - any obscene visual or print medium
  - depicting any prohibited sexual act or simulation of such an act
  - if one or more of the participants in the act is a child under 18. §30-6A-3(D).

Again, as above, these are specially designated crimes carrying a penalty of twelve years of imprisonment.

Two additional crimes were added in 2007 to prohibit the manufacture or distribution of obscene visual or print medium depicting any prohibited sexual act or simulation if the perpetrator knows or has a reason to know that a real child under the age of 18 who is not a participant is depicted as a participant. §30-6A-1(G).

Section 30-6A-2 defines the key terms used in the foregoing crimes as follows:

- "Manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in the act is under eighteen. §30-6A-2(D).

  In *State v. Smith*, the Court of Appeals held that the copying of pornographic digital images of children to a portable storage device creates a new digital copy of the prohibited image sufficient to constitute manufacturing under §30-6A-2. 2009-NMCA-028, ¶15, 145 N.M. 757.

- "Obscene" means any material when the content, if taken as a whole:
  - appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;
  - portrays a prohibited sexual act in a patently offensive way; and
  - lacks serious literary, artistic, political or scientific value. §30-6A-2(E).

  In *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, the Court of Appeals considered whether photographs of children in various states of undress were obscene under §30-6A-2 and concluded that only intolerable sexually explicit material could be deemed obscene without violating Article II, Section 17, the free speech provision of the New Mexico Constitution. Applying this standard, the court concluded that photographs of nude children engaged in typical childhood activities without showing the children's genitals or pubic area were not obscene.

  The New Mexico Supreme Court discussed *Rendleman* at length in *State v. Myers (Myers II)*, 2009-NMSC-016, 146 N.M. 128. *Myers II* involved a defendant convicted of seven counts of sexual exploitation of children in violation of §30-6A-3(D) for covertly videotaping minor female victims using the bathroom. The Supreme Court concluded that, while material must do more than depict a naked child to violate contemporary community standards, it does not necessarily have to be identifiable as hard-core child pornography to be obscene under §30-6A-2(E).

  According to the Court in *Myers II*, child pornography is distinguishable from adult pornography, only a subset of which is obscene under the standard set forth in the *Miller v. California*, 413 U.S. 15 (1973), the U.S. Supreme Court case establishing the test for whether material is obscene and not protected under the First Amendment. *Myers II*, ¶39. The Court concluded that substantial evidence existed to support the trial court's finding that the images appeal to a prurient interest in sex and portray a prohibited sexual act in a patently offensive way, and that the trial court could reasonably have found beyond a reasonable doubt that the images are obscene under §30-6A-2(E). *Id.* ¶40.

  The Supreme Court has also decided *Myers III* in which, among other things, it clarified but confirmed its holding in *Myers II*. *State v. Myers*, 2011-NMSC-028, ¶¶29-36, 150 N.M. 1. It is important to read the two decisions together.

- "Performed publicly" means performed in a place that is open to or used by the public. §30-6A-2(C).

- "Prohibited sexual act" means: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.

  In *Myers II*, the Supreme Court disagreed with *Rendleman's* use of an objective standard to evaluate whether material is "for purpose of sexual stimulation" under §30-6A-2(A)(5). *Myers II*, 2009-NMSC-016, ¶32. The Court adopted a more subjective standard, which examines the defendant's actual intent in distributing, possessing or manufacturing the images, to determine whether the material fulfills the "purpose of sexual stimulation" element. *Id.* ¶32. This includes consideration of extrinsic evidence of the defendant's intent, such as the circumstances under which the materials at issue were prepared, the location where photographs were found, and the presence or absence of other pornographic materials. *Id.* When the Supreme Court reviewed the Court of Appeals' decision on remand from *Myers II*, it revisited and clarified its view of *Rendleman* and its holding in *Myers II*. *Myers III*, 2011-NMSC-028, ¶¶29-36. As noted above, it is important to read the two *Myers*' decisions together.

- "Visual or print medium" means: (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc, or computer or electronically generated imagery; or (2) any book, magazine, or other form of publication or photographic reproduction containing or incorporating film, photograph, negative, slide, computer diskette, videotape, videodisc, or any computer generated or electronically generated imagery. §30-6A-2(B).

  In *State v. Olsson*, 2014-NMSC-012, the Supreme Court addressed the crime of possession in situations in which various media have been used to store any number of images. One of the defendants, for example, argued that he possessed a "computer diskette" and that the unit of prosecution should be defined by the medium, not the number of acts the medium depicts. *Id*. ¶17. In a 4-1 decision, the Court held that the Legislature had not clearly defined the unit of prosecution for possession of child pornography under §30-6A-3(A) and ultimately applied the rule of lenity to hold that the defendants could only be charged with one count of possession. In so holding, the Court observed that significant and rapid technological developments have occurred since §30-6A-3(A) was last amended in 2001 and respectfully recommended that the Legislature revise the statute to reflect modern advances in technology and clarify the intended unit of prosecution. *Id*. ¶45. *See also State v. Sena*, 2016-NMCA-062, wherein the Court held that Defendant could only be convicted of one count of distribution of child pornography, as Defendant created one distinct computer file containing multiple images of child pornography and making the file accessible

through sharing software constituted one act of distribution. ¶19.

41.5.6 Child Solicitation by Electronic Communication Device

Under §30-37-3.2(A), the offense of "child solicitation by electronic communication device" consists of an individual knowingly and intentionally soliciting a child under 16 years of age, by means of an electronic communication device:

- to engage in sexual intercourse, sexual contact, or in a sexual or obscene performance, or
- to engage in any other sexual contact when the perpetrator is at least four years older than the child.

"Electronic communication device" is defined as a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment, or any other device that can produce an electronically generated image, message, or signal. §30-37-3.2(F). Those charged with this offense cannot use as a defense that the alleged intended victim was a law enforcement officer posing as a child. §30-37-3.2(D).

Child solicitation by electronic communication device is a fourth-degree felony if the child is at least thirteen years of age but under sixteen and a third-degree felony if the child is under thirteen. §30-37-3.2(B). The crime is committed in this state if an electronic communication device transmission either originates or is received in this state. §30-37-3.2(E).

In *State v. Tufts*, 2016-NMSC-020, Defendant filmed himself masturbating, saved the image on a secure digital (SD) memory card, inserted the card into a cell phone, handed the phone to a 15-year old girl, and told her there was a surprise on the phone for her. He was convicted of criminal sexual communication of a child in violation of §30-37-3.3(A), which requires "communicating directly with a specific child … by *sending* the child obscene images … by means of an electronic communication device …." Defendant argued that his conduct of placing an SD memory card in a cell phone and handing the phone to the child cannot constitute "sending" under this statute. The Supreme Court affirmed the conviction, holding that the word "sending" may also occur by delivering the electronic communication device containing the obscene images directly to the child. ¶5. The Court reviewed the history and purpose of the statute in reaching this conclusion. ¶¶6–9.

34.6 Evidence (*See also Handbook Chapter 29)*

34.6.1 Abuse and Neglect Reports

The contents of a report of child abuse or neglect required by §32A-4-3 of the Children's Code and related facts may not be excluded from evidence on the grounds that the matter may be the subject of a physician-patient privilege or similar privilege or rule against disclosure. §32A-4-5(A).

41.6.2 Limitations on Privileged Communications

Under Rule 11-504(D)(4) of the Rules of Evidence, there is no privilege for communications relevant to any information that a doctor, psychotherapist, state or nationally licensed mental-health therapist, or patient is required by law to report to a public employee or agency. Under Rule 11-505(D)(1), there is no privilege in proceedings in which one spouse is charged with a crime against a child of either spouse.

41.6.3 Information from Civil Abuse or Neglect Case

All records or information concerning a party to a civil abuse or neglect proceeding that are in the possession of the court or CYFD are confidential, although they are open to inspection by the district attorney unless use immunity has been granted under §32A-4-11. §32A-4-33(A) and (B)(8).

Use immunity prohibits the district attorney in a criminal proceeding from using records, documents, or other physical objects produced by an immunized respondent in an abuse and neglect proceeding in children's court, when production of those items was compelled by a court order. §32A-4-11(B). Additionally, use immunity prevents the district attorney from using a respondent's in-court testimony, as well as respondent's statements made during the course of court-ordered psychological evaluation or treatment. §32A-4-11(A) and (C). Information otherwise available is not subject to use immunity.

Because use immunity orders may not be granted after the fact, any statements made by respondents either in treatment, for evaluation or in court prior to the entry of the immunity order are not covered by the order. Furthermore, use immunity "shall attach only to those statements made during the course of the actual evaluation or treatment and specifically does not attach to statements made to other department employees, agents or other representatives in the course of the investigation of alleged child abuse or neglect." §32A-4-11(C).

The Children's Court Rules authorize the children's court to grant use immunity, not only for the respondent in the abuse or neglect proceeding, but to any person who has been or may be called to testify or to produce a record or other object in that proceeding. Rule 10-341(A). However, it is critical that the district attorney be served with a copy of the application for immunity and notice of hearing on the application. Rule 10-341(B). A grant of use immunity means that the children's court can compel a person to testify or produce a record, document or other object in the civil abuse or neglect proceeding notwithstanding the person's privilege against self-incrimination, except as provided in Rule 11-413 of the Rules of Evidence. Rule 10-341(C).

41.6.4 Videotaped Depositions of Alleged Child Victims

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, the district court may, for a good cause shown, order a videotaped deposition of any alleged victim who is under 16 to be used in lieu of direct testimony at trial. The deposition must be videotaped in the judge's chambers and the judge, district attorney, defendant, and his or her

attorney(s) must be present. As with all witnesses, the alleged victim will be examined and cross-examined under Rule 11-611. §30-9-17.

Under Rule 5-504 of the Rules of Criminal Procedure for the District Court:

- The person seeking the videotaped deposition must show that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm.
- The deposition may be admitted into evidence as an additional exception to the hearsay rule if:

    - the child will be unable to testify without suffering unreasonable and unnecessary mental or emotional harm;
    - the deposition was presided over by a district judge and defendant was present and represented by counsel or waived counsel; and
    - the defendant was given an adequate opportunity to cross-examine the child, subject to such protection as the judge deems necessary.

Rule 5-504 provides that the deposition may also be used for any of the reasons set forth in Rule 5-503(N). However, Rule 5-503 was rewritten in 2000 and no longer contains Paragraph N. (Former Paragraph N allowed use of the deposition if the witness was unavailable as defined in Rule 11-804, the witness gave inconsistent testimony at the trial or hearing, or the deposition was otherwise admissible.)

The relevant case law includes:

- *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79**.** The defendant challenged the district court's admission of a deposition tape without making findings of fact or otherwise weighing his right of confrontation against the potential harm that would result from a face to face encounter with the victim. The Court of Appeals found that defendant implicitly waived his right to confront the child witnesses against him when he did not file a response to the state's motion for a videotaped deposition, did not object when the videotaped deposition was taken or admitted as evidence, and when he relied on the deposition tape in his opening and closing arguments.

- *State v. Fairweather*, 1993-NMSC-456, 116 N.M. 456. In a prosecution for sexual abuse, the trial court did not abuse its discretion in allowing testimony by depositions taped outside the defendant's presence and then shown to the jury. The judge had made requisite findings that the individualized harm which would otherwise result to the child victims outweighed the defendant's right to face-to-face confrontation with his accusers.

- *State v. Benny E.*, 1990-NMCA-52, 110 N.M. 237. Child defendant's confrontation rights were violated when the alleged child victim was permitted to testify at trial in judge's chambers with only counsel and judge present and the accused child watched on video monitor located in another room. The procedure was invalid because no particularized findings of special harm to victim, supported by substantial evidence,

were made.

- *State v. Tafoya*, 1988-NMCA-82, 108 N.M. 1. Videotaped depositions of victims taken while defendant was required to remain outside the room in which the testimony given was not a violation of Confrontation Clause and was consistent with §30-9-17.

- ***See also*** §41.6.5 below, discussing *State v. Ruiz*, 2001-NMCA-97, 131 N.M. 241, and the committee commentary to Rule 5-504.

Videotapes are subject to a protective order of the court in order to protect the privacy of the victim. §30-9-17(E).

The Uniform Child Witness Protective Measures Act passed in 2011 is similar to Rule 5-504 but is not limited to sexual abuse cases. Under Act, the court may allow a child witness under the age of 16 to testify by videotaped deposition in a criminal proceeding upon a showing that the child witness may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. §§38-6A-1 to 38-6A-9. As of June 2018, the Supreme Court had not adopted rules in connection with the Act for criminal cases, although it has adopted rules for Children's Court cases, *see* Rule 10-340.

In *State v. Thomas*, 2016-NMSC-024, the New Mexico Supreme Court determined that a defendant's confrontation rights were violated under *Crawford* when a forensic expert was permitted to testify via Skype. The Supreme Court commented: "The United States Supreme Court has never adopted a specific standard for two-way video testimony, but we doubt it would find any virtual testimony an adequate substitute for face-to-face confrontation without at least the showing of necessity that [*Maryland v. Craig*, 497 U.S. 846 (1990)] requires." ¶27. The Court continued: "A criminal defendant may not be denied a physical-face-to-face confrontation with a witness who testifies at trial unless the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact." ¶29. Because the required findings were not made, the Court held that the admission of remote testimony violated Defendant's right to confrontation. ¶30.

41.6.5 Psychological Evaluations of Victims

Every person is competent to be a witness unless the Rules of Evidence provide otherwise. Rule 11-601.

Under §30-9-18, if the crime charged is criminal sexual penetration or criminal sexual contact of a minor and the alleged victim is under 13, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the child's competency is in sufficient doubt that the court requires expert assistance, then the court may order a

psychological evaluation. However, the defendant must show a compelling reason to justify the evaluation. In order for a compelling reason to exist, the probative value of the evidence reasonably likely to be obtained from the examination must outweigh the prejudicial effect of such evidence and the witness's right of privacy. *State v. Casillas*, 2009-NMCA-034, ¶33, 145 N.M. 783.

If an evaluation is granted:

- it must be conducted by only one psychologist or psychiatrist;
- the court must select the evaluator;
- the evaluator may be used by either or both parties; and
- if the victim has been evaluated on competency during an investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement, the psychological evaluation must be conducted by a psychologist or psychiatrist selected by the court upon recommendation of the defense. §30-9-18.

Although no other provision in the law expressly allows the defendant to obtain a psychological evaluation of the alleged victim, courts have found that a psychological evaluation is warranted when the victim's mental anguish is put in issue by the state. For example, in *State v. Garcia*, 1980-NMCA-61, ¶¶11-13, 94 N.M. 583, the defendant was entitled to an evaluation of the victim because mental anguish was alleged as an essential element of the crime of criminal sexual penetration by the use of force or coercion that results in mental anguish as the personal injury.

Similarly, the Court of Appeals held that the state placed the child's mental state at issue when it requested a videotaped deposition because testifying would cause the child unreasonable mental anguish. *State v. Ruiz*, 2001-NMCA-097, ¶38, 131 N.M. 241. Although the appellate court did not hold that a psychological evaluation was required under the circumstances, it remanded to allow the trial court to determine whether to order the psychological evaluation. *Id.* ¶40.

According to the Committee Commentary to Rule 5-504 (videotape deposition rule), the committee was requested in 1988 to consider amendments to the rule that would have limited psychological evaluations. The committee was of the opinion that "in the rare case that a psychological examination is necessary to show good cause [for a videotaped deposition], the trial judge should appoint an independent psychiatrist or psychologist to examine the child and report to the court. No other examination should be required."

41.6.6 Expert Witness Testimony

Under Rule 11-702, the prerequisites for admission of expert witness testimony are that:

- the witness is qualified as an expert by knowledge, skill, experience, training, or education; and
- scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

If a witness is qualified as an expert, the witness may testify in the form of an opinion or otherwise. Rule 11-702.

Case law further clarifies these requirements:

- *State v. Alberico*, 1993-NMSC-47, 116 N.M. 156, sets forth the standards for admitting expert testimony in child abuse cases.
    - Expert post-traumatic stress disorder (PTSD) testimony must be scientifically valid, probative, and assist the trier of fact.
    - PTSD testimony is admissible if it is provided by a properly qualified mental health professional who testifies on the issue of whether the victim's PTSD symptoms are consistent with sexual abuse.
    - Improper PTSD testimony includes testimony used as direct evidence of the victim's credibility, direct evidence of the perpetrator's identity, testimony that sexual abuse caused the victim's PTSD symptoms, testimony identifying or equating PTSD with RTS (rape trauma syndrome), and testimony offered to explain the victim's post-incident behavior where the defendant did not raise the issue.

- *State v. Lucero*, 1993-NMSC-64, 116 N.M. 450, which followed *Alberico*, emphasized that three forms of expert testimony are prohibited: (1) the expert may not comment directly on the victim's credibility; (2) the expert may not identify the perpetrator; and (3) the expert may not testify that the victim's PTSD symptoms were caused by sexual abuse. However, the prosecution should be allowed to inquire into these prohibited areas if the defense opens the door to such testimony.

- *State v. Consaul*, 2014-NMSC-030. Overturning Defendant's conviction for child abuse resulting in great bodily harm based on a theory of suffocation, the Supreme Court examined the reliability of expert medical opinion in criminal child abuse cases, particularly those in which medical opinion testimony often serves as the foundation of the prosecution's theory, such as shaken baby syndrome. ¶73, n.4. The Court held that the expert medical testimony alone, which at best demonstrated that the infant in *Consaul* was "likely suffocated" with no additional non-opinion evidence in support, was insufficient to support a criminal verdict beyond a reasonable doubt. ¶¶2, 57, 70-72. The Court specified that, if the prosecution is to rely only on medical opinion, it must go beyond the mere probable causation required for evidentiary admissibility and "establish … why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt." ¶73.

41.6.7 Confrontation Clause and Hearsay

41.6.7.1 Confrontation Clause Considerations

Under the Confrontation Clauses of the 6th Amendment to the U.S. Constitution (applied to states through the 14th Amendment) and Article II, Section 14 of the New Mexico

Constitution, criminal defendants have a right to cross-examine witnesses against them. This right may be compromised when a hearsay statement is admitted into evidence without the declarant being available for cross-examination. Consequently, the U.S. Supreme Court has ruled that when hearsay evidence offered against a criminal defendant is testimonial and the declarant is not available to testify, the federal Confrontation Clause prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36 (2004).

The Supreme Court stated in *Crawford* that the "core class" of testimonial statements requiring the opportunity for cross-examination may include *ex parte* in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials. 541 U.S. at 51-52. Examples may include:

- affidavits;
- depositions;
- statements made while in police custody;
- statements made in response to police interrogation;
- confessions;
- prior testimony at a preliminary hearing, before a grand jury or during a former trial;
- similar pretrial statements that declarants would reasonably expect to be used in a prosecution; and
- statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

In *Ohio v. Clark*, 135 S.Ct. 2173 (2015), the U.S. Supreme Court applied the *Crawford* analysis to statements made by a child victim and decided that the introduction at trial of statements made by a 3 year old to his preschool teachers after they asked him about injuries on his body were not testimonial and did not violate the Confrontation clause. The Court held that the teachers elicited the statements for the primary purpose of protecting the child in the context of an on-going emergency involving suspected child abuse, circumstances similar to the 911 call in *David v. Washington*, 547 U.S. 812 (2006), discussed later in this section.

The Court in *Ohio v. Clark* indicated that statements of the very young and statements made to teachers will not likely be testimonial. "Statements made to someone who is not principally charged with uncovering criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. *See, e.g., Giles*, 554 U.S., at 376." *Id.* at 2182. The Court found it irrelevant that the teacher questioning the child had a duty to report the matter and that such reporting had a natural tendency to result in the perpetrator's prosecution.

There have been no New Mexico cases to date that have applied *Ohio v. Clark* to a criminal child abuse case, but the state's appellate courts have held hearsay evidence to be testimonial under the *Crawford* decision in a number of cases. *See, e.g., State v. Walters,*; 2007-NMSC-050, 142 N.M. 644; *State v. Romero*, 2007-NMSC-013, 141 N.M. 403; *State v. Forbes*, 2005-NMSC-27, 138 N.M. 264; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309; *State v.*

Johnson, 2004-NMSC-029, 136 N.M. 348; *State v. Henderson*, 2006-NMCA-059, 139 N.M. 595; and *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404.

In four of these cases, the appellate courts held that admission of an unavailable accomplice's statement violated the defendant's confrontation rights because the statements were made while in police custody. According to the courts, statements made during a custodial interview fall "squarely within the class of 'testimonial' evidence" described by *Crawford*. *Johnson*¸ 2004-NMSC-029, ¶7; *see also Forbes*, 2005-NMSC-027, ¶13; *Alvarez-Lopez*, 2004-NMSC-030, ¶24; and *Duarte*, 2004-NMCA-117, ¶13. Similarly, in a trial of multiple defendants, the statements made by the various defendants to the police were testimonial: "[t]he interrogation of the codefendants constituted an effort by the police to 'prove past events potentially relevant to later criminal prosecution.'" *Walters*, 2007-NMSC-050, ¶23.

The preliminary hearing testimony of an unavailable witness is also considered testimonial. *State v. Henderson*, 2006-NMCA-059, ¶14, 139 N.M. 595. However, in *Henderson*, the court held that introduction of the testimonial evidence did not violate the Confrontation Clause because the defendant had a prior opportunity to cross-examine the statement being offered into evidence at trial. *Id*. ¶16.

The U.S. Supreme Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009), that certificates signed by state laboratory analysts which stated that a seized substance was cocaine were "testimonial" and inadmissible under *Crawford*. Following *Melendez*, the New Mexico Supreme Court decided in the *Bullcoming* case that a blood alcohol content report was testimonial. *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487. However, the analyst who prepared the report had not testified at trial. The Court held that this did not bar admission of the report because "the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation." *Id*. ¶1. The U.S. Supreme Court, in a plurality decision, reversed. Rejecting the "mere scrivener" rationale, the Court held that it was violation of the Confrontation Clause to have a surrogate provide testimony as to what the original analyst did or observed. *Bullcoming v. New Mexico*, 564 U.S. 647, 657-658 (2011).

The New Mexico Supreme Court has found that observations from an autopsy report are testimonial statements subject to the Confrontation Clause. In *State v. Navarette*, 2013-NMSC-003, ¶1, the Court held that the *Crawford* line of cases precluded a forensic pathologist from relating subjective observations recorded in an autopsy report (the report itself was not admitted into evidence) as a basis for the pathologist's trial opinions, when the pathologist neither participated in nor observed the autopsy performed on the decedent. On the other hand, the Court held in *State. v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654 (*Cabezuela I*), a criminal child abuse case, that the Confrontation Clause was not violated even though the doctor who prepared the autopsy report did not testify, because the testifying pathologist supervised the autopsy and had first-hand knowledge of the procedure and findings of the doctor conducting the autopsy. The testifying doctor was also testifying as to her own opinion. ¶52; *see also State v. Cabezuela*, 2015-NMSC-016, ¶¶30-31 (*Cabezuela II*) (upholding admission of the same forensic pathologist's testimony while finding that

admission of pathologist's other statements about alleged bite marks violated the Confrontation Clause).

Applying the rationale in *Navarette* and the *Melendez-Diaz* line of cases, the Court of Appeals in *State v. Carmona*, 2016-NMCA-050, considered the Confrontation Clause implications of scientific evidence and expert testimony in the context of DNA samples taken by a SANE nurse from a child who was allegedly the victim of sexual abuse. When the SANE nurse died, Defendant moved to suppress the DNA evidence collected by the nurse and the report prepared by the State's expert witness comparing the evidence collected by the SANE nurse from the victim with that of Defendant's buccal swab. *Carmona*, ¶¶3, 4. The Court reviewed the U.S. Supreme Court cases since *Crawford v. Washington*, 541 U.S. 36 (2004), together with the N.M. Supreme Court decision in *State v. Navarette*, 2013-NMSC-003. It concluded that the nurse's statements on the labels affixed to the rape kit identifying the swab as being taken from the child were testimonial hearsay because the nurse would have reasonably understood those statements' sole purpose to be for use in investigating and prosecuting criminal charges against Defendant. *Carmona*, ¶40. Since the declarant was deceased and hence unavailable to testify, allowing the expert to offer her opinion to the jury in reliance on the labels violated Defendant's rights under the Confrontation Clause. ¶42.

A number of cases have considered whether statements made at the scene of a crime are testimonial. The U.S. Supreme Court in *Davis v. Washington*, 547 U.S. 813 (2006), held that statements made in the course of a 911 call were not testimonial since the primary purpose of the police operator's questioning was to enable the police to provide emergency assistance. Similarly, the Court in *Michigan v. Bryant*, 562 U.S. 344 (2011), held that statements made by a shooting victim to police while he was lying on the ground in severe distress waiting for medical attention were not testimonial. Again, the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. 562 U.S. at 374-378.

The New Mexico courts have followed suit. The Supreme Court applied the "context-specific inquiry" established in *Michigan v. Bryant* to hold that statements made to the 911 operator and a deputy at the scene by a victim in considerable pain were nontestimonial. *State v. Largo*, 2012-NMSC-015, ¶¶1, 21. As in *Bryant*, the victim was shot, the location of the shooter was unknown, and the interrogation was quick, unstructured, and focused on the location where the victim was found. *Largo*, ¶14. In an earlier case, the Court of Appeals held that statements given spontaneously and recorded on video while police were securing a scene were nontestimonial. *State v. Gutierrez*, 2011-NMCA-088, ¶¶14-16, 150 N.M. 505.

Keep in mind that *Crawford* and its progeny do not apply in civil cases, including cases under the Abuse and Neglect Act in children's court. *See re Pamela A.G.*, 2006-NMSC-019, ¶12, 139 N.M. 482.

41.6.7.2 Hearsay in Criminal Child Abuse and Neglect Cases

In *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, the New Mexico Court of Appeals applied *Crawford* to exclude hearsay statements made by a child victim to a sexual assault nurse examiner (SANE) nurse during an examination in a criminal child abuse and neglect

case. The court concluded that the primary purpose of the SANE interview was evidence gathering, not medical diagnosis or treatment, making any resulting statements testimonial and inadmissible under *Crawford*. Based on this conclusion, the court further reasoned that, if the purpose of the interview is forensic, then any resulting statements are not made for purposes of medical diagnosis or treatment under Rule 11-803(D) (now Rule 11-803(4)).

In *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, a case concerning only the hearsay exception in Rule 11-803(D) and not implicating the Confrontation Clause (declarant was available to testify), the New Mexico Supreme Court overruled *Ortega* to the extent that *Ortega* discussed the admissibility of hearsay statements under Rule 11-803(D). The Court did not overrule *Ortega*'s discussion of the constitutional issues. *Mendez*, ¶40. In *Mendez*, the Court noted that the court in *Ortega* improperly aligned its Rule 11-803(D) admissibility analysis with its Confrontation Clause analysis, changing the fundamental approach to analyzing statements under Rule 11-803(D), at least with regard to statements made to SANE nurses, and improperly shifting the inquiry away from the trustworthiness of the statement. *Mendez*, ¶¶27, 40.

The Court interpreted *Ortega* and its progeny (including *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, and the Court of Appeals opinion in *Mendez*) as standing for the proposition that under Rule 11-803(D), courts must categorically exclude all statements made during the course of an encounter, the primary purpose of which is not medical, regardless of whether any individual statement might be for a valid medical purpose. They would exclude statements made to a SANE nurse because of the overall forensic aspect of the SANE examination. *Mendez*, ¶24. According to the Supreme Court, these cases focus on the overall purpose of the encounter, instead of the trustworthiness of each statement, which oversimplifies the Rule 11-803(D) inquiry. *Id.* ¶¶24-33.

The Court pointed out that the hearsay rule and the Confrontation Clause are not co-extensive and must remain distinct. It outlined the differences between the Confrontation Clause analysis, which focuses on the purposes of and circumstances surrounding the examination in order to guarantee the accused in a criminal trial the right to be confronted with the witnesses against him regardless of how trustworthy the out of court statement may appear to be, and the Rule 11-803 analysis, which focuses on the trustworthiness of the individual statement and ensuring that the jury is not exposed to unreliable evidence. *Id.* ¶¶27-28. "Surrounding circumstances are certainly relevant, but the focus must center on the individual statement." *Id.* ¶31.

The Court held that statements made by a child to a SANE nurse may fall under the Rule 11-803(D) hearsay exception. To determine admissibility of a statement made to a SANE nurse under Rule 11-803(D), "[t]he trial court must carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant." *Id.* ¶43. The Court went on to illustrate examples of statements that could be deemed admissible under the proper analysis. *Id.* ¶¶47-54.

Applying *Mendez*, the Court of Appeals in *State v. Skinner* found that victim statements during a SANE exam that involve the identification of the abuser may be admissible under Rule 11-803(D), where the identity of the abuser is pertinent to psychological treatment or where treatment involves separating the victim from the abuser. *State v. Skinner*, 2011-NMCA-070, ¶¶18-19, 150 N.M. 26.

In *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, the Court of Appeals upheld the trial court's decision to admit into evidence out-of-court statements made to parents and medical professionals by a three-year old too young to recall anything at trial. The trial court ruled the statements to the parents admissible under the present sense impression exception to the hearsay rule and under the catch-all exception. The appellate court concluded that the statements to the parents were not sufficiently contemporaneous to warrant admission under the present sense impression exception, but that admission of the statements under the catch-all exception in Rule 11-804(B)(5). (Due to a 2007 amendment to the Rules of Evidence, the "catch-all" exception is now referred to as the "residual" exception and is codified in Rule 11-807.)

With respect to the statements made to medical personnel, the defendant in *Massengill* argued that the statements identifying him as the perpetrator were taken for law enforcement purposes and were not "reasonably pertinent to diagnosis or treatment," as required by Rule 11-803(D). The Court of Appeals disagreed. The medical providers in question provided a plausible rationale for their need to obtain the information and the trial court did not abuse its discretion in admitting the statements. *Id.* ¶¶20-21. *Massengill* also involved challenges based on the Confrontation Clause but the Court's discussion is not described here because the opinion predates *Crawford* and its progeny.

In *State v. Casaus*, 1996-NMCA-031, 121 N.M. 481, the Court of Appeals limited the admission of a prior consistent statement under Rule 11-801(D)(1)(b), relying on *Tome* v. *U.S. (Tome I)*, 513 U.S. 150 (1995). The Court held that, to be admitted, the statement must have been made prior to the improper influence or motive. The State introduced a videotaped interview of the victim (the safehouse videotape) to rebut the charge that she fabricated the molestation because she was angry at her uncle and wanted more attention from her mother. The court admitted the videotape as a prior consistent statement to rehabilitate the victim's testimony. However, the motive to lie came two weeks before the interview. Because the prior consistent statement (the videotape) did not pre-date the improper influence or motive, it was inadmissible under Rule 11-801(D) (now Rule 11-801(4)). *Casaus*, ¶¶19-20.

Consider this example: Child Sara tells her teacher on Monday that her father molested her. On Tuesday, the father punishes Sara. On Wednesday, Sara tells the school counselor that her father molested her. The statement made by Sara on Monday would be admissible because it was made prior to the improper motive, *i.e*. Sara being angry with her father for punishing her. The statement Sara made on Wednesday would not be admissible because it was made after the basis for the improper motive arose.

41.6.8 Prior Acts and Convictions

Rule 11-404(B) provides that evidence of a crime, wrong, or other act, while inadmissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. For the testimony to be admissible under Rule 11-404(B), it must be "relevant to a disputed issue other than the defendant's character, and [the court] must determine that the prejudicial effect of the evidence does not outweigh its probative value." *State v. Beachum*, 1981-NMCA-89, ¶6, 96 N.M. 566, cited in *Ervin*, discussed below. In *State v. Serna*, the Supreme Court held that any evidence of convictions permitted to be admitted by a particular statute must also be admissible under the Rules of Evidence. 2013-NMSC-033, ¶1.

In *State v. Sena*, the Supreme Court held that the state may prove that defendant's touching was "unlawful" under the statute on sexual penetration of a minor by showing that "defendant's behavior was done to arouse or gratify sexual desire." 2008-NMSC-053, ¶13, 144 N.M. 821 (citations omitted). While grooming evidence -- in this case, evidence that defendant had walked around naked in front of Child, showed her a pornographic video, showed her his wife's thong underwear, and showered naked with her -- cannot be offered to show defendant's propensity to act improperly, it may be offered as proof of defendant's unlawful intent. *Id.* ¶¶14, 21. The Court also rejected Defendant's challenge to the admission of evidence based on Rule 11-403 (authorizing exclusion of relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice). *Id.* ¶16. *See also State v. Bailey*, 2017-NMSC- 001 ¶¶22, 24 (rejecting Defendant's challenges to admission of evidence of a similar but uncharged act; the similar uncharged act could not be reasonably viewed as parental care and it was highly probative of Defendant's intent, where Defendant's only defense was that he was engaging in harmless parenting. ¶¶22, 24.)

In *State v. Ervin***,** 2008-NMCA-16, ¶21, 143 N.M. 493, a CSCM/CSPM case, the Court of Appeals found that testimony by the child's grandmother that the defendant intimidated the child was permissible to show why the child might succumb to the defendant and was not mere propensity evidence.

41.6.9 Rape Shield Laws and Right of Confrontation

Rule 11-412(A) provides that evidence offered to prove that a victim engaged in other sexual behavior or evidence offered to prove a victim's sexual predisposition are inadmissible in a civil or criminal proceeding involving alleged sexual misconduct. However, under Rule 11-412(B), the court may admit evidence of the victim's past sexual conduct that is material and relevant to the case when the inflammatory or prejudicial nature does not outweigh its probative value.

The purpose of Rule 11-412 (formerly Rule 11-413) and §30-9-16, otherwise referred to as New Mexico's rape shield statute, are "to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *State v. Stephen F.*, 2008-NMSC-037, ¶7, 144 N.M. 360 (citations omitted). While the rape shield

law and rule aim at protecting a victim's privacy, the Sixth Amendment right of confrontation acts as a limitation on that protection. If application of the rape shield law or rule in a particular case would conflict with the defendant's confrontation rights and prevent a full and fair defense, the statute and rule must yield to the defendant's right of confrontation. The opinion in *Stephen F.* sets forth the standards for this type of analysis.

41.7 Victim's Rights

The Victims of Crime Act, §§31-26-1 through 31-26-16, protects the rights of victims and imposes requirements on prosecutors and judges to enforce those rights. Child abuse and abandonment and criminal sexual offenses are among the criminal offenses to which the Act applies. §31-26-3. Under the Act, a child victim's parent or grandparent may exercise the victim's rights, unless they are accused of committing the crimes against the child. §31-26-7(C). In that case, the court may appoint a victim's representative for the child. Under §31-26-10.1, the court must inquire at hearings whether a victim (or victim's representative) is present for the purposes of making a statement. If the victim is not present, the court must inquire on the record whether an attempt has been made to notify the victim. If the prosecutor cannot verify that an attempt was made, the court must either reschedule the hearing or continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement.

41.8 Sentencing Issues

The court may not defer or suspend sentencing on any crime that is a first-degree felony. If the court chooses to suspend or defer sentencing for a conviction of any crime that is not a first-degree felony, the court may order conditions of probation that are reasonably related to the defendant's rehabilitation and that are relevant to the offense for which probation was granted. In *State v. Garcia*, 2005-NMCA-065, ¶13, 137 N.M. 583, the Court of Appeals held that the district court could prohibit the defendant from having contact with all minors, including his own daughters, subject to modification by further court order. The defendant had pled guilty to several counts of criminal sexual contact of a minor, one of his daughters. The defendant argued that this condition worked to effectively terminate his parental rights without the due process protections of the termination of parental rights proceedings. The court held that this probation condition was reasonably related to achieving the sentencing goal of deterring defendant from engaging in similar criminal conduct again.

Under §31-20-5.2(A), when a defendant is convicted of a sex offense listed in §31-20-5.2(F) and the court defers imposition of a sentence or suspends all or a portion of a sentence, the court is required to impose an indeterminate period of supervised probation between five and twenty years. There is a process set out for periodic review of the terms and conditions of the supervised probation. §31-20-5.2(B).

Sex offenders are required to register with the county sheriff under §29-11A-4(B) of the Sex Offender Registration and Notification Act. The Supreme Court has held that the trial court does not have authority under SORNA to stay registration requirements pending appeal. *State v. Myers (Myers III)*, 2011-NMSC-028, ¶45, 150 N.M. 1.

APPENDIX A

ACRONYMS

ACF	Administration for Children and Families, U.S. Health and Human Services Department
ADA	Americans with Disabilities Act
AOC	Administrative Office of the Courts
ASFA	Adoption and Safe Families Act of 1997
BIA	Bureau of Indian Affairs
CAPTA	Child Abuse Prevention and Treatment Act of 1974
CASA	Court Appointed Special Advocate
CCA	Children's Court Attorney
CCIC	Children's Court Improvement Commission
CFR	Code of Federal Regulations
CMHDD Act	Children's Mental Health and Developmental Disabilities Act
CFSR	Court and Family Service Review
CYFD	New Mexico Children, Youth and Families Department
FCM	Family Centered Meeting
FERPA	Family Educational Rights and Privacy Act
FINCOS	Families in Need of Court-Ordered Services
GAL	Guardian ad Litem
ICWA	Indian Child Welfare Act
IV-B	Title IV-B of the Social Security Act
IV-E	Title IV-E of the Social Security Act, added by the Adoption Assistance and Child Welfare Act of 1980
JPO	Juvenile Probation Officer
KGA	Kinship Guardianship Act
MEPA	Multiethnic Placement Act of 1994
NCJFCJ	National Council of Family and Juvenile Court Judges
PIP	Program Improvement Plan
P.L. 96-272	Adoption Assistance and Child Welfare Act of 1980
PPLA	Planned Permanent Living Arrangement
PSD	Protective Services Division
RA	Respondent's/Parent's Attorney
SCI	State Central Intake, CYFD
SCRB	Substitute citizen review board (formerly known as a CRB)
SIJS	Special Immigrant Juvenile Status
TPR	Termination of Parental Rights
UJI	Uniform Jury Instruction
YA	Attorney for Child 14 or Older, or Youth Attorney

APPENDIX B

GLOSSARY

SELECTED STATUTORY DEFINITIONS

Abandonment includes instances when the parent, without justifiable cause:

(1) left the child without provision for the child's identification for a period of fourteen days; or

(2) left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:

(a) three months if the child was under six years of age at the commencement of the three-month period; or

(b) six months if the child was over six years of age at the commencement of the six-month period. §32A-4-2.

Abused child means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;

(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or

(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child. §32A-4-2.

Acknowledged father, under the Adoption Act, means a father who:

(1) acknowledges paternity of the adoptee (*i.e.*, the person who is the subject of an adoption petition) pursuant to the putative father registry, as provided for in §32A-5-20;

(2) is named, with his consent, as the adoptee's father on the adoptee's birth certificate;

(3) is obligated to support the adoptee under a written voluntary promise or pursuant to a court order; or

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee, as follows:

(a) for an adoptee under six months old at the time of placement,

- Has initiated an action to establish paternity;
- Is living with the adoptee at the time the adoption petition is filed;
- Has lived with the mother a minimum of 90 days during the 280 day period prior to birth or placement of the adoptee;
- Has lived with the adoptee within the 90 days immediately preceding the adoptive placement;
- Has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee’s birth in accordance with his

means and when not prevented from doing so by the person or agency having lawful custody of the adoptee or the adoptee's mother;

- Has continuously paid child support in at least the amount provided in §40-4-11.1, the child support guidelines, or has brought current any delinquent child support payments; or
- Any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee; or

(b) for an adoptee over six months at the time of placement:

- Has initiated an action to establish paternity;
- Has lived with the adoptee within the 90 days before the placement;
- Has continuously paid child support in at least the amount provided in §40-4-11.1, the child support guidelines, since the adoptee's birth or is making reasonable efforts to bring del inquent payments current;
- Has contact with the adoptee on a monthly basis when physically and financially able and when not prevented by the person or agency with lawful custody;
- Has regular communcation with the adoptee or with the person or agency having care or custody of the adoptee, when physically and financially unable to visit the adoptee and when not prevented from doing so by the person or agency with lawful custody. §32A-5-3.

Adult means a person who is 18 years of age or older. §32A-1-4.

Aggravated circumstances include those circumstances in which the parent, guardian or custodian has:

(1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;

(2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;

(3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or

(4) had parental rights over a sibling of the child terminated involuntarily. §32A-4-2.

Alleged father means an individual whom the biological mother has identified as the biological father, but the individual has not acknowledged paternity or registered with the putative father registry, as provided for in §32A-5-20. §32A-5-3.

Child means a person who is less than 18 years old. §32A-1-4.

Court appointed special advocate or **CASA** means a person appointed as a CASA, pursuant to the provisions of the Children's Court Rules, who assists the court in determining the best interests of the child by investigating the case and submitting a report to the court. §32A-1-4.

Custodian means an adult with whom the child lives who is not a parent or guardian. §32A-1-4.

Department, or **CYFD**, means the Children, Youth and Families Department, unless otherwise specified. §32A-1-4.

Disproportionate minority contact means the involvement of a racial or ethic group with the criminal or juvenile justice system at a proportion either higher or lower than that group's proportion in the general population. §32A-1-4.

Educational decision maker means an individual appointed by the children's court to attend school meetings and to make decisions about the child's education that a parent could make under law, including decisions about the child's educational setting, and the development and implementation of an individual education plan for the child. §32A-4-2 (definition added in 2017).

Fictive kin means a person not related by birth, adoption or marriage with whom a child has an emotionally significant relationship. §32A-4-2 (definition added in 2016).

Foster parent means a person, including a relative of the child, licensed or certified by the department or a child placement agency to provide care for children in the custody of the department or agency. §32A-1-4.

Great bodily harm means an injury to a person that creates a high probability of death, that causes serious disfigurement or that results in permanent or protracted loss or impairment of the function of any member or organ of the body. §32A-4-2.

Guardian means a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law. §32A-1-4.

Guardian ad litem or **GAL** means an attorney appointed by the children's court to represent and protect the best interests of the child in a case; provided that no party or employee or representative of a party to the case shall be appointed to serve as a guardian ad litem. §32A-1-4.

Indian child means an unmarried person who is:
(1) less than 18 years old; and either
(2) a member of an Indian tribe or
(3) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4). (§32A-1-4 provides a slightly different definition but the federal definition applies.)

Indian child's tribe means:
(1) the Indian tribe in which an Indian child is a member or eligible for membership; or
(2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts. §32A-1-4.

Indian tribe means a federally recognized Indian tribe, community or group pursuant to 25 U.S.C. §1903(1). §32A-1-4.

Legal custody means a legal status created by order of the court or other court of competent jurisdiction or by operation of statute that vests in a person, department or agency the right to determine where and with whom a child shall live; the right and duty to protect, train and discipline the child and to provide the child with food, shelter, personal care, education and ordinary and emergency medical care; the right to consent to major medical, psychiatric, psychological and surgical treatment and to the administration of legally prescribed psychotropic medications pursuant to the Children's Mental Health and Developmental Disabilities Act; and the right to consent to the child's enlistment in the armed forces of the United States. §32A-1-4.

Neglected child means a child:

(1) who has been abandoned by the child's parent, guardian or custodian;

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;

(3) who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;

(4) whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

(5) who has been placed for care or adoption in violation of the law; provided that nothing in the Children's Code shall be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Children's Code; and further provided that no child shall be denied the protection afforded to all children under the Children's Code. §32A-4-2.

Parent or **parents** includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child. §32A-1-4.

Permanency plan means a determination by the court that the child's interest will be served best by:

(1) reunification;

(2) placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;

(3) placement with a person who will be the child's permanent guardian;

(4) placement in the legal custody of the department with the child placed in the home of a fit and willing relative; or

(5) placement in the legal custody of the department under a planned permanent living arrangement. §32A-1-4.

Physical abuse includes any case in which the child suffers strangulation or suffocation and any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and:

(1) there is not a justifiable explanation for the condition or death;

(2) the explanation given for the condition is at variance with the degree or nature of the condition;

(3) the explanation given for the death is at variance with the nature of the death; or

(4) circumstances indicate that the condition or death may not be the product of an accidental occurrence. §32A-4-2 (strangulation and suffocation added in 2018).

Preadoptive parent means a person with whom a child has been placed for adoption. §32A-1-4.

Presumed father means:

(1) the husband of the biological mother at the time the adoptee was born;

(2) an individual who was married to the mother and either the adoptee was born during the term of the marriage or the adoptee was born within 300 days after the marriage was terminated by death, annulment, declaration of invalidity or divorce; or

(3) before the adoptee's birth, an individual who attempted to marry the adoptee's biological mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid and if the attempted marriage:

(a) could be declared invalid only by a court, the adoptee was born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity or divorce; or

(b) is invalid without a court order, the adoptee was born within 300 days after the termination of cohabitation. §32A-5-3.

Protective Supervision means the right to visit the child in the home where the child is residing, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations and obtain information and records concerning the child. §32A-1-4.

Relative means a person related to another person by birth, adoption or marriage within the fifth degree of consanguinity. §32A-4-2 (definition added in 2016).

Reunification means either a return of the child to the parent or to the home from which the child was removed or a return to the noncustodial parent. §32A-1-4

Sexual abuse includes criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law. §32A-4-2.

Sexual exploitation includes:

(1) allowing, permitting or encouraging a child to engage in prostitution;

(2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or

(3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law. §32A-4-2.

Sibling means a brother or sister having one or both parents in common by birth or adoption. §32A-4-2 (definition added in 2016).

Transition plan means an individualized written plan for a child, based on the unique needs of the child, that outline all appropriate services to be provided to the child to increase independent living skills. The plan must also include responsibilities of the child, and any other party as appropriate, to enable the chld to be self-sufficient upon emancipation. §32A-4-2.

Tribal court means:

(1) a court established and operated pursuant to a code or custom of an Indian tribe; or

(2) any administrative body of an Indian tribe that is vested with judicial authority. §32A-1-4.

Tribal court order means a document issued by a tribal court that is signed by an appropriate authority, including a judge, governor or tribal council member, and that orders an action that is within the tribal court's jurisdiction. §32A-1-4.

APPENDIX C

TABLE OF STATUTES

Abuse and Neglect Act, NMSA 1978, Chapter 32A, Article 4, §§32A-4-1 to 32A-4-35.

Adoption Act, NMSA 1978, Chapter 32A, Article 5, §§32A-5-1 to 32A-5-45.

Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, 111 Stat. 2115, amending 42 U.S.C. §§671-675.

Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500, 42 U.S.C. §§670-676 and amending §§620-628.

Americans with Disabilities Act (ADA), 42 U.S.C. §12131-12134.

Assessment and Accountability Act, NMSA 1978, Chapter 22, Article 2C, §§22-2C-1 to 22-2C-13.

Bilingual Multicultural Education Act, NMSA 1978, Chapter 22, Article 23, §§22-23-1 to 22-23-6.

Charter Schools Act, NMSA 1978, Chapter 22, Article 8B, §§22-8B-1 to 22-8B-17.1

Child Abuse Prevention and Treatment Act of 1974 (CAPTA), P.L. 93-247, 88 Stat. 4, 42 U.S.C. §§5101-5107.

Child and Family Services Improvement Act of 2006, P.L. 109-288, 120 Stat. 1233, amending Title IV-B of the Social Security Act.

Child Placement Agency Licensing Act, NMSA 1978, Chapter 40, Article 7A, §§40-7A-1 to 40-7A-8.

Children's Code, NMSA 1978, Chapter 32A, Articles 1 to 25.

Children's Mental Health and Developmental Disabilities Act, NMSA 1978, Chapter 32A, Article 6, §§32A-6A-1 to 32A-6A-30.

Children, Youth and Families Department Act, NMSA 1978, Chapter 9, Article 2A, §§9-2A-1 to 9-2A-24.

Citizen Substitute Care Review Act, NMSA 1978, Chapter 32A, Article 8, §§32A-8-1 to 32A-8-7.

Compulsory School Attendance Law, NMSA 1978, Chapter 22, Article 12, §§22-12-1 to 22-12-10.

Delinquency Act, NMSA 1978, Chapter 32A, Article 2, §§32A-2-1 to 32A-2-33.

Emancipation of Minors Act, NMSA 1978, Chapter 32A, Article 21, §§32A-21-1 to 32A-21-7.

Every Student Succeeds Act (2015), P.L. 114-95, 129 Stat. 1802, 20 U.S.C. §§6301 *et seq.,* amending McKinney-Vento Act, P.L. 114-95, and reauthorizing the Elementary and Secondary Education Act of 1965 (20 U.S.C. §6301 *et seq.).*

Families in Need of Court-Ordered Services Act, NMSA 1978, Chapter 32A, Article 3B, §§32A-3B-1 to 32A-3B-22.

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g.

Family First Prevention Services Act (FFPSA) (2018), P. L. 115-123, amending Titles IV-B and IV-E of the Social Security Act.

Foster Care Independence Act, P.L. 106-169, 42 U.S.C. §§677-679c.

Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, 122 Stat. 3949, amending 42 U.S.C. §§671-676, among others.

Hispanic Education Act, Chapter 32A, Article 23B, §§32A-23B-1 to 32A-23B-6.

Indian Child Welfare Act of 1978 (ICWA), P.L. 95-608, 92 Stat. 3069, 25 U.S.C. §§1901-1923.

Indian Education Act, Chapter 32A, Article 23A, §§32A-23A-1 to 32A-23A-8.

Individuals with Disabilities Education Act (IDEA), P.L. 94-142, 104 Stat. 1142, 20 U.S.C. §§ 1400 to 1482.

Interstate Compact on the Placement of Children, NMSA 1978, Chapter 32A, Article 11, §§32A-11-1 to 32A-11-7.

Kinship Guardianship Act, NMSA 1978, Chapter 40, Article 10B, §§40-10B-1 to 40-10B-15.

McKinney-Vento Homeless Assistance Act Act (1987), P.L. 114-95, 101 Stat. 482, 42 U.S.C. ch. 119 § 11301 *et seq.*

Multiethnic Placement Act (MEPA), P.L. 103-382, 108 Stat. 4056, amended by P.L. 104-188, 110 Stat. 1903, 42 U.S.C. §§622(b)(7), 671(a)(18) and 1996b.

Pre-Kindergarten Act, Chapter 32A, Article 23, §§32A-23-1 to 32A-23-9.

Preventing Sex Trafficking and Strengthening Families Act (2014), P.L. 113-183, 128 Stat. 1919, amending Title IV-E of the Social Security Act.

Public School Code, NMSA 1978, Chapter 22, Articles 1 to 33 [except Article 5A]

Rehabilitation Act (1973), Pub. L. No. 93-112, 87 Stat. 394 (Sept. 26, 1973), 29 U.S.C. §701 *et seq*.

Safe and Timely Interstate Placement of Foster Children Act, P.L. 109-239, 120 Stat. 508, 42 U.S.C. 1305, 42 U.S.C. 673c and 42 U.S.C. 622.

Safe Haven for Infants Act, NMSA 1978, Chapter 24, Article 22, §§24-22-1 to 24-22-8.

Sex Offender Registration and Notification Act (SORNA), NMSA 1978, Chapter 29, Article 11A, §§29-11A-1 to 29-11A-10.

Title IV-B of the Social Security Act, 42 U.S.C. §§620- 629m.

Title IV-E of the Social Security Act, 42 U.S.C. §§670-679c.

Uniform Child Witness Protective Measures Act, NMSA 1978, Chapter 38, Article 6A, §§38-6A-1 to 38-6A-9.

APPENDIX D

TABLE OF CASES

STATE CASES

FEDERAL CASES